Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue queen ouest Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF CROWN HILL CAPITAL CORPORATION
and WAYNE LAWRENCE PUSHKA

REASONS AND DECISION

Merits Hearing: May 9-10, 14-17, 24-25, July 18-20, August 13, 15, and September 18, 2012

Merits Decision: August 23, 2013

Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	Christopher Portner	- Commissioner
	Judith N. Robertson	- Commissioner
Counsel:	Anna Perschy Albert Pelletier	- For Staff of the Commission
	Alistair Crawley	- For Wayne Lawrence Pushka
	Melissa MacKewn	- For Crown Hill Capital Corporation

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REASONS AND DECISION

I. INTRODUCTION

[1] On July 7, 2011, the Ontario Securities Commission (the "**Commission**") issued a notice of hearing in this matter pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") in connection with a statement of allegations (the "**Statement of Allegations**") issued by Staff of the Commission ("**Staff**") on the same day.

[2] Staff alleges multiple breaches by Crown Hill Capital Corporation ("**Crown Hill Capital**" or "**CHCC**") of its fiduciary duty and/or duty of care under section 116 of the Act in connection with the actions and transactions referred to in the Statement of Allegations. Staff also alleges that disclosure made by CHCC in a management proxy circular of the Crown Hill Fund (the "**Crown Hill Fund**" or "**CHF**") dated June 3, 2009 was inadequate and materially misleading, and that CHCC caused CHF to enter into a transaction that breached its Declaration of Trust. Staff also alleges that CHCC failed to have written policies and procedures required by Ontario securities law to address conflict of interest matters. Staff also alleges that Wayne Lawrence Pushka ("**Pushka**" and collectively with CHCC, the "**Respondents**"), as President and Chief Executive Officer and a director of CHCC, authorized, permitted or acquiesced in the conduct of CHCC that breached the Act and in so doing is deemed pursuant to section 129.2 of the Act to have also not complied with the Act. Staff also alleges that the foregoing conduct of the Respondents was contrary to the public interest and harmful to the integrity of Ontario capital markets. (See the summary of Staff's allegations commencing at paragraph 40 of these reasons, the Respondents' submissions (commencing at paragraph 43 of these reasons) and the matters we must determine set out in paragraph 74 of these reasons.)

[3] The hearing of this matter took place over 14 hearing days from May 9, 2012 to September 18, 2012.

[4] These are our reasons and decision in this matter.

II. THE PARTIES

Crown Hill Capital Corporation

[5] Crown Hill Capital was a company incorporated under the laws of Ontario. At the relevant time, it was the investment fund manager ("**IFM**") and trustee of the Crown Hill Fund or its predecessor funds, MACCs Sustainable Yield Trust ("**MACCs**") and Crown Hill Dividend Fund ("**CHDF**"). As such, CHCC had a fiduciary duty as an IFM under section 116 of the Act and as an IFM and trustee pursuant to the CHF Declaration of Trust and under the declarations of trust of its predecessor funds. At the relevant time, CHCC and its affiliates were wholly-owned by Pushka, directly or indirectly. When we refer to CHCC in these reasons, that reference includes its various affiliates.

Wayne Lawrence Pushka

[6] Pushka is a resident of Ontario. He was the President and Chief Executive Officer and a director of CHCC and held those positions at all relevant times for the purposes of these reasons. At all relevant times, Pushka was registered with the Commission as an Investment Counsel and Portfolio Manager and had been registered in that capacity since at least 2006. CHCC has been an IFM for over ten years. During the relevant time, Pushka was director and sole officer of Crown Hill Asset Management Inc. ("**CHAM**"), which was the portfolio manager of Crown Hill Fund and its predecessor funds until it was replaced by Robson Capital Management Inc. ("**Robson**") on January 16, 2009 (see paragraphs 28 and 355 of these reasons).

Crown Hill Fund

[7] At all relevant times, Crown Hill Fund was a publicly traded closed-end investment fund established under a declaration of trust as restated from time to time (the "**CHF Declaration of Trust**"). CHCC was both the IFM and trustee under that declaration of trust. The units of CHF traded on the Toronto Stock Exchange. Both MACCs and CHDF were publicly traded closed-end investment funds.

III. BACKGROUND

1. Composition of the CHCC Board and CHF IRC

[8] At all relevant times, the CHCC board of directors (the "**CHCC Board**") consisted of Pushka, Thomas I. A. Allen ("**Allen**") and Terry A. Jackson ("**Jackson**"). Allen and Jackson were independent of Pushka and constituted a majority of the members of the CHCC Board. There was no legal requirement that a majority of the CHCC Board be independent. Except as otherwise indicated in these reasons, Allen and Jackson participated in all of the CHCC Board meetings referred to in these reasons and approved all of the actions and transactions taken or approved at those meetings. Accordingly, all of the actions and transactions approved by the CHCC Board were approved by a majority of independent directors. Allen testified at the hearing.

[9] Allen is an experienced businessperson and director, and a former securities lawyer with a leading Canadian law firm. Jackson is also an experienced businessperson in the financial industry. Allen and Jackson are of unquestioned integrity.

[10] At all relevant times, CHF's Independent Review Committee (the "**IRC**") under National Instrument 81-107 – *Independent Review Committee for Investment Funds* ("**NI 81-107**") consisted of Andrew Fleming ("**Fleming**") (see paragraph 70(c) of these reasons), John N. Campbell ("**Campbell**") and Mark L. Maxwell ("**Maxwell**"). There is no dispute that the members of the IRC were independent of CHCC and Pushka. Except as otherwise indicated in these reasons, all of the members of the IRC participated in all of the IRC meetings referred to in these reasons and approved all of the actions taken or approved at those meetings. Fleming testified at the hearing.

[11] Maxwell is an experienced businessperson with a long history in the asset management business in Ontario. Campbell is an experienced director and businessperson in the transportation and other industries. Fleming, Campbell and Maxwell are equally of unquestioned integrity.

2. CHCC Acquisition of MACCs Management Services Agreements

[12] On or about February 1, 2008, a subsidiary of CHCC purchased the rights to the management services agreements for MACCs, a closed-end investment fund. CHCC and its subsidiary then amalgamated and CHCC thereby became the IFM and trustee for MACCs. CHCC financed the purchase of the MACCs management services agreements itself.

[13] CHCC purchased the rights to the MACCs management services agreements at least in part in order to be able to spread CHCC's fixed costs of managing CHDF over the larger asset base of MACCs and CHDF.

3. CHCC Management Fees

[14] CHCC's management fees are calculated based on the net asset value ("**NAV**") of the funds it manages. If the NAV of the funds increase, so do the fees paid to CHCC, and if the NAV falls, the fees paid to CHCC also decline. There is nothing unusual in that. That is the accepted compensation arrangement for IFMs in the investment fund industry.

[15] As a result, however, CHCC received a direct financial benefit from any increase in the NAV of the funds it managed. One of the ways to increase management fee revenue is for an IFM to acquire the rights to manage another fund. Such funds are then often merged with the investment funds then managed by the IFM. Unitholders may benefit from a fund merger because a merger potentially increases the liquidity of fund units because more units are outstanding.[1] Unitholders may also benefit from a fund merger because the fixed costs of managing the funds are allocated over the larger number of units outstanding. As a result, the management expense ratio (or "**MER**")[2] of a fund following a merger typically declines as a percentage of NAV. However, because the management fees and other variable expenses remain relatively constant, the positive impact on MER of allocating fixed costs over a larger unitholder base diminishes as the NAV of a fund increases. Another way to reduce MER is for an IFM to be more efficient in the management of a fund or group of funds; for example, by negotiating more favourable terms with third party service providers.

[16] The NAV of the CHDF was approximately $24.2 million as of December 31, 2005 and approximately $8.7 million as of December 31, 2007. Clearly, the NAV of the CHDF fell significantly over that period. As of July 23, 2008, CHDF had

[1] Increased liquidity means that there would be a higher volume of trading of the units on the exchange resulting in unitholders being able to more efficiently trade in or dispose of their units (see paragraph [31] of these reasons with respect to increased liquidity as a result of the merger of CHF with the Fairway Fund).

[2] "MER" is the percentage of an investment fund's average net assets paid by the fund each year to pay the costs of managing the fund, including IFM management fees.

a NAV of $6.4 million (see paragraph 374 of these reasons for information with respect to subsequent CHF NAVs). As of June 6, 2008, CHDF had experienced "another year of high redemptions" (see paragraph 201 of these reasons).

[17] In 2005, CHDF paid management fees to CHCC in the amount of $156,161. For the one-year period ended December 31, 2007, the management fees paid by CHDF to CHCC were $75,717, less than half of what they had been in 2005. For the year ended December 31, 2008, CHDF paid management fees to CHCC of $44,218 (see paragraph 522 of these reasons for information with respect to increases in management fees as a result of the fund mergers described in these reasons).

4. CHCC Roles

[18] CHCC managed MACCs and CHDF separately until the funds were merged on December 30, 2008.

[19] CHCC was the IFM and trustee for CHDF from May 19, 2004 until CHDF was merged with MACCs. From the date that the MACCs management services agreements were acquired by CHCC to the date that MACCs was merged with CHDF, CHCC was also the IFM and trustee for MACCs.

[20] CHAM was CHDF's portfolio manager before CHDF's merger with MACCs, and became MACCs' portfolio manager on August 1, 2008. Upon the merger of MACCs and CHDF, CHAM became the portfolio manager of the continuing fund, which was named the Crown Hill Fund. CHAM was the portfolio manager of CHF until it was replaced by Robson on January 16, 2009 (see paragraph 355 of these reasons).

[21] The IRC for MACCs was also the IRC for CHDF.

5. CHCC's Growth Strategy

[22] In March 2008, Pushka recommended to the CHCC Board a strategy of increasing CHDF assets under management through fund mergers. The expressed purpose for pursuing that strategy was to benefit unitholders by providing increased liquidity for their units, because of the larger number of units outstanding, and a reduction in MER by spreading the fixed fund costs over a larger number of units.

[23] On April 30, 2008, CHCC filed a MACCs management proxy circular (the "**June 08 Circular**") with the Commission and sent copies of the circular to MACCs unitholders in connection with a special meeting of unitholders to be held on June 4, 2008. The June 08 Circular recommended that unitholders vote to approve proposed changes to the MACCs Declaration of Trust. The letter to unitholders that accompanied the June 08 Circular stated that CHCC was "proposing amendments to the declaration of trust in order to facilitate mergers with other closed-end investment funds from time to time" without the need for unitholder approval (see paragraphs 190 to 195 of these reasons).

[24] The MACCs unitholders approved the changes to the MACCs Declaration of Trust, which was amended and restated as of June 4, 2008. On June 6, 2008, the CHCC Board approved further amendments to the MACCs Declaration of Trust, which was restated as of that date (see paragraph 202 and following of these reasons).

[25] On July 25, 2008, CHCC filed a CHDF management proxy circular (the "**August 08 Circular**") with the Commission and sent copies of the circular to CHDF unitholders in connection with a special meeting of unitholders to be held on August 28, 2008. The August 08 Circular recommended that unitholders vote to approve proposed changes to the CHDF Declaration of Trust to facilitate a merger with one or more other closed-end funds without the need for unitholder approval, subject to certain criteria (see paragraph 238 of these reasons). The changes were approved by unitholders at the August 28, 2008 meeting. CHDF's Declaration of Trust was amended and restated as of that date.

[26] MACCs and CHDF were merged on December 30, 2008, with MACCs as the continuing fund. As a result, MACCs' Declaration of Trust became the declaration of trust for the continuing fund. Prior to the merger, CHDF had a NAV of approximately $6.4 million and MACCs had a NAV of approximately $3.8 million. As a result of the merger of MACCs with CHDF, the NAV of the continuing fund increased to approximately $10.2 million (see paragraph 374 of these reasons) and the continuing fund was named the Crown Hill Fund.

6. The Fairway Transaction

[27] In August 2008, Pushka initiated discussions with a third party fund manager to purchase the rights to the management services agreement for the Fairway Diversified Income and Growth Trust (that agreement is referred to in these reasons as the "**Fairway Management Agreement**" and that fund is referred to as the "**Fairway Fund**") with the aim of merging the Fairway Fund with MACCs and CHDF. (Ultimately, the merger of CHDF with MACCs occurred before the merger of CHF with the Fairway Fund.)

[28] On January 16, 2009, Robson was appointed the portfolio manager of CHF to replace CHAM (see paragraph 355 of these reasons). That appointment was made in order to permit CHF to lend approximately $1.0 million to an affiliate of CHCC (see paragraph 30 below) in order to finance CHCC's purchase of the rights to the Fairway Management Agreement (see paragraph 357 of these reasons).

[29] CHCC acquired the rights to the Fairway Management Agreement on January 20, 2009 and became the IFM of the Fairway Fund.

[30] That acquisition was carried out through the following transactions. On January 20, 2009, Crown Hill Fund loaned $995,000 to a numbered company wholly-owned by Pushka (that loan is referred to in these reasons as the "**Fairway Loan**" and that numbered company is referred to in these reasons as "**CHCC Holdco**") that owned all of the outstanding shares of CHCC. CHCC Holdco used the funds to subscribe for additional shares in the capital of CHCC. CHCC guaranteed the obligations of CHCC Holdco to repay the loan and CHCC Holdco pledged the shares of CHCC as security.

CHCC then used the subscription proceeds to purchase the shares of a numbered company which owned the rights to the Fairway Management Agreement. On the same day, the numbered company was amalgamated with CHCC and CHCC thereby became the IFM of the Fairway Fund. Three days later, on January 23, 2009, CHF was merged with the Fairway Fund; the continuing fund was named the Crown Hill Fund. Following the merger, CHF had a NAV of approximately $44 million (see paragraph 374 of these reasons). We refer to the transactions described in this paragraph as the "**Fairway Transaction**".

[31] Subsequent to the completion of the Fairway Transaction, Pushka advised the CHCC Board at a meeting held on March 27, 2009 that, as a result of the merger of CHF with the Fairway Fund (and the previous merger of CHDF and MACCs), trading in the units of the Crown Hill Fund on the TSX had increased from approximately 40,000 units per month in December 2008 to approximately 600,000 units per month in March 2009 (see paragraph 262 of these reasons). Clearly, that was a very material increase in the volume of trading of CHF units.

[32] We understand that by the time of this hearing the Fairway Loan had been repaid to CHF in full.

7. The Citadel Transaction

[33] In May 2009, Pushka entered into discussions with the owners of the management services agreements for the Citadel Group of Funds (as defined in paragraph 34 below) to acquire the rights to those agreements (the "**Citadel Management Agreements**"). At the time, the Citadel Group of Funds had an aggregate of approximately $1.0 billion of assets under management.

[34] The Citadel Group of Funds was comprised of the following 13 funds: the Citadel Diversified Investment Trust, the Citadel Premium Income Fund, the Equal Weight Plus Fund, the Citadel HYTES Fund, the Citadel S-1 Income Trust Fund, the Citadel SMaRT Fund, the Citadel Stable S-1 Income Trust, the Energy Plus Income Fund, the Financial Preferred Securities Corporation, the Series S-1 Income Fund, the Sustainable Production Energy Trust, the CGF Mutual Funds Corporation and the CGF Resources 2008 Flow-Through LP (collectively, the "**Citadel Group of Funds**").

[35] On June 3, 2009, CHCC caused Crown Hill Fund to acquire indirectly the rights to the Citadel Management Agreements for a purchase price of $28 million (the "**Citadel Acquisition**") pursuant to the transaction described in paragraph 399 of these reasons. CHF acquired those rights because CHCC was not itself able to finance the purchase price.

[36] Following the acquisition by CHF of the rights to the Citadel Management Agreements, Pushka intended to merge at least eight funds in the Citadel Group of Funds with the Crown Hill Fund which would be the continuing fund. The Citadel funds proposed to be merged with the CHF were: Citadel Diversified Investment Trust, Citadel Premium Income Fund, Equal Weight Plus Fund, Citadel HYTES Fund, Citadel S-1

Income Trust Fund, Citadel SMaRT Fund, Citadel Stable S-1 Income Fund, and Series S-1 Income Fund (collectively, the "**Citadel Funds**"). Ultimately, only five of the Citadel Funds were merged with CHF in December 2009. As a result of those mergers, the NAV of the continuing fund increased to approximately $237 million (see paragraph 374 of these reasons).

[37] On June 4, 2009, Crown Hill Capital publicly announced that CHF had acquired the rights to the Citadel Management Agreements and that CHCC proposed to carry out a "Reorganization" as the first step in the process to cause the mergers of the Citadel Funds with CHF (see paragraph 403 of these reasons for the definitions of the terms "Reorganization" and the "Citadel Transaction"). Crown Hill Capital sent to CHF unitholders a notice of meeting and a management proxy circular dated June 3, 2009 (the "**June 09 Circular**") in connection with a special meeting of CHF unitholders to be held on June 29, 2009 to approve the Reorganization. The Reorganization would have constituted a related party transaction between CHF and CHCC if it had been completed (see paragraph 450 of these reasons).

[38] As a result of the intervention by Staff, the June 29, 2009 CHF unitholder meeting was not held, the Reorganization did not take place and CHF's acquisition of the rights to the Citadel Management Agreements was restructured. A portion of the $28 million purchase price was repaid to CHF and the balance became a loan by CHF to CHCC. We understand that by the time of this hearing that loan had been repaid to CHF in full.

[39] The Respondents and Staff agreed that none of the events that occurred after the end of June 2009 would be the subject matter of this proceeding. There were, however, some references in the evidence to events subsequent to that date.

IV. STAFF ALLEGATIONS

[40] The following is a summary of Staff's allegations contained in the Statement of Allegations. Staff alleges that, during the period from April 2008 to and including June 2009:

(a) CHCC caused Crown Hill Fund and its predecessor funds to:

(i) enter into a series of transactions to have CHCC acquire, either initially or ultimately, the management services agreements for other non-redeemable investment funds and bring about mergers of those funds with the CHF. In doing so, CHCC and Pushka acted primarily in their own interests rather than that of the Crown Hill Fund, contrary to section 116 of the Act and contrary to the public interest;

(ii) in two instances (in connection with the Fairway Loan and the Citadel Acquisition), use Crown Hill Fund's assets to finance CHCC's acquisition of the rights to the management services agreements for other non-redeemable investment funds as a means whereby CHCC would increase the assets under its management and thereby increase its management fees. In doing so, CHCC caused Crown Hill Fund to

breach its investment requirements and/or exposed it to unnecessary risks, contrary to section 116 of the Act and contrary to the public interest;

(b) CHCC did not act honestly, in good faith and in the best interests of unitholders of the predecessors to CHF, contrary to section 116 of the Act, in increasing the management fees payable by the funds to CHCC, loosening the investment requirements or restrictions and/or broadening CHCC's powers, including by means of the merger of CHDF with MACCs;

(c) CHCC and Pushka benefited from the acquisition of the Fairway Management Agreement and the subsequent merger of CHF and the Fairway Fund because CHCC's management fees increased as a result;

(d) CHCC as a trustee and manager had a conflict of interest in causing CHF to lend money to CHCC's parent which also created a continuing conflict of interest as CHCC was in substance the creator of CHF;

(e) CHCC did not act honestly, in good faith and in the best interests of the Crown Hill Fund and/or did not act with the degree of care, diligence and skill of a reasonably prudent person in the circumstances, contrary to section 116 of the Act, in causing CHF to enter into the Fairway Transaction when CHCC, among other things:

    (i) failed to assess the results of the prior acquisition and merger of CHDF with MACCs;

    (ii) failed to fully explore sources of financing for the purchase of the Fairway Management Agreement so as to avoid unnecessary and continuing conflicts;

    (iii) failed to consider and evaluate all the risks, costs and expenses associated with the proposed Fairway Transaction, including the additional costs of retaining additional portfolio managers; and/or

    (iv) appointed Robson despite the fact that Robson had little or no experience in managing a portfolio of securities of the size and nature of the Crown Hill Fund;

(f) CHCC caused CHF to indirectly acquire the rights to the Citadel Management Agreements that put CHF in the position of having control over, and indirect responsibility for, the management of the Citadel Group of Funds, contrary to the public interest;

(g) CHCC caused CHF to acquire indirectly the rights to the Citadel Management Agreements for $28 million, an amount that constituted more than 60% of its assets at the time, before any CHF unitholder meeting took place, and made disclosure in the June 09 Circular that was inadequate and

misleading in the circumstances, contrary to Ontario securities law including section 116 of the Act, and contrary to the public interest;

(h) CHCC caused CHF to use more than 60% of its assets to acquire the rights to the Citadel Management Agreements contrary to CHF's Investment Strategy and its Investment Restrictions set out in sections 5.2 and 5.3 of CHF's Declaration of Trust and thereby failed to act honestly, in good faith and in the best interests of CHF and its unitholders and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances, contrary to section 116 of the Act and/or contrary to the public interest;

(i) CHCC caused CHF to indirectly acquire the rights to the Citadel Management Agreements and failed to consider, avoid and/or minimize the risks of significant losses as well as the costs and expenses associated with the Citadel Transaction, contrary to section 116 of the Act and/or contrary to the public interest;

(j) by structuring the Citadel Transaction as it did and by causing CHF to indirectly acquire the rights to the Citadel Management Agreements, CHCC acted primarily in its own interests (and those of Pushka) rather than the interests of CHF, contrary to section 116 of the Act and/or contrary to the public interest;

(k) CHCC failed to act honestly, in good faith and in the best interests of Crown Hill Fund and/or did not act with the degree of care, diligence and skill of a reasonably prudent person in the circumstances, contrary to section 116 of the Act and contrary to the public interest, by:

    (i) failing to assess the results of the prior acquisitions and mergers and to consider the current situation of the Crown Hill Fund, the need for mergers with the Citadel Funds and the purported benefits of such mergers;

    (ii) failing to consider the appropriateness of causing the Crown Hill Fund to acquire the rights to the Citadel Management Agreements so as to use fund assets as a means of financing CHCC's ultimate acquisition of those agreements;

    (iii) failing to consider financing alternatives for the acquisition of the rights to the Citadel Management Agreements and/or determine fair and reasonable terms for such financing;

    (iv) failing to properly assess and seek to avoid or minimize the risks of significant losses to CHF as well as all the costs and expenses associated with the Citadel Acquisition, the Reorganization and the mergers of the Citadel Funds with CHF;

(v) causing CHF to expend 60% of its assets to acquire the rights to the Citadel Management Agreements without first making timely and accurate disclosure to CHF and its unitholders; and

(vi) providing inadequate and misleading disclosure in the June 09 Circular as described in the Statement of Allegations;

(l) during the relevant time, CHCC did not have written policies and procedures in place to address conflicts of interest, contrary to section 2.2 of NI 81-107;

(m) Pushka as President and Chief Executive Officer and a director of CHCC and, indirectly as its sole shareholder, authorized, permitted or acquiesced in the conduct of CHCC that constituted breaches of section 116 of the Act and, in so doing and pursuant to section 129.2 of the Act, Pushka is deemed also to have breached the Act and acted contrary to the public interest;

(n) Pushka as President, Chief Executive Officer and a director of CHCC, in authorizing the conduct described above, failed to act honestly, in good faith and *in the best interests of the Citadel Funds* [emphasis added] and/or did not act with the degree of care, diligence and skill of a reasonably prudent person in the circumstances, contrary to section 116 of the Act and/or contrary to the public interest by, among other things:

(i) seeking to bring about the mergers of the Citadel Funds and CHF without seeking and obtaining the approval of the unitholders of the Citadel Funds in advance;

(ii) failing to consider the current situation of the Citadel Funds and whether there were any benefits for each of those funds merging with CHF; and/or

(iii) failing to evaluate and seek to minimize all the risks, costs and expenses associated with the mergers for the Citadel Funds and their unitholders including any tax implications; and

(o) the conduct engaged in by CHCC and Pushka as described above violated Ontario securities laws as specified in the Statement of Allegations. In addition, that conduct compromised the integrity of Ontario's capital markets, was abusive to Ontario capital markets and was contrary to the public interest.

[41] A chronology of the events considered in these reasons is set out in Schedule "A" to these reasons.

[42] The matters we must determine are set out in paragraph 74 of these reasons.

V. RESPONDENTS' SUBMISSIONS

[43] The Respondents submit that they, together with the CHCC Board and the IRC, made decisions to proceed with the transactions at issue in this proceeding, honestly, in good faith and in the best interests of CHF and its unitholders. The transactions at issue were carefully structured, on the advice of highly qualified legal counsel, to comply with the provisions of Ontario securities law. All of those transactions were approved by the independent directors of CHCC and recommended by the IRC.

[44] Further, the Respondents submit that there is no evidence that the transactions impugned by Staff were commercially improvident and certainly were not outside the range of reasonable business alternatives. The Respondents submit that there was a clearly articulated business rationale for each transaction and that the business judgment rule applies to the decisions to implement them. As a result, the Respondents submit that the Commission should not now second-guess those business decisions.

Amendments to MACCs Declaration of Trust

[45] The Respondents submit that Staff's complaints about the amendments to MACCs Declaration of Trust are confined to an increase in management fees, the loosening of investment restrictions and the broadening of CHCC's powers as an IFM. The Respondents submit that Staff expanded their allegations in relation to the MACCs amendments in their submissions to include the amendment of redemption rights and the process by which the amendments were made. The Respondents say that Staff's focus on the amendment of management fees and redemption rights in isolation is plainly inappropriate. As Allen testified, the amendments were considered as a whole and determined to be in the best interests of the CHF as a package.

[46] The Respondents submit that the amendments were made to give authority to CHCC to carry out a merger strategy in a timely and cost effective manner and to produce a workable constating document that would serve the "continuing fund" as new funds were merged with it. The Respondents submit that the amendments have to be viewed in their totality with a view to balancing the interests of the fund as a whole and not in isolation. A commercially reasonable fee structure was also implemented with a view to the long-term health of CHF.

[47] The Respondents submit that the error of focusing on particular amendments in isolation is clearly shown in relation to the changes to redemption rights. Staff erroneously assumes that when it comes to redemption rights, "more is always better". This is clearly not the case from the perspective of the CHF. The evidence was consistent that the existing redemption rights had been detrimental to CHF by allowing the rapid erosion of assets.

[48] Staff's narrow approach is repeated with respect to the amendments to the MACCs Declaration of Trust on September 25, 2008 to allow CHCC to increase its management fees to 1%. Staff's submission is effectively that any increase in costs to the

unitholders of CHF (and its predecessors) is automatically not in their best interests and therefore a breach of section 116 of the Act.

[49] The Respondents submit that the CHF Declaration of Trust, as restated from time to time, has served CHF since January 2009 without incident or complaint. Staff has led no evidence to demonstrate that the terms of the previous MACCs Declaration of Trust would have achieved a superior outcome for CHF.

Loan to Facilitate the Fairway Transaction

[50] The Respondents submit that Staff has provided no support for the proposition that a loan from an investment fund to its IFM can never be in the best interests of a fund. It is unclear why such a loan can "never" be in the best interests of the fund merely as a result of a conflict of interest that it raises. The Respondents say that this position is contradicted by the very existence of NI 81-107, which contemplates transactions occurring notwithstanding conflict matters. Further, the regulatory regime contemplates related party transactions which raise conflict of interest matters. By having an IRC review such transactions, a balance is struck by providing protection to the CHF on the conflict matters, but at the same time not foreclosing the approval and implementation of potentially beneficial transactions.

[51] The Respondents identified the relevant "conflicts of interest" arising from the transactions impugned by Staff, presented those conflicts to the IRC together with all of the information relevant to the conflicts, and obtained its recommendations to proceed. The IRC was aware that a loan from CHF to CHCC was a conflict of interest, and, in the case of the Fairway Loan, were presented with a detailed discussion document setting out in detail the issues surrounding the loan (that document is referred to in these reasons as the "Pushka Memorandum"; see paragraph 304 and following of these reasons). They were aware that the specific terms of the loan were a matter of potential conflict of interest.

[52] The Respondents submit that Staff's allegations fail to distinguish between a related party transaction between two parties who have a special relationship prior to the transaction, and a true conflict of interest, where the interests of two parties are not aligned. In this case, there was no conflict of interest in the Fairway Transaction because both the CHF and CHCC would benefit from the transaction. The view that the interests of the CHF and CHCC were aligned with respect to the Fairway Transaction was shared by the IRC.

[53] The Respondents submit that they acted in good faith and that the record is clear that the Fairway Transaction was only undertaken after extensive review and analysis by the CHCC independent directors and the IRC in the months leading up to the transaction. In particular, the concept of using a loan from CHF to CHCC to finance the acquisition of a management agreement was discussed at three separate meetings of the CHCC Board and two meetings of the IRC. It was also the subject of a legal opinion of Stikeman Elliott LLP ("**Stikeman**"), which concluded that the loan could be made in compliance with

Ontario securities law (see the discussion related to reliance on legal advice commencing at paragraph 595 of these reasons).

[54] Staff alleges that CHCC did not "fully explore" possible third-party financing for the Fairway Transaction. It is clear that CHCC did explore financing options through the discussions with an investment banker suggested by one of the directors. Moreover, the Respondents submit that Staff failed to present any evidence of other available alternatives to the Fairway Loan that would have provided a superior economic result for CHF unitholders or which would have presented a superior method for completing the Fairway Transaction.

[55] The Respondents submit that the fact that CHCC did not have a written conflicts manual at the time of the Fairway Transaction is immaterial to the allegations that the Respondents breached their fiduciary duties under section 116 of the Act. CHCC was not required to have a written policies and procedures manual in respect of the matters at issue in this proceeding.

[56] The Respondents say that in recommending the Fairway Transaction, the IRC was aware, and considered, that one effect of the merger could be increased management fees paid to CHCC as IFM as a result of CHF becoming a larger fund.

[57] The Respondents submit that the Fairway Loan was made for the sole purpose of facilitating the acquisition of the Fairway Management Agreement in order to effect the merger of CHF with the Fairway Fund. The related party element of the transaction was entirely manageable and was reviewed and implemented appropriately. It is evident that the loan terms were commercially reasonable. Staff has led no evidence that such terms were not within the range of commercially reasonable terms.

Retainer of Robson

[58] The Respondents submit that there is no evidence that Robson was unqualified to provide portfolio management services for a small closed-end investment fund such as CHF. Robson's portfolio management fee was commercially reasonable. The decision to retain Robson is the type of decision taken in the normal course by an IFM, and is supportable as a stand-alone decision.

The Citadel Transaction

[59] Staff submits that the investment by CHF in the rights to the Citadel Management Agreements was made for CHCC's benefit and not for the benefit of CHF. The Respondents submit that this allegation runs contrary to all of the evidence and is hard to reconcile with the fact that the transaction was approved by all of CHCC's directors, including Allen and Jackson. The latter directors were independent directors who had no personal interest in the outcome and had no motivation other than to act in CHF's best interests. The Citadel Transaction could not have proceeded had Allen or Jackson not voted in favour of it. In order to make the finding requested by Staff, the Commission would effectively have to find that both Allen and Jackson ignored their fiduciary duties to the CHF. That is plainly not the case.

[60] CHCC's ultimate conclusion, after considerable analysis and diligence, was that the Citadel Acquisition was beneficial to CHF. While CHCC was unable to implement the Reorganization due to the intervention of Staff, the alternative negotiated with Staff was successful and CHF's investment was repaid in full as originally intended, albeit without the Preferred Return (as defined in paragraph 429 of these reasons).

[61] The Respondents note that, in Staff's view, the fact that the revenue stream from the rights to the Citadel Management Agreements would eventually revert to CHCC is evidence that CHCC was acting exclusively in its own interest. This erroneous view ignores the following three important aspects of the Citadel Transaction:

(a) the structure of the proposed Joint Venture (referred to in detail in paragraph 402 of these reasons), including the existence of the senior and subordinated interests in the Joint Venture, was to be the subject of a vote of CHF unitholders. If, for some reason, CHF unitholders were opposed to the Reorganization or if they wanted a higher return, they could have voted against the transaction. However, the unitholders overwhelmingly supported the Reorganization;

(b) CHCC subordinated its interest to that of CHF by ensuring that CHF would be repaid its entire investment, plus the Preferred Return, before CHCC would receive any revenues. If the transaction was not profitable for CHF, it would also not be profitable for CHCC; and

(c) because CHCC would be the manager of the Citadel Funds, it follows that CHCC would be entitled to receive management fees. That interest was subordinated to the interest of CHF and was essentially security for CHF for the receipt of its investment and the Preferred Return.

[62] The Respondents submit that Staff has attacked the Fairway Transaction and the Citadel Acquisition on the basis that there was an irreconcilable conflict of interest resulting from CHCC causing CHF to invest assets to acquire the management contracts for the Fairway Fund and the Citadel Group of Funds. However, Staff can point to no provision of Ontario securities law that was breached, and Staff's submissions are utterly divorced from applicable legal principles. The Respondents submit that the regulatory regime has recognized that related party transactions and conflicts of interest may arise and that transactions can nonetheless proceed provided appropriate precautions are taken, as they were in this case. The Respondents submit that there is no allegation in the Statement of Allegations that CHCC failed to follow NI 81-107 regarding conflict of interest matters. (We note that there is an allegation by Staff that CHCC did not have written policies or procedures in place to address conflicts of interest contrary to section 2.2 of NI 81-107 and the public interest; see paragraph 40(l) of these reasons.)

[63] Staff has submitted that the Citadel Acquisition was unprofitable and therefore an improvident transaction. The Respondents submit that unless Staff can show that the transaction was outside the range of reasonable commercial alternatives, Staff's submission is unfounded.

[64] The Respondents submit that Staff erroneously relies on the "run-off" analysis that Pushka provided to the sellers of the rights to the Citadel Management Agreements during negotiations to establish the revenue stream that would be available to support CHF's investment. Staff falsely assumes that the revenue stream reflected in that schedule could not have been increased by any means other than the successful completion of the anticipated mergers of the Citadel Funds with CHF, as CHCC was proposing. The Respondents submit that Staff failed to consider whether there were any other scenarios by which the revenue stream from the Citadel Management Agreements could be increased through good management of the funds. In taking this approach, Staff fails to give any credit to the business judgment of CHCC. It is clear that experienced and financially knowledgeable business people were keenly focused on the economics of the Citadel Acquisition. If Staff intended to attempt to prove that the Citadel Acquisition was likely to be unprofitable, they should have made that allegation in the Statement of Allegations and called evidence, likely expert evidence, to prove it. Instead, the Respondents submit Staff relies on questionable inferences based on erroneous assumptions.

[65] Staff submits that CHCC could not have accomplished the mergers of the Citadel Funds with CHF that CHCC was planning because some of the Citadel Funds would not meet the criteria of the permitted merger provisions[3] contained in the relevant declarations of trust. Staff implies that CHCC had overlooked these criteria. However, the Respondents submit that was exactly the assessment that CHCC carried out. CHCC concluded that the relevant permitted merger criteria would be met and that it would be in the best interests of the Citadel Funds to proceed with the mergers. Staff has submitted no evidence that this was not a reasonable assessment. Moreover, this was a matter of business judgment.

[66] Staff submits that the decision to delay the CHF unitholder meeting to approve the Reorganization until after the Citadel Acquisition was not in the best interests of CHF. The Respondents submit that Staff's position is incorrect. As a starting point, no provision of Ontario securities law required a unitholder meeting in connection with the Citadel Acquisition and none was required by CHF's Declaration of Trust. In any event, the decision whether or not to consult unitholders when a transaction is in its formative stages and before it is approved by a board of directors is a matter of business judgment to which deference should be accorded by the Commission. In this case, the CHCC Board decided in good faith, with the benefit of legal advice, that no meeting of unitholders should be held to approve the Citadel Acquisition.

[67] The Respondents submit that Pushka was attempting to create a large, stable investment fund that would not be burdened by the same deteriorating NAV that had plagued MACCs, CHDF, the Fairway Fund and the Citadel Funds. He attempted to create a fund with a diversified portfolio not vulnerable to market swings. This motivation to

[3] When we refer to a "permitted merger provision" in these reasons, we are referring to a provision in an investment fund's declaration of trust that permits the IFM to merge the investment fund with another fund without obtaining unitholder approval. There will be conditions imposed by the permitted merger provision on the ability of the IFM to rely on it, such as the Merger Criteria referred to in paragraph 238 in these reasons.

improve the overall, long-term health of an investment fund is wholly consistent with an IFM's fiduciary duty under section 116 of the Act.

Allegations not Made by Staff in the Statement of Allegations

[68] The Respondents submit that Staff's closing written submissions are a broad-based attack on practically every element of the transactions undertaken by CHCC since its acquisition of the MACCs management services agreements in early 2008, and culminating in the Fairway Transaction and the Citadel Transaction. The various allegations made by Staff are not confined to the allegations made in the Statement of Allegations and, accordingly, should not be considered by the Commission (see the discussion of this issue commencing at paragraph 627 of these reasons).

VI. WITNESSES AT THE HEARING

[69] We heard the testimony of nine witnesses.

[70] Staff called the following seven witnesses at the hearing:

(a) Yvonne Lo ("**Lo**"), a Senior Forensic Accountant, Enforcement Branch of the Commission;

(b) Jeffrey C. Shaul ("**Shaul**"), the owner and principal of Robson, the portfolio manager for Crown Hill Fund between January 16, 2009 and November 2009;

(c) Andrew Fleming ("**Fleming**"), an experienced securities lawyer and senior partner with Norton Rose Canada LLP, a member of the IRC of Crown Hill Fund and its predecessors during the relevant time;

(d) Alfred L. J. Page ("**Page**"), an experienced securities lawyer and senior partner with Borden Ladner Gervais LLP ("**BLG**"), who provided certain legal advice in connection with the Citadel Transaction (see the discussion commencing at paragraph 596 of these reasons as to who BLG was acting for and what advice BLG gave);

(e) Darin R. Renton ("**Renton**"), an experienced securities lawyer and partner with Stikeman, who provided legal advice to CHCC in connection with the Fairway Transaction and the Citadel Transaction (see the discussion commencing at paragraph 596 of these reasons as to who Stikeman was acting for and what advice Stikeman gave);

(f) M. Paul Bloom ("**Bloom**"), the portfolio manager for six of the Citadel Funds that had an aggregate of approximately $700 million of assets under management at the time of the Citadel Acquisition; and

(g) Victoria Ringelberg ("**Ringelberg**"), qualified by us as an expert witness based on her extensive senior level experience in the investment fund industry for the limited purposes of:

   (i) identifying the issues that are typically considered when investment funds are merged; and

   (ii) commenting on whether closed-end investment funds typically purchase rights to the management services agreements of other closed-end investment funds.

[71] The Respondents called two witnesses at the hearing: Pushka and Allen. As noted above, Allen was one of the two independent directors on the CHCC Board during the relevant time.

[72] Staff and the Respondents tendered a large number of documents at the hearing consisting of 34 exhibits. Staff and the Respondents agreed to the admissibility of all those documents and they also submitted six pages of uncontested facts and an agreed cast of characters.

[73] We have not summarised the evidence of the witnesses in these reasons. We have, however, referred to that testimony where we considered it relevant. The testimony of Pushka, Allen and Fleming was generally consistent with the submissions made by CHCC and Pushka (those submissions are summarised beginning at paragraph 43 of these reasons).

VII. MATTERS TO BE DETERMINED

[74] The matters we must decide are:

(a) Did CHCC breach its fiduciary duty and/or its duty of care to MACCs, and/or breach its fiduciary duty and/or its duty of care to CHDF, by causing amendments to be made to the MACCs Declaration of Trust and/or to the CHDF Declaration of Trust, including by means of the merger of CHDF with MACCs, to, among other things, increase the management fees payable to CHCC, loosen the applicable investment restrictions and/or broaden CHCC's authority to amend the MACCs or CHF Declarations of Trust without unitholder approval?

(b) Did CHCC breach its fiduciary duty and/or its duty of care to CHF by causing CHF to make the Fairway Loan?

(c) Did CHCC breach its fiduciary duty and/or its duty of care to CHF by causing CHF to acquire the rights to the Citadel Management Agreements pursuant to the Citadel Acquisition and/or by proposing the Reorganization?

(d) Was the disclosure related to the Reorganization in the June 09 Circular materially misleading and did it fail to provide sufficient information to

enable a reasonable CHF unitholder to make an informed judgement whether to vote to approve the Reorganization, contrary to Ontario securities law?

(e) Was the indirect acquisition by CHF of the rights to the Citadel Management Agreements contrary to and in breach of the investment restrictions contained in the CHF Declaration of Trust? If so, did CHCC thereby breach its fiduciary duty to CHF?

(f) Did CHCC, during the relevant time, fail to have written policies and procedures to address the conflicts of interest arising from the Fairway Loan and/or the Reorganization, contrary to section 2.2 of NI 81-107?

(g) Is CHCC entitled to rely, as a defence to Staff's allegations, upon the legal advice it received in connection with the making by CHF of the Fairway Loan, the acquisition by CHF of the rights to the Citadel Management Agreements pursuant to the Citadel Acquisition and/or the proposed Reorganization?

(h) If we conclude that CHCC has contravened Ontario securities law by its conduct described above, is Pushka deemed, pursuant to section 129.2 of the Act, to also have not complied with Ontario securities law?

(i) Was the conduct of CHCC and Pushka in connection with the matters referred to above contrary to the public interest?

VIII. PRELIMINARY MATTERS

1. Mandate of the Commission

[75] The mandate of the Commission is (i) to provide protection to investors from unfair, improper or fraudulent practices; and (ii) to foster fair and efficient capital markets and confidence in the capital markets (Act, *supra*, section 1.1).

[76] In fulfilling its mandate, the Commission is guided by certain fundamental principles reflected in the Act. One of these principles is that the primary means for achieving the purposes of the Act are: (i) requirements for timely, accurate and efficient disclosure of information; (ii) restrictions on fraudulent and unfair market practices and procedures; and (iii) requirements for the maintenance of high standards of fairness and business conduct to ensure honest and responsible conduct by market participants. (Act, *supra,* section 2.1)

2. Standard of Proof

[77] It is well settled that the standard of proof that must be met in an administrative proceeding such as this is the civil standard of the balance of probabilities (*Re ATI Technologies* (2005), 28 OSCB 8558 at paras. 13-14; *Re Sunwide Finance Inc.* (2009), 32 OSCB 4671 at para. 28; *Re Al-Tar Energy Corp*. (2010), 33 OSCB 5535 at paras. 32-34;

Re White (2010) 33 OSCB 1569 at paras. 22-25; and *Re Biovail Corporation* (2010), 33 OSCB 8914 at paras. 58-62).

[78] The Supreme Court of Canada has considered the nature of the civil standard of proof. That Court has confirmed that there is only one civil standard of proof, which is proof on a balance of probabilities:

> Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.
>
> (*F.H.* v. *McDougall*, [2008] 3 S.C.R. 41, at para. 40 ("***McDougall***"))

[79] The Court noted in *McDougall* that the "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test". However, this requirement for clear, convincing and cogent evidence does not elevate the civil standard of proof above a balance of probabilities (*McDougall*, *supra,* at para. 46).

[80] The balance of probabilities standard requires a trier of fact to decide "whether it is more likely than not that the event occurred" (*McDougall*, *supra,* at para. 44).

[81] We have applied this standard of proof in addressing the matters before us.

3. Evidence

(a) General Comment on the Evidence

[82] We heard testimony in this matter from the nine witnesses referred to above and received and reviewed a relatively large number of documents including e-mails, memoranda describing the various actions and transactions that are the subject matter of this proceeding and how they were proposed to be carried out, declarations of trust for CHF and its predecessor funds, management information circulars for meetings of unitholders of CHF and its predecessor funds, and minutes and handwritten notes related to CHCC Board and IRC meetings.

[83] Where the testimony of, or characterization of events by, a witness, including Pushka, was inconsistent with contemporaneous documents tendered in evidence, we placed more reliance on that documentary evidence.

[84] As will be apparent from these reasons, we are sceptical of Pushka's testimony and we have concluded that, in certain circumstances, Pushka misled the independent directors of CHCC and the members of the IRC and, in any event, failed to make full disclosure to them (see paragraph 632 of these reasons).

[85] At the relevant time, Pushka was the President and Chief Executive Officer and a director of CHCC and, directly or indirectly, the sole shareholder of CHCC and its affiliates. As noted above, there are two other directors on the CHCC Board: Allen and Jackson, both of whom are independent of Pushka. Pushka was clearly the directing mind of CHCC and its affiliates. Accordingly, we have attributed to CHCC the knowledge of Pushka and vice-versa.

[86] We have based our findings on the preponderance of evidence before us and have concluded that, overall, the evidence is clear, convincing and cogent. This is not a matter in which there were what we considered to be crucial disagreements as to the facts or direct inconsistencies in the testimony of witnesses that affected our findings.

(b) Hearsay Evidence

[87] The Commission is entitled to receive and rely on relevant hearsay evidence. Subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, C. s.22 ("**SPPA**") provides as follows:

> 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.

[88] The Ontario Divisional Court has held that "the Commission is expressly entitled by statute to consider hearsay evidence" and that "hearsay evidence is not, in law, necessarily less reliable than direct evidence" (*Rex Diamond Mining Corp.* v. *Ontario Securities Commission*, 2010 ONSC 3926 (Div. Ct.) at para. 4 ("***Rex Diamond (Div. Ct.)***").

[89] Although the notes of CHCC Board and IRC meetings prepared by Ligia Simoes ("**Simoes**"), an administrative assistant employed by CHCC, may constitute hearsay evidence (see paragraphs 169 to 171 and following of these reasons), none of the parties objected to the submission of those notes as evidence. Simoes's notes were important to us in identifying the issues discussed and addressed at CHCC Board and IRC meetings.

[90] The weight to be given to hearsay evidence is a matter for our discretion.

4. The Commission's Public Interest Jurisdiction

[91] The Commission is entitled to make various sanction orders under section 127 of the Act if in its opinion it is in the public interest to do so. In considering the Commission's power to make such orders in the public interest, the Supreme Court of

Canada has observed that "[t]he OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so" (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("***Asbestos***"), at para. 45).

[92] The Supreme Court of Canada has stated that the Commission's public interest discretion is subject to two constraints:

> In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy Securities Act misconduct alleged to have caused harm or damages to private parties or individuals.
>
> (*Asbestos*, *supra,* at para. 45)

[93] The Supreme Court of Canada has recognized general deterrence as an additional factor that the Commission may appropriately consider when imposing sanctions. In *Cartaway Resources Corp*., [2004] 1 S.C.R. 672 at para. 60, the Supreme Court stated that "…it is reasonable to view general deterrence as an appropriate and perhaps necessary consideration in making orders that are both protective and preventative".

[94] Accordingly, the Commission's public interest jurisdiction is preventative in nature and prospective in orientation. It is intended to be exercised to prevent future harm to investors and Ontario capital markets. It may, however, also be exercised in order to deter respondents and others from similar conduct.

5. Section 116 of the Act

[95] Section 116 of the Act states that:

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

[96] An "investment fund manager" (IFM) is defined in the Act as "a person or company that directs the business, operations or affairs of an investment fund" (Act*, supra,* s.1(1) "investment fund manager").

[97] An "**investment fund**" is defined in the Act as "a mutual fund or a non-redeemable investment fund". A **non-redeemable investment fund** is defined as an issuer whose primary purpose is to invest money provided by its security holders, that does not invest for certain specified purposes and is not a mutual fund (Act, *supra,* s.1(1) "investment fund" and "non-redeemable investment fund").

[98] There is no dispute that, during the relevant time, CHCC was the IFM and trustee of the Crown Hill Fund (and its predecessor funds) and that the Crown Hill Fund (and its predecessor funds) was a non-redeemable investment fund for purposes of the Act. Accordingly, CHCC owed the duties set forth in section 116 of the Act to CHF (and its predecessor funds). Similarly, the Fairway Fund and the Citadel Funds were non-redeemable investment funds and, upon CHCC (or an affiliate) becoming the IFM for those funds, CHCC (or such affiliate) would become subject to the duties in section 116 of the Act in respect of those funds.

[99] The declarations of trust for CHF (and its predecessor funds, CHDF and MACCs) imposed similar fiduciary obligations on CHCC as IFM. Those declarations of trust imposed on CHCC *as trustee* similar fiduciary obligations but, in those cases, the duty was to act in the best interests of the *unitholders* rather than the fund.

[100] The wording of section 116 of the *Securities Act* is almost identical to the language of subsection 122(1) of the *Canada Business Corporations Act* and subsection 134(1) of the *Ontario Business Corporations Act*. [*Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as am., s.122(1) ("**CBCA**"); *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s.134(1) ("**OBCA**")]. In *Laxey Partners Ltd.* v. *Strategic Energy Management Corp.* ("***Laxey Partners***") [2011] O.J. No. 5172 at para. 91, the Court held that the duty set out in subsection 116(a) of the Act mirrors the fiduciary duty of directors. Accordingly, cases addressing the nature of a director's fiduciary duty are relevant for our purposes. We discuss *Laxey Partners* further commencing at paragraph 126 of these reasons.

[101] Under the CBCA and OBCA, the duties of directors and officers of a corporation are owed to the corporation. In *BCE Inc.* v. *1976 Debentureholders*, [2008] 3 S.C.R. 560 ("**BCE**"), the Supreme Court of Canada stated that, under the CBCA:

> … the directors are subject to two duties: a fiduciary duty to the corporation under s.122(1)(a) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s.122(1)(b) (the duty of care).
>
> *(BCE* at para. 36)

The Court also stated that "[i]n *Peoples Department Stores*, this Court found that, although directors must consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders" (*BCE* at para. 39).

[102] As President and Chief Executive Officer and a director of CHCC, Pushka owed a fiduciary duty and duty of care to CHCC.

[103] For purposes of these reasons, we refer to the obligation of an IFM under subsection 116(a) of the Act to "exercise the powers and discharge the duties of their office honestly, in good faith and in the best interests of the investment fund" as an IFM's "fiduciary duty" or "duty of loyalty". We refer to the obligation of an IFM under subsection 116(b) of the Act to "exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances" as an IFM's "duty of care".

6. Fiduciary Duty and Duty of Care

(a) Fiduciary Duty

[104] A director's fiduciary duty is a duty to act in the best interests of the corporation and to place the interests of the corporation above the director's personal interests. In *Peoples Department Stores Inc*. v. *Wise* ("***Peoples***"), [2004] S.C.J. No. 64, the Supreme Court of Canada stated:

> The statutory fiduciary duty requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position.
>
> *(Peoples, supra,* at paras. 32 and 35)

[105] The fiduciary relationship between a director and the corporation "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest" (*Canadian Aero Service Ltd.* v. *O'Malley*, [1973] S.C.J. No. 97 at p. 11). The obligation of a director to act in good faith means more than just acting in the absence of bad faith. However, a fiduciary is generally presumed to act in good faith.

[106] A director who is a party to a self-interested or related party transaction with the corporation must make the board of directors or shareholders, as the case may be, "fully informed of the real state of things" (*UPM-Kymmene Corp.* v. *UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412 (Ont. Sup. Ct.), at para. 116; aff'd [2004] O.J. No. 636 (C.A.) ("***UPM-Kymmene Corp.***") However, disclosure does not relieve the director of the duty to act in the best interests of the corporation, "[t]he director must always place the interests of the corporation ahead of his own" (*UPM-Kymmene Corp., supra*, at para. 117). Self-interested or related party transactions entered into by a fiduciary to acquire or benefit from the use of corporate property engage the fiduciary's duty of loyalty. *The onus is on the fiduciary to demonstrate that such transactions are entered into in compliance with its duty of loyalty and that the conflicts of interest have been appropriately addressed.* When we say in these reasons that a conflict of interest matter

should be appropriately addressed, we mean addressed by the review and approval of the independent directors of CHCC, by the review and recommendation of the IRC and by the approval given by unitholders of the relevant fund, as the circumstances dictate.

[107] The Commission has considered the importance of an IFM's duty to protect the best interests of an investment fund and its unitholders. In *Re AGF Funds Inc.*, certain mutual fund managers admitted that their conduct in failing to fully protect the best interests of their funds in respect of market timing trading was contrary to the public interest. In approving the settlement agreement, the Commission stated:

> In order for there to be fairness and confidence in Ontario's capital markets it is critical that [investment] fund managers faithfully and diligently fulfill their duty to fully protect the best interest of their funds (and the investors in those funds) such that certain investors are not given preferential treatment to the detriment of others. Ontario's investors must be in a position to believe that their investments will be treated with the utmost care by those in whose trust they are placed.
>
> *(Re AGF Funds Inc.* (2004), 28 OSCB 73 at para. 6)

Accordingly, as a fiduciary, CHCC had an obligation to place the interests of CHF ahead of its own, to protect the interests of CHF and to treat the investments of CHF with the utmost care.

[108] In *Sextant Capital Management Inc. (Re)*, the Commission found various breaches by an IFM of section 116 of the Act. The Commission referred to the restrictions on self-dealing applicable to the fund and stated:

> The purpose of self-dealing restrictions is to prevent the fund manager from making decisions in its own interests rather than those of the investors. Otto Spork did just that – he made decisions in his own interest rather than those of his investors, to the ultimate detriment of those investors. In doing so, he failed to exercise the powers of his office in the best interests of the investment fund and failed to exercise the degree of care that a reasonably prudent person would exercise in the circumstances. We find he contravened s. 116 of the Act and s. 2.1 of Rule 31-505.
>
> *(Sextant Capital Management Inc. (Re)* (2011), 34 OSCB 5863 at para. 264)

[109] The fiduciary duty of an IFM under section 116 of the Act must be interpreted within the context of the regulatory objectives of the Act and the role of an IFM as a fiduciary in investing and managing the assets of the investment fund on behalf of investors. CHF is a trust, the beneficiaries of which are the unitholders. Unlike in *BCE*, there are no other stakeholders in CHF (such as employees, customers, creditors, or holders of different classes of securities) because it is a passive investment vehicle. While CHCC's fiduciary duty was owed to CHF, acting in the best interests of an investment fund such as CHF includes an obligation to look to and take account of the best interests

of the unitholders of that fund as a whole. It was not enough for CHCC to have acted only in the best interests of CHF; CHCC must also have looked to and taken account of the best interests of CHF unitholders as a whole. We would add that CHCC as trustee under the CHF Declaration of Trust had an express fiduciary obligation to act in the best interests of CHF unitholders.

[110] The key individuals acting for a corporate IFM also have section 116 duties and can be held personally responsible for breaches of those duties (*Re Tersigni* (2010), 33 OSCB 3366 at paras. 6, 7 and 31) ("***Re Tersigni***"). The individual respondent in *Re Tersigni* acknowledged that:

> … his failure to personally disclose, and to ensure that RIMI disclosed to the Fund its intended receipt of the Additional Fees, prior to accepting such payments, was in breach of his and RIMI's obligations pursuant to section 116 of the Act to exercise its powers and discharge its duties fairly, honestly, in good faith and in the best interests of the Fund and to exercise the degree of care, diligence and skill expected of a reasonably prudent fund manager in the circumstances. Equally, his failure to inform the Fund of RIMI's receipt of the Additional Fees, including but not limited to his receipt of the Personal Benefit, was in breach of section 116 of the Act.
>
> (*Re Tersigni, supra,* at para. 31)

[111] In this case, CHCC was not only the IFM of the Crown Hill Fund but was also the trustee under the CHF Declaration of Trust. Under that declaration of trust, CHCC had an express obligation to act in the best interests of the *unitholders* of *CHF*. As such, CHCC had the fiduciary duty of a trustee as a matter of common law. When a person accepts such a dual fiduciary role, they must be mindful of those different roles. It does not necessarily follow that, because an IFM has taken an action which it considers to be in the best interests of the investment fund, the trustee under the declaration of trust related to that fund may simply give effect to that action as being in compliance with the trustee's fiduciary duty. CHCC as trustee gave effect to various changes to the terms of the CHF Declaration of Trust that, on their face, may not have been in the best interests of unitholders (see, for instance, paragraph 202 of these reasons and the discussion following).

Conclusion as to Fiduciary Duty

[112] Accordingly, an IFM's fiduciary duty under section 116 of the Act requires that the IFM:

(a) act with utmost good faith and in the best interests of the investment fund and put the interests of the fund and its unitholders ahead of its own;

(b) generally avoid material conflicts of interest and transactions that give rise to material conflicts of interest on the part of the IFM, including self-interested and related party transactions;

(c) where a conflict of interest cannot be avoided, or where a material self-interested or related party transaction is proposed, ensure that the conflict of interest or transaction is appropriately addressed as a matter of good governance and in compliance with NI 81-107;

(d) make full disclosure to the board of directors, the independent review committee and unitholders, as the circumstances may dictate, in respect of all of the circumstances surrounding a material conflict of interest or self-interested or related party transaction;

(e) obtain the informed consent of unitholders where a conflict of interest or self-interested or related party transaction is sufficiently material to warrant obtaining such consent; and

(f) ensure compliance in all material respects with the terms of the declaration of trust governing the relationship between the IFM and the investment fund.

All of the foregoing responsibilities are important considerations in addressing the issues in this proceeding. It is a key question in this proceeding whether CHCC appropriately addressed the conflicts of interest that arose in the circumstances.

[113] CHCC owed a fiduciary duty under section 116 of the Act to CHF (and its predecessor funds) because it was an IFM charged with the responsibility of managing, or causing the management of, the assets of an investment fund on behalf of investors. CHCC also had an express fiduciary duty to *unitholders* as trustee under the CHF Declaration of Trust. As a fiduciary, an IFM is not permitted to appropriate the assets of the fund for its own benefit or advantage, except as expressly authorized by the declaration of trust or as consented to by unitholders. A fiduciary must meet the highest standard of ethical conduct where a conflict of interest arises from a material self-interested or related party transaction in which assets of the fund are to be used for the benefit of, or are to be advanced to, the IFM. Where such a conflict of interest arises, an IFM has the onus of establishing that it complied with its fiduciary duty. The failure to appropriately address a material conflict of interest itself constitutes a breach of fiduciary duty.

[114] If there is reasonable doubt whether an IFM is permitted to enter into a material self-interested or related party transaction, the IFM should obtain the informed consent of unitholders of the fund. Generally, unitholder approval given by means of a unitholder vote would be sufficient consent, particularly where, as here, the investment fund is a business trust. We reiterate, however, that the onus remains on the fiduciary throughout to establish compliance with its fiduciary duty.

[115] As noted above, in addressing a conflict of interest matter, a fiduciary has an obligation to make full disclosure to the board of directors, the independent review committee and/or unitholders, as the circumstances may dictate. Full disclosure means that a fiduciary has disclosed all relevant information (the "real state of things"; see

paragraph 106 above), has identified all of the important issues, has fairly characterized the circumstances and transactions (including the specific conflicts of interest being addressed) and has fairly communicated the legal and other advice received by the fiduciary. Disclosure must be sufficient to permit the directors or the members of an independent review committee to carry out their responsibilities on a fully informed basis. Disclosure to unitholders must permit them to make an informed decision how to vote on a matter submitted to them. Where a material conflict of interest arises, the onus is on the fiduciary to establish that full disclosure was made in the particular circumstances.

[116] In this case, CHCC submits, among other things, that the Fairway Transaction and the Citadel Transaction were approved by the independent portfolio manager of the Crown Hill Fund and the independent directors on the CHCC Board. CHCC further submits that the Fairway Loan and the Reorganization were considered and recommended by the IRC as achieving a fair and reasonable result for CHF. We discuss those purported approvals and recommendations elsewhere in these reasons. *We note here, however, that even if those approvals and recommendations were given on a fully informed basis, CHCC was not relieved of its fiduciary duty and duty of care, which it remained obligated to discharge.* Such approvals and recommendations are only means by which a fiduciary attempts to establish that it has complied with its fiduciary duty and duty of care in the circumstances. A fiduciary may be prohibited from entering into a transaction that would not be objectionable when entered into by arm's length parties. If we conclude that CHCC did not act in good faith and in the best interests of CHF, any approval by the independent directors of CHCC and any recommendation of the IRC would not affect that conclusion.

(b) Duty of Care

[117] The duty of care imposes an obligation upon directors "to be diligent in supervising and managing the corporation's affairs." The standard of care is objective in nature. In *Peoples,* the Supreme Court of Canada stated:

> To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are important in the case of the s. 122(1)(b) duty of care, as opposed to the subjective motivation of the director or officer, which is the central focus of the statutory fiduciary duty of s. 122(1)(a) of the CBCA.
>
> *(Peoples, supra,* at para. 63)

Accordingly, the duty of care imposes on a fiduciary an obligation to act with prudence and due care.

[118] Given our conclusions in these reasons as to CHCC's compliance with its fiduciary duty, we have not found it necessary to address CHCC's compliance with its duty of care.

7. The Business Judgment Rule

[119] The so-called "business judgment rule" reflects the fundamental corporate principle that the business and affairs of a corporation are managed by or under the supervision of its board of directors. The rule operates to shield from court review business decisions that have been made honestly, in good faith and on reasonable grounds. In such cases, a board's business decisions will not be subjected to microscopic examination and a court will not second-guess, in hindsight, business decisions made by directors or usurp their role in managing the corporation (*CW Shareholdings Inc.* v. *WIC Western International Communications Ltd.*, [1998] O.J. No. 1886).

[120] The Supreme Court of Canada in *Peoples* also addressed the business judgment rule. Major and Deschamps JJ. speaking for the court stated:

> … Canadian courts, like their counterparts in the United States, the United Kingdom, Australia and New Zealand, have tended to take an approach with respect to the enforcement of the duty of care that respects the fact that directors and officers often have business expertise that courts do not. Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available *ex post facto*. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the "business judgment rule", adopting the American name for the rule.
>
> (*Peoples, supra,* at para. 64)

[121] The Supreme Court stated in *BCE* that:

> The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives… It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.
>
> (*BCE*, at para. 40)

It is important to note, however, that the business judgment rule may be invoked to shelter business decisions from review, not matters relating to legal obligations.

[122] The Supreme Court of Canada held in *Kerr* v. *Danier Leather Inc.,* [2007] 3 S.C.R. 331 ("**Danier**") that the business judgement rule does not apply to decisions regarding disclosure under the Act. The Supreme Court stated that:

> … while forecasting is a matter of business judgment, disclosure is a matter of legal obligation. The Business Judgment Rule is a concept well-developed in the context of *business* decisions but should not be used to qualify or undermine the duty of disclosure.
>
> (*Danier, supra,* at para. 54)

[123] This principle was adopted by the Commission in *Re AiT Advanced Information Technologies Corp.* (2008), 31 OSCB 712, *Re Rex Diamond Corp.* (2008), 31 OSCB 8337 and most recently in *Re Coventree* (2011), 34 OSCB 10209 ("***Coventree***").

[124] The Commission held in *Coventree* that determining questions such as whether a fact is a "material fact" or whether a "material change" has occurred within the meaning of section 75 of the Act "are matters squarely within our expertise as a specialized tribunal" (*Coventree, supra,* at para. 157). On appeal, the Ontario Divisional Court held that it is "beyond question that the interpretation of material change under the *Securities Act* and the Commission's discretionary application of its public interest jurisdiction under s. 127 of the *Securities Act* are issues falling within the specialized expertise of the Commission (*Cornish v. Ontario Securities Commission*, 2013 ONSC 1310 ("***Cornish***") at para. 34). The Court noted that "[t]he Commission has repeatedly held that, as an expert tribunal, it does not require evidence from experts or investors in order to determine questions of disclosure and materiality" (*Cornish*, *supra,* at para. 58). The Commission held in *Coventree* that disclosure decisions under the Act are not sheltered by the business judgment rule.

[125] The business judgment rule has been applied to the trustees of an income fund. In *Rio Tinto Canadian Investments Ltd.* v. *Labrador Iron Ore Royalty Income Fund (Trustee of)*, [2001] O.J. No. 2440, Farley J. held that the business judgment rule should apply to the trustees of an income fund. He stated:

> ... The Fund Trust is a commercial one which is modeled upon a corporate enterprise including providing for the duties and obligations of the Trustees to be equivalent to those of the directors of a (public issuer) corporation incorporated under the Canada Business Corporations Act. Thus the subject trust and the Declaration of Trust should be viewed according to quasi-corporate principles.
>
> In assessing the actions of the trustees in a quasi-corporate situation such as this, trust obligations and duties of trustees should be appropriately modified to take into account the "corporate aspect". This corporate aspect would include the business judgment rule.

While we agree with that general principle, we do note that the fiduciary duty imposed by section 116 of the Act must be interpreted within the context of the role of an IFM as a fiduciary in managing the assets of an investment fund on behalf of investors.

The Laxey Partners Decision

[126] Section 116 of the Act was recently considered by the Ontario Superior Court in *Laxey Partners*. That decision addressed circumstances that are in some respects similar to the circumstances before us in this matter. As a result, we will discuss that decision in some detail.

Facts

[127] *Laxey Partners* involved an action by Laxey Partners Limited ("**Laxey**") for damages allegedly caused by the dilution to NAV resulting from an exchange offer made by the Strategic Energy Fund (the "**Strategic Fund**"), a closed-end investment trust, for 69 other investment funds. Laxey, an investor in the Strategic Fund, brought a civil action against Strategic Energy Management Corp. ("**Strategic Management**"), the manager of the Strategic Fund, Sentry Select Capital Corporation ("**Sentry**"), the portfolio manager of the Strategic Fund, and Computershare Trust Company of Canada ("**Computershare**"), the trustee of the Strategic Fund. Laxey alleged that, by reason of the exchange offer, the defendants caused the NAV per unit of the Strategic Fund to be diluted and thereby committed breaches of trust, fiduciary duty and contract, and were negligent. Laxey alleged that the principal objective of the exchange offer was to increase management fees to Strategic Management as a result of the increase in NAV.

[128] The Court addressed the question of whether the business judgment rule applied to the actions of Strategic Management as an investment fund manager. The Court found in the circumstances that it did.

[129] In deciding whether the defendants had breached their fiduciary duty to the Strategic Fund, the Court considered the motivations of the investment fund manager in undertaking the exchange offer. The business rationale for the exchange offer was that income trusts in the oil and gas sector were undervalued, in part, as a result of announced changes to the taxation of income trusts. Accordingly, the exchange offer was an investment intended to assist the Strategic Fund to achieve its investment objectives. The Court accepted that "increased management fees were not the reason for the exchange offer" *(Laxey Partners, supra,* at para. 54).

[130] The Court also found that there was no basis to conclude that the decision to make the exchange offer was not reasonable in the circumstances. The Court considered it relevant that Strategic Management, as well as the portfolio manager of the Strategic Fund, carefully considered the effect of dilution prior to making the exchange offer *(Laxey Partners, supra,* at para. 73).

Application of the Business Judgment Rule

[131] The Court noted that the business judgment rule is a corporate law principle requiring courts to afford directors and officers a measure of deference in relation to their business decisions (referring to *Peoples, supra,* at para. 64) (see paragraph 120 of these reasons).

[132] The Court also referred to *Maple Leaf Foods Inc.* v. *Schneider Corp*. (1998), 42 O.R. (3d) 177, where Weiler J.A. stated, at p. 192:

> The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction.

[133] The Court concluded that Strategic Fund and Sentry were carrying on a business and that "the form of the business may be an income trust, because of income tax considerations, but the business is essentially the same as if it were run by a corporation" *(Laxey Partners, supra,* at para. 78).

[134] The Court referred to disclosure in the prospectus related to the exchange offer and concluded that "… the provision in the prospectus is no more than a common sense recognition that the management of Strategic Fund were running a business and that people were investing in units of the Fund because of their reliance upon the business judgment of those persons. Unitholders could hardly expect those persons not to be able to rely upon the business judgment rule when considering whether they had breached their obligations to the unitholders."

[135] The Court found that the business judgment rule protected the decisions of management in the circumstances. The Court stated that:

> In my view, the business judgment rule protects Strategic Management and Sentry in this case. The decisions taken were done carefully by persons knowledgeable in the business and taken on an informed basis. The view taken that the dilution of the NAV per unit caused to the unitholders of the Fund by the exchange offer would likely be outweighed by the benefits to those unitholders resulting from the exchange offer was a reasonable decision and one which a court ought not to second-guess. This is not even one of those cases in which a decision reasonably taken turned out later to be a mistake. The evidence was that all of the factors which were considered would in the future lead to an increase in the value of the Fund in fact occurred. Be that as it may, there is no basis to say that the decision to proceed with the exchange offer was not reasonable in the circumstances.

(*Laxey Partners, supra,* at para. 81)

Court Conclusion in Laxey Partners

[136] Based on the foregoing analysis, the action by Laxey was dismissed. The Court held that there was no evidence that the defendants acted in bad faith. The Court also concluded that the defendants owed a duty under the relevant trust agreement to the unitholders collectively, not to Laxey individually. The Court found that the purpose of the exchange offer was to achieve the investment objectives of the Strategic Fund and not to increase management fees. The Court concluded that the business judgment rule applied to the business decisions of Strategic Management and Sentry in the circumstances. The Court also found that, when Laxey purchased its units, it was aware of the exchange offer and the potential dilution from it. Laxey thereby acquiesced to the exchange offer. The Court concluded that if any damages were suffered, they were of Laxey's own doing.

[137] The circumstances before us are significantly different from those in *Laxey Partners*. We distinguish *Laxey Partners* on the following grounds:

(a) This is a regulatory proceeding and not a civil action. As a regulatory proceeding, this matter raises a number of public interest issues that go beyond the matters in dispute between parties to a civil action.

(b) This matter involves related party transactions between, directly or indirectly, CHCC, as IFM, and CHF, an investment fund managed by CHCC, in the case of both the Fairway Loan and the proposed Reorganization; those transactions were novel market transactions for an investment fund and directly engaged CHCC's duty of loyalty.

(c) We have concluded that, in certain of the circumstances addressed in these reasons, CHCC and Pushka acted in bad faith (see paragraphs 236 and 366 of these reasons) and failed to make full disclosure to and/or misled the independent directors of CHCC and the members of the IRC (see paragraph 632 of these reasons).

(d) The financial benefits to CHCC of the Citadel Transaction were disproportionate relative to the benefits to CHF unitholders (see paragraph 522 of these reasons).

(e) *Laxey Partners* involved what was at its core a business decision to invest in a diversified portfolio of securities. That investment decision appears to have been within the range of reasonable alternatives in the circumstances and complied with the governing documents of the trust; that is not the case with respect to the Citadel Acquisition (see paragraph 526 of these reasons).

(f) In *Laxey Partners*, the Court concluded that the decisions were made on an informed basis and there was no allegation that inadequate or misleading disclosure was made to unitholders. In this case, there was inadequate or

misleading disclosure made to unitholders in connection with material changes made to the MACCs Declaration of Trust (see paragraphs 217 to 219 of these reasons), in connection with the CHDF merger with MACCs (see paragraph 276 of these reasons), and in connection with the Reorganization (see paragraph 574 of these reasons).

(g) The transaction in *Laxey Partners* did not give rise to potential continuing conflicts of interest on the part of the IFM as did the Fairway Loan and the proposed Reorganization.

(h) We have not concluded that the Fairway Transaction and/or the Citadel Acquisition were carried out by CHCC in good faith for legitimate investment purposes and not for the principal or primary purpose of increasing the management fees payable to CHCC and/or the value of CHCC. While CHCC's stated rationale for those transactions was the benefits to unitholders of a reduced MER, increased liquidity and, in the case of the Citadel Transaction, an increase in NAV of approximately $0.50 per unit (see paragraph 573 of these reasons), that rationale ignored the very substantial benefits to CHCC resulting from increased management fees, particularly in the case of the Citadel Transaction. In *Laxey Partners*, the Court accepted that "increased management fees were not the reason for the exchange offer" *(Laxey Partners, supra,* at para. 54).

Conclusion

[138] The question we are addressing is whether CHCC is entitled to rely on the business judgment rule in connection with the various decisions made by CHCC and Pushka that are the subject matter of this proceeding.

[139] Staff has alleged that CHCC breached its duties under section 116 of the Act. CHCC submits that those duties are generic duties that mirror the duty of directors and officers of a corporation at common law and under applicable business corporation statutes. CHCC submits that in this type of case, the scope of our inquiry should be limited by the legal principles developed to assess decisions involving the exercise of business judgment.

[140] As a threshold matter, the business judgment rule applies to the business decisions made by CHCC in the circumstances before us. However, while certain of CHCC's decisions may have involved business decisions, the business judgment rule does not relieve CHCC from its obligation to act in good faith and in the best interests of CHF, and to exercise due care, in making and carrying out those business decisions. The interpretation and application of those duties in the circumstances before us are legal questions for our determination. In this respect, we note the decision of the Alberta Securities Commission in *Re Anderson* (2007) ABASC 97, where that Commission stated:

> The business judgment rule has an important place in interparty legal disputes in Canada. This, though, is not such a case. At issue here was not a respondent's choice among different legal avenues to achieving a business end. The issue, rather, was whether he contravened the law or acted contrary to the public interest in a regulated area of activity. There is in our view no basis for extending the business judgment rule to serve as a defence to illegal conduct - a contravention of securities laws - nor as a shield against the enforcement of those laws.
>
> (*Re Anderson*, at para. 313)

[141] Whether CHCC complied with its fiduciary duty and duty of care in making and carrying out its business decisions is not a business decision. That is a question of mixed fact and law that we are entitled to determine in all the circumstances. We are not second-guessing in these reasons CHCC's business strategy of attempting to increase CHF's assets under management or, for instance, the business decisions to merge CHDF with MACCs, to merge CHF with the Fairway Fund or to merge CHF with the Citadel Funds. Nor are we second-guessing the amount paid by CHF for the rights to the Citadel Management Agreements. The principal matters we must decide are set out in paragraph 74 of these reasons and include (i) changes made to the CHF Declaration of Trust (and that of its predecessor funds) including by means of the merger of CHDF with MACCs; (ii) the use of CHF assets to finance CHCC's acquisition of the rights to the Fairway Management Agreement and to acquire the rights to the Citadel Management Agreements; (iii) the proposed related party transaction between CHCC and CHF in connection with the Reorganization; (iv) the adequacy of disclosure in the management proxy circular related to the Reorganization; (v) whether the Citadel Acquisition breached the CHF Declaration of Trust; and (vi) whether CHCC complied with its fiduciary duty and duty of care in carrying out the foregoing actions and transactions. The foregoing are not at their core matters of business judgement; they are legal assessments and determinations that we must make in determining whether CHCC has contravened Ontario securities law, which includes the duties imposed under section 116 of the Act.

[142] As noted above, the decisions made by CHCC to cause CHF to make the Fairway Loan and to propose the Reorganization involved related party transactions between, directly or indirectly, CHCC and CHF. It is clear that CHCC substantially benefited from the Fairway Loan and the Citadel Acquisition. It would have further benefited from the Reorganization had it been completed on the terms originally proposed. Where conflicts of interest arise, a fiduciary cannot rely on the business judgment rule to shelter the decisions made from review. In such circumstances, the onus is on the fiduciary to establish compliance with its fiduciary duty and duty of care in all the circumstances.

[143] We would add that, while assessing the risks related to different actions and transactions may generally be a matter of business judgment, that principle does not apply here because risks were imposed on CHF and its unitholders by decisions made by CHCC in connection with related party transactions pursuant to which CHCC substantially benefited. Related party transactions directly engage a fiduciary's duty of

loyalty (see the responsibilities of a fiduciary described in paragraph 112 of these reasons).

[144] Even if CHCC was entitled to rely on the business judgment rule as a defence to Staff's allegations, CHCC would have to establish that (i) full disclosure was made by CHCC to the independent directors of CHCC and to the members of the IRC in connection with their consideration of the Fairway Loan, the Citadel Acquisition and the Reorganization (see paragraph 115 of these reasons for what we mean by full disclosure); and (ii) any business decisions made by CHCC were within the range of reasonable alternatives in the circumstances. CHCC has not established that it made full disclosure with respect to the transactions referred to in clause (i) (see paragraph 632 of these reasons). Further, CHCC has not established that the decision to cause CHF to enter into the Citadel Acquisition was within the range of reasonable alternatives in the circumstances (see paragraph 526 of these reasons).

[145] Accordingly, CHCC is not entitled to rely on the business judgment rule in connection with the principal issues we must address in this proceeding. In addition, because CHCC had material conflicts of interest in connection with the actions, decisions and transactions that are challenged by Staff, the onus is on CHCC in each case to establish, on the balance of probabilities, that it acted in good faith and in the best interests of CHF.

8. Section 118 of the Act

[146] At the relevant time, subsection 118(2) of the Act stated that:

> The portfolio manager shall not knowingly cause any investment portfolio managed by it to,
>
> (a) invest in any issuer in which a responsible person or an associate of a responsible person is an officer or director unless the specific fact is disclosed to the client and the written consent of the client to the investment is obtained before the purchase;
>
> (b) purchase or sell the securities of any issuer from or to the account of a responsible person, any associate of a responsible person or the portfolio manager; or
>
> (c) *make a loan to a responsible person or an associate of a responsible person or the portfolio manager*.
>
> [emphasis added]

[147] Further, section 118 of the Act provided that:

> a "**responsible person**" means a portfolio manager and every individual who is a partner, director or officer of a portfolio manager together with every affiliate of a portfolio manager and every individual who is a

> director, officer or employee of such affiliate or who is an employee of the portfolio manager, if the affiliate or the individual participates in the formulation of, or has access prior to implementation to investment decisions made on behalf of or the advice given to the client of the portfolio manager.

[148] Section 118 of the Act was in force at the relevant time. It was subsequently repealed in 2009 and replaced with the conflict of interest provisions in subsection 13.5(2) of National Instrument 31-103 – *Registration Requirements, Exemptions and On-going Registrant Obligations*.

[149] The principal role of a portfolio manager is to make investment decisions with respect to fund assets. Among other things, section 118 of the Act prohibited a portfolio manager from investing fund assets, including by way of loan, in an affiliate of the portfolio manager, if that affiliate participated in or had access prior to implementation to investment decisions made by the portfolio manager. CHAM was the portfolio manager of CHF until the appointment of Robson on January 16, 2009 and CHCC and Pushka participated in or had access prior to implementation to the investment decisions made by CHAM. Accordingly, until the appointment of Robson, CHCC was a "responsible person" within the meaning of section 118 of the Act because CHCC was an affiliate of CHAM. There was no dispute that section 118 of the Act would have prohibited the Fairway Loan so long as CHAM was the portfolio manager of CHF.

9. Good Faith Reliance on Legal Advice

[150] Good faith reliance on legal advice is a defence expressly available to a respondent in a quasi-criminal proceeding under section 122 of the Act or where an administrative proceeding is brought under a section of the Act that expressly provides a due diligence defence or a requirement for an intentional or wilful act. Such a defence is not available with respect to other administrative proceedings under the Act because such proceedings are regulatory in nature (see *Gordon Capital Corporation and Ontario Securities Commission* (1990), 13 OSCB 2035, affirmed (1991), 14 OSCB 2713 (Ont. Div. Ct.). Except in the circumstances referred to above, if a respondent contravenes the Act, it is no defence to say that he or she did so in reliance on the advice of legal counsel. In our view, reliance on legal advice is not a defence to the allegations made by Staff in this proceeding. Reliance on legal advice is relevant, however, for the purposes referred to in paragraph 153 below.

[151] The Commission has considered reliance on legal advice as a defence to a regulatory proceeding. The Commission stated in *Re YBM Magnex International Inc.* (2003), 26 OSCB 5285 at para. 254 that:

> The Board relied on legal advice throughout. Good faith reliance upon legal advice that is fully informed, ostensibly credible and within the lawyer's area of expertise is consistent with the exercise of reasonable care; *Blair* v. *Consolidated Enfield Corp.* (1993), 15 O.R. (3d) 783 at 796-801, aff'd [1995] 4 S.C.R. 5.

[152] Accordingly, reliance on legal advice must be in good faith and must be reasonable in the circumstances. Reliance on legal advice is not reasonable where the reliance is not fully informed or the advice is not credible. Further, reliance on legal advice may not be reasonable where the legal counsel giving the advice has a material conflict of interest.

[153] As noted above, if CHCC relied in good faith on Stikeman legal advice in entering into the transactions Staff challenges, that reliance is not a legal defence to Staff's allegations. However, if that reliance was reasonable, it is evidence that (i) supports the submission that CHCC acted in good faith and with due care in connection with the conduct sheltered by the legal advice; (ii) is a relevant consideration in imposing any sanctions in respect of the Respondents' conduct; and (iii) is a relevant consideration in determining whether the Respondents' conduct was contrary to the public interest.

[154] We discuss CHCC's reliance on Stikeman legal advice commencing at paragraph 604 of these reasons.

10. Matters Required to be referred to an IRC under NI 81-107

[155] NI 81-107 applies to Crown Hill Fund as a publicly-traded non-redeemable investment fund.

[156] Under section 5.1 of NI 81-107, when a "conflict of interest matter" arises, and before taking any action in the matter, the manager of a fund must:

> (a) determine what action it proposes to take in respect of the matter, having regard to
>
> > (i) its duties under securities legislation; and
> > (ii) its written policies and procedures on the matter; and
>
> (b) refer the matter, along with its proposed action, to the independent review committee for its review and decision.

[157] For purposes of NI 81-107, "**a conflict of interest matter**" includes "a situation where a reasonable person would consider a manager, or an entity related to the manager, to have an interest that may conflict with the manager's ability to act in good faith and in the best interests of the investment fund". Clearly, it is the obligation of the IFM to identify conflict of interest matters and to refer them to the independent review committee.

[158] Under subsection 2.4(1)(a) of NI 81-107, when a manager of a fund refers a conflict of interest matter to an independent review committee, the manager must:

> (a) provide the independent review committee with information sufficient for the independent review committee to properly carry out its responsibilities, including

(i) a description of the facts and circumstances giving rise to the matter;

(ii) the manager's policies and procedures;

(iii) the manager's proposed course of action, if applicable; and

(iv) all further information the independent review committee reasonably requests.

This requirement imposes a heavy responsibility on an IFM to ensure that the disclosure made to an independent review committee is sufficient to permit it to carry out its responsibilities on a fully informed basis. Consistent with the requirement in subsection 2.4(1)(a)(ii) of NI 87-107, an IFM is required to have written policies and procedures to address conflict of interest matters (see paragraph 590 of these reasons).

[159] A member of an independent review committee has a fiduciary duty to the investment fund. Subsection 3.9(1) of NI 81-107 provides as follows:

> (1) Every member of an independent review committee, in exercising his or her powers and discharging his or her duties related to the investment fund, and, for greater certainty, not to any other person, as a member of the independent review committee must
>
> (a) act honestly and in good faith, with a view to the best interests of the investment fund; and
>
> (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> (2) Every member of an independent review committee must comply with this Instrument and the written charter of the independent review committee required under section 3.6.

[160] The Commentary to subsection 3.9(1) provides, in part, that:

> *1. The standard of care for independent review committee members under this section is consistent with the special relationship between the independent review committee and the investment fund.*
>
> *The CSA consider the role of the members of the independent review committee to be similar to corporate directors, though with a much more limited mandate, and therefore we would expect any defences available to corporate directors to also be available to independent review committee members.*

> *2. The CSA consider the best interests of the investment fund referred to in paragraph (1)(a) to generally be consistent with the interests of the securityholders in the investment fund as a whole.*
>
> …

[161] Before a manager of a fund may proceed with a conflict of interest matter, "… the independent review committee must provide a recommendation to the manager as to whether, in the committee's opinion *after reasonable inquiry*, the proposed action achieves a fair and reasonable result for the investment fund …" (subsection 5.3(1)(a) of NI 81-107). Any consideration by an independent review committee of a conflict of interest matter must include a consideration of the fairness to both the fund and to its unitholders as a whole. When we refer in these reasons to a recommendation by the IRC of a particular action or transaction, we mean a recommendation that an action or transaction achieves a fair and reasonable result for the investment fund within the meaning of subsection 5.3(1)(a) of NI 81-107.

[162] These provisions of NI 81-107 establish a means to ensure that the interests of an investment fund and its security holders as a whole, are considered when a "conflict of interest matter" arises. An independent review committee has a more limited role and mandate than that of an IFM. Section 5.1 of NI 81-107 does not prevent an IFM from carrying out a transaction once the independent review committee has made a recommendation (whether in favour or opposed). The IFM has the discretion to proceed with such a transaction and has the responsibility to ensure that the transaction is in the best interests of the fund. (Section 5.1 is in contrast to section 5.2 of NI 81-107 that prohibits certain transactions without the approval of the independent review committee.)

[163] A recommendation made by an independent review committee is simply one factor to be considered in determining whether a conflict of interest matter has been appropriately addressed. Clearly, the failure of an IFM to refer a conflict of interest matter to an independent review committee would constitute a breach of NI 81-107 and of Ontario securities law. However, the positive recommendation of an independent review committee does not relieve an IFM from its obligation to ensure that a transaction is in the best interests of the investment fund, and to otherwise comply with its fiduciary duty and duty of care.

[164] While the role of an independent review committee is more limited than that of an IFM, it is clear that an independent review committee has a particular responsibility to consider whether a proposed action or transaction "achieves a fair and reasonable result for the investment fund", including its unitholders as a whole. An independent review committee has a duty to exercise due care in the circumstances (see subsection 3.9(1) of NI 81-107) and an obligation to make reasonable inquiry in connection with any recommendation made by it (see subsection 5.3(1)(a) of NI 81-107). Section 3.11(1) of NI 81-107 gives an independent review committee authority to request from the IFM the information it determines useful or necessary to carry out its duties and it can engage independent counsel and other advisers necessary for that purpose. Accordingly, an independent review committee must consider, among other matters, (i) whether it has sufficient information before it to make a requested recommendation; and (ii) whether it

has received appropriate legal and other advice and whether independent advice may be necessary or desirable. One of the principal focuses of an independent review committee should be on fairness to unitholders. That focus should include an assessment of whether material changes are being made to the rights of unitholders or whether a material related party transaction is being proposed that should be submitted to unitholders for approval.

[165] We do not accept CHCC's submission that the decision whether to submit a conflict of interest matter to unitholders for approval is a business decision that is sheltered by the business judgment rule. To the contrary, that decision involves legal, fiduciary and fairness considerations that go well beyond business judgment. We also do not agree with the submission that the existence of NI 81-107 means that an IFM is entitled to enter into related party transactions with a managed fund, subject only to compliance with that instrument.

[166] Finally, the failure of an IFM to fully disclose to an independent review committee all relevant information may vitiate any recommendation made by the committee.

11. Minutes of CHCC Board and IRC Meetings

[167] Pushka acknowledged in his testimony that all of the relevant proceedings and resolutions of the CHCC Board and of the IRC during the relevant time are included in the evidence submitted to us (with the exception referred to in paragraph 279 of these reasons). That acknowledgment is important given the unsatisfactory state of the governance records and the gaps in the proceedings of, and resolutions passed by, the CHCC Board and the IRC.

[168] The minutes of the various meetings of the CHCC Board and the IRC referred to in these reasons tend to be general in nature and a number of them are short and do not identify or disclose the significant issues that were considered or discussed at the various meetings. That is particularly true of the minutes of the IRC meetings. As a result, some of the minutes submitted in evidence were of limited assistance to us in identifying the specific issues that were considered and discussed at the various meetings.

[169] The notes taken by Simoes at a number of the CHCC Board and IRC meetings appear to be a substantially verbatim record of who said what at the various meetings. They provide much more information than the relevant minutes with respect to the matters considered and discussed at the meetings. The Commission stated in *Hudbay Minerals Inc. (Re)*, 2009 LNONOSC 350 at para. 42 that "handwritten notes may be very relevant in another proceeding for purposes of determining matters such as what was discussed at a meeting and what was considered in making a decision." We note, however, that Simoes was not called as a witness in this proceeding.

[170] We recognize the inherent frailties of relying on Simoes's notes. We also recognize that those notes may not reflect all that was said at a particular meeting and that some of the attributed statements may not accurately reflect what was in fact said. Notwithstanding, given the lack of information reflected in the minutes of key CHCC

Board and IRC meetings, Simoes's notes were helpful to us in attempting to determine what issues were considered and discussed. There is inherent credibility to the notes because they were taken by Simoes to assist her in preparing the formal minutes and because they constitute a contemporaneous record of what was said at the various meetings. Allen testified, in this respect, that "[y]es, I think looking at all of her various notes, I think she did a pretty good job of recording what occurred". Allen also testified that he expected the minutes of CHCC Board meetings to reflect the resolutions passed but that material discussions would be reflected in Simoes's notes. He noted, however, that Simoes's notes should not be viewed as "all encompassing".

[171] To the extent that Simoes's notes may constitute hearsay evidence, we are nonetheless entitled to admit them as evidence. We determined the weight to be given to them in the circumstances.

[172] CHCC has the onus of establishing that the CHCC Board and the IRC in approving or recommending the actions and transactions described in these reasons acted on a fully informed basis. To the extent that the minutes fail to disclose the significant issues considered by the CHCC Board or the IRC, those minutes do not assist CHCC in discharging that onus. We give little weight to self-serving testimony that the CHCC Board or IRC would have proceeded after a "robust discussion of the various issues flagged in the minutes". We would add that, while the testimony of witnesses that they do not recall the discussion of specific issues at a particular meeting is understandable given the time that has passed, general testimony that "the issues were understood and fully debated" is not helpful to us in determining whether the CHCC Board and/or the IRC acted on an informed basis and with due care.

[173] We are not suggesting that CHCC Board or IRC minutes should reflect all of the various statements that were made by directors or members of the IRC at a particular meeting or that they summarise all of the discussions leading to a particular decision. What we need to know, however, is whether the directors and members of the IRC turned their minds to the important issues and relevant circumstances. If we cannot determine that based on the minutes of the various meetings, we have to consider any other evidence that is available to assist us. In this case, we have Simoes's notes of a number of the CHCC Board and IRC meetings.

12. Ringelberg Testimony

[174] We qualified Ringelberg as an expert to identify the issues that are typically considered when investment funds merge and to comment on whether closed-end investment funds typically purchase rights to the management services agreements of other closed-end investment funds. While Ringelberg's experience was more focused on mutual funds, her experience also included closed-end investment funds.

[175] Ringelberg testified that the following issues are typically raised, and should be addressed, when two funds are to be merged:

(a) compliance with the applicable declarations of trust;

(b) the size of the funds being acquired;

(c) the attributes of the funds being acquired, such as management fees and redemption rights and what attributes will apply post-merger;

(d) what impact the merger has on the service providers to the funds, such as portfolio managers and back-office administrators;

(e) conflicts of interest associated with the transaction, including whether to change portfolio managers;

(f) how to allocate the costs of the transaction given that the IFM is benefiting from the transaction as a result of increased management fees;

(g) how the transaction is financed;

(h) how to structure the transaction, including structuring from a tax perspective; and

(i) regulatory issues such as whether a unitholder vote is required and whether input from regulators is desirable.

She testified that appropriately addressing these kinds of issues takes time.

[176] *Ringelberg also testified that she had never seen a transaction where the assets of a closed-end investment fund were used by an IFM to finance its acquisition of management rights to other funds*. She identified a number of reasons for that, including:

(a) whether the terms of the relevant declaration of trust permit such a transaction;

(b) the expectations of unitholders who would not typically envision an investment by a fund in a related party such as an IFM;

(c) the limited liquidity of the investment and the ability to liquidate it, if necessary, to fund redemptions;

(d) difficulties in valuing the investment and determining the effect on a fund's NAV;

(e) challenges in determining reasonable commercial terms for financing arrangements;

(f) the conflicts of interest arising from the transaction, including on-going monitoring of the investment in an IFM; and

(g) regulatory risks related to such a novel transaction.

Accordingly, the Fairway Loan and the Citadel Transaction were not typical transactions for a closed-end investment fund. Pushka acknowledged in his testimony that they were novel transactions.

[177] Among other things, Ringelberg noted that the valuation of such an investment for purposes of determining NAV raises a conflict of interest because IFM fees are based on NAV. There is no ready reference for determining that value (as there is, for instance, in valuing securities listed on an exchange). Ringelberg acknowledged, however, that it is certainly possible to come to a view as to the appropriate value of an interest in a management services agreement for purposes of determining NAV.

[178] Ringelberg also noted that a closed-end investment fund typically has no "mind or management" independent of its IFM. As a result, she felt that managing the on-going conflicts arising from such a transaction would be challenging.

[179] Ringelberg testified that the issues referred to in paragraph 175 of these reasons also arise in connection with an investment fund directly acquiring the management services agreement for another investment fund. She testified that investments by a closed-end investment fund are typically in publicly-traded securities and are passive in nature. Such investments do not require the active management of another investment fund.

[180] Many of the issues identified in paragraphs 175 and 176 of these reasons are relevant considerations in this matter, particularly in the case of the proposed mergers of the Citadel Funds with CHF.

13. Management Expense Ratios

[181] There were a number of different submissions made to us about the relevance of CHF's MERs to the issues before us. Staff submits that CHCC justified the Fairway Transaction and the proposed mergers of the Citadel Funds with CHF, at least in part, on the basis that such transactions would benefit unitholders by reducing MER. Staff submits that, in fact, CHF's MERs were not positively affected by those mergers. Further, one of the merger criteria that permitted CHCC to merge the CHF with the Fairway Fund without a unitholder vote (pursuant to the relevant permitted merger provision) required that CHCC determine in good faith that there would be no increase in MER as a result of the merger. Staff submits that Pushka represented to the independent directors of CHCC and the members of the IRC that the mergers of CHF with the Fairway Fund, and subsequently with the Citadel Funds, would reduce CHF's MER (by spreading fixed costs over a larger number of outstanding units).

[182] Pushka expressed the view in his testimony that unitholders of CHF would not have objected to increases in management fees payable to CHCC as long as those increases did not increase the overall MER. While we agree that the overall MER is the primary concern of unitholders, the level of management fees paid by a fund has a significant effect on the calculation of MER. Unitholders would have an interest in the relative level of all the costs that contribute to MER. It is not clear, for instance, that

unitholders would be indifferent to higher management fees paid to CHCC versus, for instance, the elimination of a service or trailer fee paid to brokers (see paragraph 243 of these reasons).

[183] Based on the evidence submitted to us, the MERs of the various funds were as follows for the periods noted:

Fund	For the Period Ending	MER
CHDF	December 31, 2007	3.18%
MACCs	December 31, 2007	3.08%
CHDF	June 30, 2008	3.62%
MACCs	June 30, 2008	5.10%
CHF	December 31, 2008 (1)	4.28%
CHF	June 30, 2009 (2)	1.8%
CHF	December 31, 2009 (3)	3.35%
CHF	June 30, 2010	2.12%
CHF	December 31, 2010	2.08%

Notes:

(1) This calculation is after the merger of CHDF with MACCs on December 30, 2008, although the benefits of that merger would not be reflected in MER until later periods. The substantial increase in CHF's MER as of December 31, 2008 (compared to prior periods) was attributed by CHCC to the effect of a high level of redemptions during the relevant period.

(2) Presumably, this significant reduction in MER reflects the effect of the merger of CHF with the Fairway Fund on January 23, 2009.

(3) The MER is calculated after the mergers of five of the Citadel Funds with CHF in December, 2009. The benefits of reduced costs would not have been reflected in MER until later periods. We note that the MER was lower for the two subsequent periods shown.

[184] We do not have detailed calculations of the MERs referred to in paragraph 183 above. In general, MER will be affected by a number of different factors, including the level of redemptions, the level of IFM and portfolio management fees, the costs incurred in connection with fund mergers and increases or decreases in other fund operating expenses. Pushka testified that some of the calculations were also affected by tax

changes. We accept that the MER should generally decline as a result of fund mergers because fixed costs will be allocated over a larger number of units.

[185] We note that the MER of 1.8% for the six months ended June 30, 2009 was the lowest over the period covered by the evidence submitted to us. Presumably, that reduction in MER was the result of the merger of CHF with the Fairway Fund. The MER appears to have also been reduced following the mergers of five of the Citadel Funds with CHF in December 2009 (although not to the level of 1.8%).

[186] We also note, however, that as the size of a fund increases, there is generally a diminishing beneficial effect of subsequent mergers on MER, in part because some of the most significant expenses, such as the IFM's management fee, are calculated as a percentage of NAV. Thus, while the merger of CHF with the Fairway Fund appears to have had a beneficial effect by reducing MER for the period ended June 30, 2009, mergers with the Citadel Funds would have had a more limited beneficial effect because CHF had already achieved a reasonable scale and a NAV of approximately $44 million as a result of the merger with the Fairway Fund. It is unlikely that CHF's MER after the mergers with the Citadel Funds was going to be significantly below 1.8%. Pushka acknowledged that in his testimony (see paragraph 518 of these reasons).

[187] The same principle applies to the effect of mergers on the liquidity of units. Given the mergers of CHDF with MACCs, and of CHF with the Fairway Fund, the mergers with the Citadel Funds would have had a less beneficial effect on the liquidity of the CHF units after those mergers.

[188] These are important considerations in assessing, in particular, the benefits to CHF unitholders of the proposed mergers of the Citadel Funds with CHF. Pushka and the independent directors of CHCC were aware of these considerations in reviewing the Citadel Transaction. There is limited evidence that Pushka submitted to either the CHCC Board or the IRC detailed calculations of what Pushka expected the MERs to have been after giving effect to the mergers of CHF with the Fairway Fund or the Citadel Funds (see paragraph 329 of these reasons for what appears to have been the only information on this topic that was before the IRC (and which was not before the CHCC Board)).

IX. AMENDMENTS TO MACCs AND CHDF DECLARATIONS OF TRUST

[189] CHCC purchased the rights to the MACCs management services agreements on or about February 1, 2008.

[190] On April 30, 2008, CHCC sent the June 08 Circular to MACCs unitholders in connection with a special meeting of unitholders to be held on June 4, 2008 to consider the amendments to the MACCs Declaration of Trust referred to below.

[191] The Notice of Meeting sent to MACCs unitholders with the June 08 Circular provided that the business of the meeting was:

> 1. To consider and, if thought appropriate, approve, with or without variation, an extraordinary resolution in the form attached as Schedule

"A" to the accompanying information circular (the "Circular") authorizing, among other things, amendments to the declaration of trust of the Trust (the "Declaration of Trust") including:

(a) Investment Objectives and Strategy. To broaden the scope of the Investment Objectives and Investment Strategy so that the Trust assets can be invested in income securities in addition to Income Funds;

(b) Independent Review Committee. To update the Declaration of Trust to expressly provide for an Independent Review Committee as required under National Instrument 81-107 – *Independent Review Committee for Investment Funds*;

(c) To Permit the Trust to Complete Mergers Without a Special Meeting. To remove the requirement for Unitholders to approve by Extraordinary Resolution a reorganization with, or acquisition of assets of, another fund where the Trust continues after such transaction, in order to reduce transaction costs and allow the Trust to act in a more timely manner;

(d) Increase the Flexibility of the Board of Directors of the Trustee. To enable the board of directors of the Trustee to make additional amendments to the Declaration of Trust as circumstances dictate; and

(e) To make certain other amendments consequential to the foregoing, all as more fully described in the Circular …

(We refer to this extraordinary resolution as the "**Amending Resolution**".)

[192] The reasons for the proposed amendments to the MACCs Declaration of Trust were described in the June 08 Circular as follows:

…

The Trust [MACCs] has experienced a substantial reduction in its size due to retractions. While the Trust has issued warrants on two occasions to increase its assets, the success of this initiative has been relatively modest. The small asset size of the Trust has resulted in high costs per Unit. All closed-end funds have a certain amount of fixed costs that are relatively uncorrelated with the amount of assets under management. In the event a fund's assets fall too low, these fixed costs become a burden on the unitholders. The Trust is near that point. The Trustee [CHCC] believes the best course of action is for the Trust to merge with, or acquire assets from, other investment funds listed on the Toronto Stock Exchange that have similar investment objectives. In particular, the Trustee believes that the first trust to approach would be the Crown Hill Dividend Fund that has a

> distribution of $0.06 per month per unit and to which the Trustee also acts as trustee and manager.
>
> …
>
> The Trustee also believes that it would be beneficial to remove the requirement for the Trust to convene a special meeting to obtain Unitholder approval by Extraordinary Resolution in connection with fund mergers where the Trust continues after the merger. The Trustee believes that removing the meeting requirement will reduce costs and, in many cases, permit the Trust to act in a more timely manner, since a merger will not be conditional on prior approval by Unitholders. The Trustee believes that this procedural change is consistent with the Trust's intention to actively seek to merge with, or acquire assets from, other investment funds listed on the Toronto Stock Exchange that have similar investment objectives.
>
> (June 08 Circular, pg. 7-8)

[193] The June 08 Circular also stated that "[t]he board of directors of the Trustee has unanimously determined that the Amendments to the Declaration of Trust are in the best interests of the Trust and the Unitholders" (June 08 Circular, pg. 8) and the CHCC Board recommended that unitholders vote in favour of the Amending Resolution.

[194] With respect to IRC consideration of the matters submitted to the MACCs unitholders, the June 08 Circular stated that:

> As required by NI 81-107, the Trustee [CHCC] presented the terms of the Amendments which raise a conflict of interest for the purposes of NI 81-107 to the Trust's [MACCs'] independent review committee for a recommendation. See "Interest of Management and Others in the Amendments". The independent review committee reviewed such conflict of interest matters and, having regard to, among other things, the process proposed for implementing the Amendments, including the requirement to obtain Unitholder approval, *recommended that such conflict of interest matters achieve a fair and reasonable result for the Trust*. While the independent review committee has considered the proposed Amendments from a "conflict of interest" perspective, it is not the role of the independent review committee to recommend that Unitholders vote in favour of the proposed Amendments. Unitholders should review the proposed Amendments and make their own decision.
>
> (June 08 Circular, pg. 8)
>
> [emphasis added]

[195] The June 08 Circular also stated:

> INTEREST OF MANAGEMENT AND OTHERS
> IN THE AMENDMENTS
>
> The Trustee [CHCC] is the trustee and manager of the Trust [MACCs] and receives a management fee from the Trust equal to 0.45% per annum of the net asset value of the Trust, calculated and payable monthly in arrears. The Trustee is responsible for paying the Investment Manager [portfolio manager] … out of this fee. One of the purposes of the Amendment Resolution is to facilitate the merger of the Trust with other investment funds listed on the Toronto Stock Exchange to increase assets under management and the Trustee will be entitled to a management fee in respect of any increase in the net asset value of the Trust.
>
> If the Amendment Resolution is not approved or if the Trust is unable to increase its assets under management, there is a risk of further significant redemptions of Units. If a significant number of Units are redeemed, the trading liquidity of the Units could be significantly reduced. In addition, the expenses of the Trust would be spread among fewer Units resulting in a lower distribution per Unit. This could lead to a termination of the Trust if the Manager determines that it is in the best interests of Unitholders to do so.
>
> (June 08 Circular, pg. 9)

1. CHCC Board Meetings related to Amendments to the MACCs Declaration of Trust

[196] The CHCC Board held the meetings and considered the issues described below with respect to the amendments to the MACCs Declaration of Trust approved by the Amending Resolution.

March 25, 2008 CHCC Board Meeting

[197] The CHCC Board met on March 25, 2008 for two and a half hours. All of the directors were present. The meeting was held primarily to approve the audited financial statements of MACCs and of CHDF. Under the heading "MACCs Unitholder Meeting", the minutes state that "[t]he President reviewed the changes that had been made to the management circular with the Board".

[198] There is no other statement or reference in the minutes to this item of business and there is no express reference to a draft management proxy circular having been tabled with the CHCC Board. We assume that the reference to the "management circular" is a reference to a draft of the June 08 Circular. No resolutions were passed at this Board meeting.

June 4, 2008 CHCC Board Meeting

[199] A subsequent meeting of the CHCC Board was held on June 4, 2008. The minutes indicate that only Jackson and Pushka were present. The meeting lasted 15 minutes and the minutes indicate that "[a] resolution approving results of the MACCs Sustainable Yield Trust unitholder meeting was passed by the Board of Directors". There is no explanation in the minutes of what that resolution approved. We assume that the resolution relates to the approval by the CHCC Board of the amendments to the MACCs Declaration of Trust approved at the unitholder meeting earlier that day (referred to in paragraph 191 of these reasons).

[200] A further meeting of the CHCC Board was held two days later on June 6, 2008. All of the directors were present, including Allen who participated by telephone. The meeting lasted 35 minutes. The minutes provide, in part, as follows:

> CHANGES TO THE MACCs DECLARATION OF TRUST
>
> The President described all of the changes that would occur in the Declaration of Trust. He also explained that the revisions that had been previously suggested by the Board had already been incorporated into the document.
>
> The Directors asked that legal counsel review certain pages of the document, such as page six, one final time to ensure everything was being amended properly. The President agreed to have the review conducted.
>
> The changes to the Declaration of Trust were approved by the Board of Directors.

[201] There is no indication in the minutes as to what changes to the MACCs Declaration of Trust were approved at this meeting. The minutes indicate that there were five other items of substantive business at the meeting. One of those items was approval by the CHCC Board of holding a CHDF unitholder meeting. Pushka informed the CHCC Board that "… the Fund had experienced another year of high redemptions" and that the unitholder meeting was to "… give management the ability to merge the Fund in the future without requiring unitholder approval". The CHCC Board approved holding a CHDF unitholder meeting on the tentative date of August 28, 2008 (see paragraph 25 of these reasons).

[202] The MACCs Declaration of Trust was amended and restated on June 6, 2008, two days after the unitholder meeting at which the Amending Resolution was passed and on the same day as the CHCC Board meeting referred to in paragraph 200 of these reasons. CHCC apparently exercised the authority under the Amending Resolution to amend the MACCs Declaration of Trust to:

(a) change the redemption and retraction rights of MACCs unitholders as follows:

(i) remove MACCs unitholders' annual right to require CHCC to redeem their units at a price equal to 100% of NAV, and replace it with a redemption right to be set by CHCC in its sole discretion from time to time;

(ii) remove MACCs obligation to purchase units in the market at any time when the market price of MACCs units fell below 95% of NAV, leaving the right of CHCC to make market purchases in its sole discretion from time to time;

(iii) add a monthly retraction feature at a price that was the lesser of:

A. 90% of the weighted average trading price of a unit on the TSX during the prior 15 trading days; and

B. the "closing market price" on the applicable valuation date;

(b) change the Investment Strategy and Investment Restrictions of MACCs by, among other things, removing the restriction that prohibited MACCs from making loans or guaranteeing obligations;

(c) authorize CHCC to terminate the existing portfolio manager and appoint CHAM in its place;

(d) add subsection 5.2(2) to the MACCs Declaration of Trust as follows:

> [t]he Manager may adjust the strategy in Section 5.2(1) [MACCs' investment strategy] in order to facilitate a merger with another trust or fund; and

(e) permit giving notice to unitholders by filing a notice on SEDAR[4] and posting it on CHCC's website.

(See the discussion of these amendments commencing at paragraph 225 of these reasons.)

[203] The changes referred to in paragraph 202 above were not submitted to or approved by MACCs unitholders.

[204] There is no question that the amendments referred to in paragraph 202(a)(i) and (ii) of these reasons were material to MACCs unitholders (see the discussion commencing at paragraph 225 of these reasons) and raised a conflict of interest on the part of CHCC. A yearly right of unitholders to redeem their units at NAV potentially increases redemptions and thereby also reduces NAV and CHCC's management fees. An obligation of MACCs to buy back units if the market price falls below 95% of NAV has the same effect. Further, any change in portfolio manager would likely also have been a

[4] The electronic system for filing documents with Canadian securities regulators.

material change from the perspective of unitholders and would have raised a conflict of interest matter. The amendments referred to in paragraph 202 (b) and (d) above became material changes given subsequent events (see paragraphs 333 and 580 of these reasons). Given the materiality of these changes, it does not seem to us that it makes any difference whether one views them individually, or as a package, as submitted by the Respondents.

[205] We understand that the amendments referred to in paragraph 202 of these reasons were the amendments to the MACCs' Declaration of Trust approved by the CHCC Board at its meeting on June 6, 2008.

[206] We note in this respect that CHCC as the IFM and trustee of MACCs issued a news release on June 6, 2008 stating that the CHCC Board had unanimously approved the following amendments to the MACCs Declaration of Trust:

> (a) Conforming Changes to Definitions. Certain changes to the definitions are to be made to conform with the amended declaration of trust as of June 6, 2008.
>
> (b) Changes to the Redemption and Addition of a Monthly Retraction Feature. The Redemption Date is to be changed from a fixed date to one that is set by the Trustee from time to time. A retraction feature will also be added enabling Unitholders to submit Units for retraction by the Trust on a monthly basis.
>
> (c) Investment Strategy and Investment Restriction Modification. The Investment Strategy and Investment Restrictions will be modified to facilitate fund mergers.
>
> (d) Removal of the Mandatory Market Purchase Program. The mandatory nature of the market purchase program will be removed, leaving market purchases to the Manager's discretion.
>
> (e) Notice to Unitholders Changed. The provisions for providing notice to Unitholders will be changed, such that press releases, filings on SEDAR and posting's [*sic*] on the Trustee's website will be sufficient for most communications.

[207] It would have been impossible for a MACCs unitholder to appreciate the substance of the changes referred to in paragraph 206(a), (b) and (c) above based on the disclosure in the news release. The news release was clearly inadequate as it related to the disclosure of the changes to the investment strategy and restrictions and to the redemption rights of unitholders. There is no reference in the news release to MACCs being able to make loans as a result of the amendments.

2. IRC Meetings Related to Amendments to the MACCs Declaration of Trust

[208] There are no minutes of any meeting of the IRC at which the June 08 Circular was considered and there is no resolution of the IRC approving that circular (notwithstanding the disclosure in the June 08 Circular referred to in paragraph 194 of these reasons).

[209] There was a meeting of the IRC held on March 5, 2008 for an hour. All of the members of the IRC, Pushka and Simoes were present. The minutes refer to the fact that "the manager/trustee duties of MACCs … was purchased … on February 1, 2008".

[210] Those minutes also state that:

> Crown Hill Capital (the "Manager") has decided to hold a meeting of the MACCs unitholders for the purpose of making changes to its Declaration of Trust that would enable the Manager to merge MACCs with other funds including CHDF.
>
> All members were in agreement with the concept of merging the two funds.

[211] There was no resolution passed by the IRC at that meeting and no reference to the June 08 Circular having been tabled with the IRC. The IRC did not meet again until October 8, 2008, well after the MACCs unitholder meeting held on June 4, 2008.

[212] Fleming testified in cross-examination that the IRC would have reviewed the June 08 Circular and would have made the recommendation set out in that circular. In our view, that testimony and the disclosure in the June 08 Circular are not sufficient to establish that the IRC did so.

[213] Accordingly, there are no minutes of any meeting of the IRC or any other document (other than the June 08 Circular itself) reflecting a consideration by the IRC of the June 08 Circular or the proposed amendments to the MACCs Declaration of Trust referred to in paragraph 191 of these reasons. Further, except for Fleming's testimony referred to above, there is no evidence supporting the statement in the June 08 Circular that the IRC had recommended that "such conflict of interest matters achieve a fair and reasonable result for the Trust" (see paragraph 194 of these reasons). Further, the June 08 Circular does not disclose the specific conflict of interest matters that were considered and on what basis they were recommended by the IRC as achieving a fair and reasonable result for MACCs. As a result, except for Fleming's testimony referred to in paragraph 212 above, there is no evidence that the IRC considered the changes to the MACCs Declaration of Trust referred to in paragraph 191 of these reasons, including the extent of the authority granted to CHCC by the Amending Power (as defined in paragraph 215 below).

[214] There is no evidence of any kind that the amendments to the CHF Declaration of Trust made on June 6, 2008 (referred to in paragraph 202 of these reasons) were referred to or considered by the IRC.

3. CHCC Authority to Amend the MACCs Declaration of Trust

[215] The form of extraordinary resolution attached to the June 08 Circular that was passed by MACCs unitholders at the June 4, 2008 meeting contains the following paragraph:

> (e) Section 18.1(5) [of the MACCs Declaration of Trust] is hereby deleted in its entirety and replaced with the following:
>
> "in lieu of an Ordinary Resolution or Extraordinary Resolution of Unitholders, modify or amend any provision of this Declaration of Trust provided that the Board of Directors of the Trustee has unanimously approved said modification or amendment; with respect to which the majority of the members of the Board of Directors are independent of the Trustee and the Manager; and upon not less than 30 days' prior written notice to Unitholders."

We refer to the authority granted by that provision as the "**Amending Power**".

[216] CHCC apparently interpreted the Amending Power as authorizing it to make any amendment to the MACCs Declaration of Trust that it wished provided the unanimous approval of the CHCC Board was obtained. A majority of the members of the CHCC Board (Allen and Jackson) are independent of CHCC and Pushka and, accordingly, any unanimous approval by the CHCC Board meets the requirement referred to in paragraph 215 above. CHCC relied on the Amending Power to make the changes to the MACCs Declaration of Trust that were made on June 6, 2008 (that are referred to in paragraph 202 of these reasons). CHCC subsequently relied upon the same authority to amend the provisions of the MACCs Declaration of Trust related to the payment of management and other fees (see paragraph 243 of these reasons).

[217] There was no disclosure in the June 08 Circular that CHCC took the view that the Amending Power permitted it to make any amendment it wished to the MACCs Declaration of Trust, including changing the investment strategy or objectives of MACCs, changing the redemption rights of unitholders and increasing the management fees payable by the fund to CHCC. That is an extraordinary power. We note, in this respect, that the MACCs Declaration of Trust prior to the amendment, referred to in paragraph 215 above, would have required that such fundamental changes be approved at a unitholder meeting by extraordinary resolution of unitholders; i.e., by 66 2/3% of the votes cast.

[218] Further, there is no disclosure in the June 08 Circular that addresses the reasons or justification for granting such an extraordinary authority to the CHCC Board. The disclosure that was included in the circular appears to justify the proposed changes on the basis of facilitating fund mergers in circumstances where MACCs would be the continuing fund after a merger. The Amending Power is simply described in the June 08 Circular as increasing the flexibility of the CHCC Board to make additional amendments as circumstances dictate. Pushka acknowledged in his testimony, however, that the

Amending Power was intended for the purpose of facilitating mergers. In any event, MACCs unitholders would not have appreciated, based on the disclosure in the June 08 Circular, the extraordinary scope of authority to amend the MACCs Declaration of Trust that was proposed to be given to the CHCC Board.

[219] The disclosure in the June 08 Circular related to the IRC consideration of the Amending Resolution is no better. That disclosure does not identify what matters the IRC believed raised a "conflict of interest matter" requiring its review and recommendation (see paragraph 194 of these reasons). We are left to speculate whether one of those matters was the authority of CHCC to amend the MACCs Declaration of Trust, without unitholder approval, in any way the CHCC Board chose. We do not know on what basis the IRC would have come to the conclusion that granting CHCC such an extraordinary authority was fair and reasonable to CHF and its unitholders. There is no evidence that the IRC considered any of these issues, other than the bald statement in the June 08 Circular and Fleming's testimony referred to in paragraph 212 above.

[220] It is clear that CHCC exercised its discretion under the Amending Power to make amendments to the MACCs Declaration of Trust that were not directly related to mergers of MACCs with other investment funds (see paragraphs 202 and 243 of these reasons).

4. Disclosure to Unitholders at the June 4, 2008 Unitholder meeting

[221] It is shocking that, only two days after the unitholder meeting on June 4, 2008 at which the Amending Power was purportedly approved by unitholders, CHCC would rely on that authority to make the changes to the MACCs Declaration of Trust set out in paragraph 202 of these reasons.

[222] Even if CHCC had no intention of making the amendments to the MACCs Declaration of Trust referred to in paragraph 202 of these reasons at the time it sent the June 08 Circular to unitholders on April 30, 2008, it must have formed that intention by the time of the unitholder meeting held on June 4, 2008. Pushka acknowledged in his testimony that CHCC did not disclose to unitholders at the June 4, 2008 meeting that it intended to make the amendments to the MACCs Declaration of Trust referred to in paragraph 202 of these reasons. That intention would clearly have been a material consideration for unitholders in voting on the Amending Resolution at the unitholder meeting.

[223] There is no evidence that the CHCC Board considered this issue when it approved the amendments to the MACCs Declaration of Trust on June 6, 2008. Further, there is nothing in the minutes of the June 6, 2008 CHCC Board meeting indicating that there was any discussion of the specific amendments to the MACCs Declaration of Trust referred to in paragraph 202 of these reasons and/or of their effect on unitholders. That directors' meeting lasted only 35 minutes and considered a number of different items of business.

[224] We note that one of the amendments to the MACCs Declaration of Trust made on June 6, 2008 was the ability to give notice to unitholders through only a filing on SEDAR

and a posting on CHCC's website. There was no evidence of any discussion by the CHCC Board of the appropriateness of giving notice to unitholders in that manner. In our view, giving notice to unitholders of material changes in their rights only in the manner referred to in paragraph 202(e) would be inadequate notice to them.

5. Amendments Approved by the CHCC Board on June 6, 2008

[225] As noted above, the CHCC Board purported on June 6, 2008 to amend the MACCs Declaration of Trust to make the changes to the MACCs Declaration of Trust referred to in paragraph 202 of these reasons. Those changes constituted material amendments to the MACCs Declaration of Trust. One of those amendments removed the ability of unitholders to require MACCs to redeem their units at NAV once a year. Whether such a redemption right would be granted in the future was left to the discretion of CHCC. The unitholders' yearly right to require a redemption of their units at NAV was a right that would have been extremely important to them for the reasons discussed below.

[226] Generally, units of a closed-end investment fund trade in the market at a discount to the NAV. There is evidence that the units of MACCs traded at such a discount during the relevant time period. One of the ways to address that issue and to attempt to reduce the amount of that discount is to provide for a yearly right of unitholders to redeem their units at NAV. In discussing the Citadel Transaction, Pushka indicated that a redemption right at NAV benefited the dealers and not the unitholders because dealers could profit from the arbitrage opportunity arising from the divergence of the market price of the units from NAV (see paragraph 420 of these reasons). While that may be the case, we note that such arbitrage also tends to narrow the discount to the NAV at which units trade in the market, to the benefit of unitholders.

[227] In any event, the important point is that the ability of unitholders to require MACCs to redeem their units at NAV once a year was an important right to unitholders given the discount to NAV at which units of MACCs traded in the market. That right would likely have been a material consideration in the decision of investors to invest in MACCs units because it permitted them to realize their investment at a potentially desirable price relative to the market price of their units. Allen was quoted in Simoes's notes as acknowledging that unitholders had "no out" other than to sell in the market at a discount to NAV. We have no reason to believe that unitholders would have considered the elimination of their yearly redemption right at NAV as being in their best interests. While it may have been in CHCC's best interests not to permit redemptions that would have had the effect of reducing NAV and therefore its management fees, unitholders would have viewed that redemption right as being in their best interests.[5]

[5] We note that in *Laxey Partners*, the plaintiff wanted to amend the trust agreement governing the Strategic Fund to allow for unlimited redemption of the fund's units at their NAV once each year. The Court stated that was effectively asking the Strategic Fund to "be converted to an open-end fund." The reverse must also be true: removal of a right to redeem fund units at NAV once a year, in effect, converts a trust from an open-ended fund to a closed-end fund. While we recognise that removal of the redemption right at NAV had no effect on the nature of MACCs as a non-redeemable investment fund, the comment by the Court in *Laxey Partners* underscores the materiality of removing the right of unitholders to redeem their units once a year at NAV.

[228] Obviously, the inclusion of a monthly retraction right based on the trading or market price of the units (see paragraph 202(a)(iii) of these reasons) does not affect the foregoing conclusion.

[229] There is nothing in the minutes of the June 6, 2008 CHCC Board meeting indicating that this issue was considered or discussed and on what basis the CHCC Board concluded that the elimination of the redemption right was in the best interests of unitholders. Further, there is nothing in those minutes indicating that there was any discussion of the other amendments to the CHF Declaration of Trust referred to in paragraph 202 of these reasons and of their impact on unitholders.

[230] CHCC submits that preventing redemptions at NAV would benefit unitholders by preserving NAV and the number of units outstanding (see the disclosure in the June 08 Circular set out in paragraph 192 of these reasons). However, some marginal benefit to unitholders as a result of removing the redemption right does not justify an action that unitholders would otherwise have considered to be contrary to their best interests.

[231] We acknowledge that, as Ringelberg agreed in cross-examination, "more" is not always better when it comes to unitholders' ability to redeem their units at NAV. That does not, however, change the fact that MACCs unitholders had the right to redeem at NAV once a year and that right was unilaterally taken away by CHCC.

[232] In our view, the amendments to the MACCs Declaration of Trust referred to in paragraphs 202(a)(i) and (ii) of these reasons raised a "conflict of interest matter" for purposes of NI 81-107. That means that CHCC should have referred those matters to the IRC for its consideration. CHCC did not do so.

[233] If we had to decide the issue, we would likely have concluded either that the amendment to the MACCs Declaration of Trust referred to in paragraph 215 of these reasons was not validly approved by unitholders (for the reasons set out in paragraphs 217 to 219 of these reasons) or that it only permitted amendments that were directly connected with fund mergers. In any event, in exercising the Amending Power, CHCC had an obligation to exercise that authority in good faith and in the best interests of CHF and its unitholders. Given the apparent breadth of the authority conferred by the Amending Power, CHCC had a particularly heavy responsibility to ensure that it acted in accordance with its fiduciary duty in exercising that authority.

6. Conclusions as to the June 6, 2008 Amendments to the MACCs Declaration of Trust

[234] CHCC has failed to establish that, in obtaining the Amending Power and in approving the changes to the MACCs Declaration of Trust referred to in paragraph 202 of these reasons, CHCC appropriately addressed the conflicts of interest raised by the Amending Power and those changes. In that respect, CHCC has not established that the CHCC Board considered (i) the extraordinary nature of the Amending Power exercised by the CHCC Board on June 6, 2008; (ii) the materiality to MACCs unitholders of the changes made to the MACCs Declaration of Trust referred to in paragraph 202 of these

reasons; or (iii) the conflicts of interest the changes raised. It is difficult to believe that the CHCC Board could have fully considered these matters at the 35-minute Board meeting on June 6, 2008.

[235] CHCC has also failed to establish that the IRC (i) reviewed the June 08 Circular; and (ii) recommended the changes to the MACCs Declaration of Trust referred to in paragraph 191 of these reasons as achieving a fair and reasonable result for MACCs (see paragraph 213 of these reasons). CHCC did not refer to the IRC for its consideration any of the changes to the MACCs Declaration of Trust referred to in paragraph 202 of these reasons. In particular, there is no evidence that the IRC considered the extraordinary nature of the Amending Power given to the CHCC Board by the Amending Resolution.

[236] Based on our conclusions in paragraph 234 and 235 above, we find that CHCC failed to appropriately address the conflicts of interest arising from the changes to the MACCs Declaration of Trust referred to in paragraphs 191 and 202 of these reasons. Further, we find that, in exercising the Amending Power to make the changes to the MACCs Declaration of Trust referred to in paragraph 202 of these reasons, CHCC acted in bad faith and contrary to the best interests of MACCs. Based on these findings, we conclude that CHCC acted contrary to and breached its fiduciary duty under subsection 116(a) of the Act.

7. Amendments to the CHDF Declaration of Trust

[237] A meeting of the CHDF unitholders was held on August 28, 2008 to authorize amendments to the CHDF Declaration of Trust granting CHCC, as trustee, authority to merge CHDF with other investment funds without seeking unitholder approval.

[238] The management proxy circular for that meeting (referred to in these reasons as the August 08 Circular) provided details of the proposed amendments as follows:

> **DETAILS OF THE PROPOSED AMENDMENTS**
>
> **Amendments to the Declaration of Trust**
>
> Unitholders of the Trust [CHDF] are being asked to consider and, if thought appropriate, approve, with or without variation, an ordinary resolution in the form attached as Schedule "A" to this Circular (the "**Amendment Resolution**") authorizing, among other things, amendments to the Declaration of Trust as follows:
>
>> To Permit the Trust to Complete Mergers Without a Special Meeting. Granting the Trustee of the Trust [CHCC] the authority, without seeking Unitholder approval, to (a) merge or otherwise combine or consolidate the Trust with one or more other trusts administered by the Trustee or an affiliate of the Trustee (an "**Affiliated Trust**"), provided that the trust or trusts to be merged or otherwise combined or consolidated with the Trust meet criteria below (the "**Merger Criteria**"); and (b) take any other steps as may

be necessary or desirable to give effect to the foregoing (collectively the "**Amendments**").

Merger Criteria

The Merger Criteria are as follows:

(a) the trusts being merged must have similar investment objectives as set forth in their respective declarations of trust, as determined in good faith by the Manager in its sole discretion;

(b) the trust with which the Trust is merged must be an Affiliated Trust;

(c) the Manager must have determined in good faith that there will be no increase in the *management expense ratio* borne by Unitholders of the Trust as a result of the merger;

(d) the merger of the trusts is completed on the basis of an exchange ratio determined with reference to the net asset value per unit of each trust; and

(e) the merger of the trusts must be capable of being accomplished on a tax-deferred "rollover" basis for Unitholders of the Trust.

While the trusts to be merged will have similar investment objectives, the trusts may have different investment strategies, guidelines and restrictions, and, accordingly, the units of the merged trusts will be subject to different risk factors.

…

(August 08 Circular, pgs. 7 and 8)

[emphasis added in clause (c) above]

[239] The August 08 Circular included the following statements with respect to why CHDF might wish to merge with other investment funds:

Although the Trust [CHDF] is achieving its investment objectives and providing Unitholders with monthly cash distributions, the Trust is facing challenges similar to those faced by other closed-end trusts including large annual retractions and the Trust trading at a discount to its NAV. As at July 23, 2008, the NAV was $8.29 per Unit and the market price was $7.25 per Unit. Current assets under management are approximately $6.4 million. The Trustee, [*sic*] [CHCC] is convening the Meeting to effect changes to the Declaration of Trust that will enable it to address these issues.

> The Trust has experienced a substantial reduction in its size due to retractions. The small asset size of the Trust has resulted in high costs per Unit. All closed-end trusts have a certain amount of fixed costs that are relatively uncorrelated with the amount of assets under management. In the event a trust's assets fall too low, these fixed costs become a burden on the unitholders. The Trust is near that point. The Trustee believes the best course of action is for the Trust to merge with other investment trusts listed on the TSX that have similar investment objectives.
>
> …
>
> (August 08 Circular, pg. 8)

[240] Any merger was expected to result in a reduction of operating costs on a per unit basis and no increase in MER. In this respect, the August 08 Circular included the following statement:

> *Management Fees and Operating Costs*
>
> Any merger is expected to result in a reduction in trust operating costs on a per unit basis. Furthermore, one of the Merger Criteria requires that there will be no increase in the *management fees* borne by Unitholders of the Trust as a result of the merger.
>
> (August 08 Circular, pg. 9)
>
> [emphasis added]

[241] We note, in this respect, that the Merger Criteria required that there be no increase in the "*management expense ratio*" as a result of the merger (see clause (c) of the Merger Criteria set out in paragraph 238 above). The August 08 Circular indicated under "Management Fees and Operating Costs" that "*the management fees* borne by Unitholders of the Trust as a result of the merger" would not increase (see paragraph 240 above). Pushka testified that the latter statement was a mistake and that it was the MER that was not to increase.

[242] The CHCC Board meeting to approve the August 08 Circular is referred to in paragraphs 254 and 255 of these reasons.

8. Further Amendments to the MACCs Declaration of Trust

[243] At a meeting of the CHCC Board held on September 25, 2008 (the same meeting referred to in paragraph 292 of these reasons), the Board authorized "adjustments" to the MACCs Declaration of Trust. All of the directors and Renton were present at the meeting, which lasted for three hours. The minutes of that Board meeting provide in part as follows:

> <u>ADJUSTING THE MACCs DECLARATION OF TRUST</u>
>
> The President presented a resolution to the Board that would involve making various changes to the MACCs Declaration of Trust. The amendments would involve:
>
> - Authorizing the Trust to change auditors from Ernst & Young LLP to PricewaterhouseCoopers LLP
> - Make [*sic*] amendments to the Management Fees and Investment Management Fees provided and to the extent that the Management Expense Ratio of the Trust does not exceed 4.00%
> - Make [*sic*] amendments to the MACCs Declaration of Trust such that: (a) the Service Fee of 0.30% would be eliminated, (b) the Management Fee may be increased up to 1.00% from its current level of 0.45% and Investment Management Fees [portfolio management fees] are to paid [*sic*] by the Trust rather than the Manager and (c) quorum for unitholder meetings would to be [*sic*] changed from 10% to 20%.
>
> The specific amendments are attached in Appendix A to these minutes.
>
> The Independent Directors asked a number of questions clarifying what each of these amendments would entail and their effect on the unitholders. The amendments were unanimously approved by the independent directors of the Board. Mr. Pushka declared that he was a shareholder of the manager and therefore an interested party, and abstained from voting on the resolution.

We refer to these changes to the MACCs Declaration of Trust, other than the change in auditors, as the "**MACCs Amendments**".

[244] Pushka tabled with the CHCC Board a discussion document that included the reasons for the proposed changes. That document stated with respect to the change in management fees that "[t]he combined fee is in line with other funds in the industry" and that "[t]he current fee structure for MACCs is the lowest we've seen for an actively managed fund." The discussion document also contained a table comparing the IFM and trailer fees for MACCs and CHDF with similar fees for the Fairway Fund, the Citadel Group of Funds and three other unrelated funds.

[245] An appendix to the minutes indicates that the overall limit on MER of 4.00% represented "approximately the level of [MER for] the first six months of 2008 less 1.00%." However, Pushka had previously advised Staff that fund expenses were generally higher in the first half of the year. While the statement set out in the appendix is technically correct (because the MACCs June 30, 2008 MER was 5.10%), that level of MER was certainly not representative (see paragraph 183 of these reasons). For instance, the CHDF MER for the same period was 3.62%.

[246] While the MACCs Amendments are characterized as "Adjusting the MACCs Declaration of Trust", the changes, in effect, authorized a management fee increase to CHCC in the amount of 0.55%, more than doubling that fee, and shifted the payment of portfolio management fees to MACCs from CHCC. We do not know what the overall effect on MER would have been but we do know that the costs to unitholders materially increased. Pushka testified, however, that no actual increase in management fees was made by CHCC until January 2009.

[247] The discussion document referred to in paragraph 244 above addressed the quorum change as follows:

> **Changing quorum**
>
> There is an inconsistency in the setting of quorum. In order for unit holders to call a meeting they currently require signatures from 20% of the outstanding units but quorum is set at only 10%. In the event that 20% of units held have called for a meeting, they should require other unitholders to participate in order to make a change. It is felt that 40% is a reasonable number that is not too onerous.

The quorum was ultimately changed to 20% of unitholders rather than the 40% originally proposed in the discussion document. Regardless, for a widely held closed-end fund, it would have been difficult to meet a 20% quorum requirement (a 40% quorum requirement would have been extremely onerous). This is an important issue because MACCs was not required to hold an annual meeting and the requisition and quorum requirements in the MACCs Declaration of Trust would have made it difficult for MACCs unitholders to challenge the actions of CHCC as IFM through a unitholder meeting. It seems quite unlikely that this change in quorum was in the best interests of MACCs unitholders. In our view, CHCC had a conflict of interest in proposing the change.

[248] The MACCs Amendments were not submitted to or approved by MACCs unitholders.

[249] Pushka acknowledged that there was no meeting of the IRC that considered the MACCs Amendments and there are no documents in evidence reflecting consideration by the IRC of those changes. We note, however, that Fleming testified that he was aware of the changes and that the members of the IRC discussed them with CHCC.

[250] "Adjusting" fees under the MACCs Declaration of Trust is clearly a "conflict of interest matter" for the purposes of NI 81-107. There can hardly be a more direct conflict of interest than an IFM changing the calculation of, or increasing, its own management fees. Pushka, in effect, acknowledged that by abstaining from voting on the resolution approving the management fee changes. The MACCs Amendments were made by CHCC under the Amending Power referred to in paragraph 215 of these reasons. As noted in paragraph 233 of these reasons, CHCC had a particularly heavy responsibility to ensure that it exercised that authority in good faith and in the best interests of MACCs and its

unitholders. This change in management fees would have required MACCs unitholder approval by extraordinary resolution had the Amending Power not been added to the MACCs Declaration of Trust.

[251] CHCC had conflicts of interest as the IFM of MACCs arising from the MACCs Amendments. CHCC has failed to establish that those conflicts of interest were appropriately addressed. Except for Fleming's testimony referred to above, there is no evidence that the conflicts of interest were referred to the IRC for its consideration or that the IRC made any recommendation with respect to the changes proposed. In our view, approval of the changes by the independent directors of CHCC did not adequately address those conflicts.

[252] We find that, in exercising its discretion under the Amending Power to make the MACCs Amendments, CHCC failed to act in good faith and in the best interests of MACCs. As a result, we find that CHCC breached its fiduciary duty to MACCs in making those changes, contrary to subsection 116(a) of the Act.

X. THE MERGER OF CROWN HILL DIVIDEND FUND WITH MACCs

[253] CHCC issued a news release on November 10, 2008 announcing its intention to merge MACCs with the CHDF on or about December 29, 2008. That news release stated that the merger was to be carried out in accordance with the merger criteria unanimously approved by CHDF unitholders at the meeting held on August 28, 2008 (see paragraph 237 of these reasons). On December 30, 2008, CHCC publicly announced the completion of that merger and stated in the news release that "MACCs is the continuing fund and will change its name to Crown Hill Fund effective December 31, 2008." The CHCC Board and IRC meetings leading up to that merger, and the approvals and recommendations made, are described below.

1. CHCC Board Meetings related to the Merger of CHDF with MACCs

[254] At the CHCC Board meeting held on June 6, 2008 (that is the Board meeting referred to in paragraph 200 of these reasons), the Board, among other matters, approved calling a meeting of CHDF unitholders to consider an amendment to its Declaration of Trust to permit CHCC as trustee to approve mergers with other investment funds without the need for unitholder approval (see paragraph 238 of these reasons for details of that amendment). Any such mergers were required to be in accordance with the "Merger Criteria" specified in the amending resolution. Those criteria included a requirement that the IFM has determined in good faith that there would be no increase in MER as a result of the merger.

[255] The minutes of the June 6, 2008 CHCC Board meeting related to this topic contain the following statements:

> <u>CROWN HILL DIVIDEND FUND UNITHOLDER MEETING</u>
>
> The President [Pushka] informed the Board that the Fund [CHDF] had experienced another year of high redemptions. The President then

> presented a resolution and sample management information circular for a unitholder meeting. He explained that the meeting would give management the ability to merge the Fund in the future without requiring unitholder approval.
>
> The Board agreed with the idea of a unitholder meeting and set a tentative date of August 28, 2008 for the meeting. A Board meeting would be held immediately after the unitholder meeting.
>
> The resolution for the Crown Hill Dividend Fund unitholder meeting was unanimously approved.

[256] The CHCC Board met again on August 28, 2008 following the unitholder meeting held that day. The Board meeting lasted five minutes. All of the directors were present, including Allen who participated by telephone. Legal counsel from Stikeman also attended. The minutes indicate that:

> <u>RESOLUTION FOR CHANGES TO THE CROWN HILL DIVIDEND FUND DECLARATION OF TRUST</u>
>
> The President explained to the Board the changes that would be made to the Declaration of Trust.
>
> A resolution for the approval of the changes to the Declaration of Trust was put forward and approved by all Directors.

[257] The minutes of that meeting do not indicate what changes to the CHDF Declaration of Trust were approved. In subsequently approving the minutes of that meeting at the CHCC Board meeting held on September 10, 2008, Allen suggested that a schedule of changes made to the CHDF Declaration of Trust be attached to the minutes so that "… it becomes obvious to the reader exactly what changes were approved. …" That suggestion was not apparently followed as there is no such schedule attached to the August 28, 2008 minutes.

[258] We assume, however, that the amendments to the CHDF Declaration of Trust gave effect to the resolution passed by unitholders at the unitholder meeting held earlier that day (see paragraph 238 of these reasons).

[259] Meetings of the CHCC Board were also held on September 10, 2008 and September 25, 2008 but none of the items of business related to CHDF.

[260] A CHCC Board meeting was held on October 1, 2008 for 30 minutes. All of the directors were present, including Jackson who participated by telephone. The substantive business of that meeting was the approval of a loan from MACCs and CHDF to CHCC for the purpose of growing the funds through acquisitions (see the discussion of this item of business commencing at paragraph 296 of these reasons).

[261] The next CHCC Board meeting was held on January 19, 2009. The substantive business considered at that meeting was the Fairway Transaction. There is no reference to any item of business related to CHDF (which had been merged with MACCs 20 days earlier on December 30, 2008).

[262] A meeting of the CHCC Board was also held on March 27, 2009. All of the directors were present, including Allen who participated by telephone. Pushka reported on events since the last Board meeting (which had been held on January 19, 2009). The meeting lasted an hour and a half. The minutes of that meeting include the following statements:

> OVERVIEW OF EVENTS SINCE LAST MEETING
>
> The President explained to the Board that the mergers of the funds had gone well. MACCs Sustainable Yield Trust and Crown Hill Dividend Fund were merged and the surviving fund renamed Crown Hill Fund ("CHF"). The Fairway Fund was merged into CHF on January 23, 2009.
>
> The Board was informed that since the completion of the mergers liquidity had increased greatly. Approximately 600,000 units had been traded in the last 30 days as opposed to 40,000 units traded in MACCs Sustainable Yield Trust in December 2008.
>
> …

[263] Based on the foregoing, there is no direct evidence that the CHCC Board passed a resolution approving the merger of CHDF with MACCs (see paragraph 279 of these reasons).

2. IRC Review of the Merger of CHDF with MACCs

[264] The IRC of CHDF and MACCs met on March 5, 2008 (that is the meeting referred to in paragraph 209 of these reasons). At the meeting, Pushka advised that the management rights to MACCs had been purchased by CHCC and that a MACCs unitholder meeting would be held to permit CHCC "to merge MACCs with other funds including CHDF" (see paragraph 210 of these reasons). The minutes indicate that "[a]ll members were in agreement with the concept of merging the two funds".

[265] The IRC of CHDF and MACCs also met on October 8, 2008 for an hour and a half and discussed, among other matters, a proposal under which CHDF and MACCs would make loans to CHCC in connection with a proposed fund merger (see paragraph 316 of these reasons). That meeting did not address the merger of CHDF and MACCs.

[266] On December 10, 2008, Pushka sent an e-mail to the members of the IRC seeking "approval for the merger of MACCs Sustainable Yield Trust and Crown Hill Dividend Fund". The e-mail provides as follows:

> Mark, John and Andrew,
>
> I require IRC approval for the merger of MACCs Sustainable Yield Trust and Crown Hill Dividend Fund. The continuing fund will be renamed "Crown Hill Fund" and it will use the MACCs trust declaration. *I've attached a copy of the board resolution approving the merger* and the Material Change Report that was filed on November 12. The merger is to take place on the 30th of December. *We've discussed this matter in the past and I don't recall any issues or concerns from anyone.* The main benefit to the unitholders is that it will reduce the per unit MER (which has gotten even higher with the recent market declines – although we weren't hit as hard as most, since both funds were so small it has gotten much worse. I was trying to merge the Jovian funds at the same time, but have delayed that until next year since everything was getting too complicated.
>
> [emphasis added]

[267] Fleming responded by e-mail on December 11, 2008 saying that "[a]s I see the result is advantageous to the unitholders by reducing expenses and increasing liquidity and thus approve."

[268] Maxwell and Campbell also concurred by e-mail that day. Campbell stated in part that "[i]n our last meeting, we all came down in favour of the merger of the three funds [MACCs, CHDF and the Fairway Fund] to create efficiencies and lower cost to the investors.

[269] The next meeting of the IRC took place on January 16, 2009, after the merger of the CHDF and MACCs on December 30, 2008.

[270] Accordingly, the IRC approved the merger of CHDF with MACCs without holding a meeting and apparently without being informed by Pushka of the material changes affecting the CHDF unitholders as a result of the merger (see paragraph 275 of these reasons for a discussion of those changes). To the contrary, Pushka's e-mail stated that "… I don't recall any issues or concerns from anyone" (see paragraph 266 above). CHCC had an obligation to fully disclose to the IRC the changes being made to the rights of CHDF unitholders by means of the merger. There is no evidence that it did so.

[271] Pushka's December 10, 2008 e-mail does not attach the CHCC Board resolution that purported to approve the merger of CHDF with MACCs. There is no other documentary evidence that such a resolution was passed by the CHCC Board.

3. Changes to the Rights of CHDF Unitholders

[272] MACCs was the continuing fund following the merger of CHDF with MACCs. As a result, the MACCs Declaration of Trust became the declaration of trust of the continuing fund, which was named the "Crown Hill Fund". Accordingly, by means of the

merger, the unitholders of CHDF lost the rights set out in the CHDF Declaration of Trust which were replaced by the rights set out in the MACCs Declaration of Trust.

[273] No approval by CHDF unitholders was sought or obtained with respect to the merger of CHDF with MACCs. The merger of CHDF was carried out by CHCC based on its authority to effect mergers without unitholder approval referred to in paragraph 238 of these reasons.

[274] Unitholders of CHDF who did not wish to participate in the merger were granted a special retraction privilege at a price "calculated with reference to the net asset value per unit on December 27, 2008, adjusted for the distribution with a record date of November 28, 2008 (if any), less any expenses associated with the retraction …"

[275] As a result of the merger, the following material rights were lost by CHDF unitholders or changed:

(a) The CHDF terminated on May 31, 2011. That termination date could only be extended by extraordinary resolution of the unitholders (a resolution passed by 66 2/3% of the votes cast). In the event that the termination date was extended, any dissenting unitholder could require CHCC to redeem all (but not less than all) of his or her units at a price per unit equal to the NAV of a unit on the termination date.

    There is no termination date or comparable redemption right at NAV in the MACCs Declaration of Trust.

(b) Under the CHDF Declaration of Trust, approval by unitholders by extraordinary resolution was required for, among other matters "(a) any change in the fundamental Investment Objectives of the Trust and any change in the Investment Policy…"; "(b) any change in the basis of the calculation of a fee or other expense that is charged to the Trust which could result in an increase in charges to the Trust other than a fee or expense charged by a person or company that is not related to the Trust within the meaning of the *Tax Act* …"; and (c) any amendment "changing the right of a Unitholder to vote at any meeting" [Section 10.3(1) (a), (b) and (e) of the CHDF Declaration of Trust]. Under the terms of the CHDF Declaration of Trust, these rights were not subject to the permitted merger provision contained in the declaration of trust (as were other unitholder rights).

    CHCC purported to have the authority under the MACCs Declaration of Trust to make any amendments to the Declaration of Trust that were unanimously approved by the CHCC Board (see the Amending Power set out in paragraph 215 of these reasons). Accordingly, on that basis, no unitholder approval was required for any change to the MACCs Declaration of Trust.

(c) The management fee under the CHDF Declaration of Trust was 0.60% of NAV and the annual trailer or service fee was 0.40% of NAV. The trustee [CHCC] was responsible for payment of the fee of any portfolio manager.

At the time of the merger, the MACCs Declaration of Trust provided that the management fee was up to 1.0% and that the fee of any portfolio manager was to be paid by the Trust (see paragraph 243 of these reasons). There was, however, no trailer or service fee payable under the MACCs Declaration of Trust. Accordingly, as a result of the merger, the overall fees charged to CHDF unitholders potentially increased by the amount of any portfolio management fee (which, when Robson became portfolio manager, was 0.25% (25 basis points)). Whatever services to investors may have been provided by brokers as a result of the payment of the trailer or service fee would, presumably, no longer be provided.

(d) CHDF unitholders had an annual right to require redemption of their units at a price equal to NAV less any out-of-pocket expenses directly incurred by CHDF, not to exceed 1% of NAV.

The MACCs Declaration of Trust no longer contained a comparable redemption right (see paragraph 202(a) of these reasons). Allen testified that he did not recall that CHDF unitholders would lose this redemption right as a result of the merger.

[276] The two news releases issued by CHCC in connection with the merger of CHDF with MACCs (referred to in paragraph 253 of these reasons) did not disclose any of the material changes to the rights of CHDF unitholders as a result of that merger (referred to in paragraph 275 above). Not only would CHDF unitholders have been unaware of those changes, without adequate disclosure, unitholders would not have known whether they should exercise the special redemption right at NAV granted to them (referred to in paragraph 274 above).

[277] Staff submits, with the support of Ringelberg's testimony, that material changes to a declaration of trust, such as those referred to in paragraph 275 above, should never be made by means of a merger that has not been approved by the vote of unitholders. Staff also says that an IFM would have to disclose in very plain and clear language what rights were being taken away from unitholders.

[278] Staff also submits that by using the MACCs Declaration of Trust as the continuing declaration of trust for Crown Hill Fund, the management and portfolio management fees previously payable by CHDF increased (as described in paragraph 275(c) above), negating the objective of lowering MER, the reason given in the August 08 Circular for such mergers. Moreover, Staff says that proceeding in this way was inconsistent with CHCC's express statement to CHDF unitholders in the August 08 Circular that management fees would not increase and that net savings would be passed on to them (see paragraphs 240 and 241 of these reasons). It is certainly true that the

August 08 Circular states that there would be no increase in management fees as a result of a merger.

4. Conclusion: Merger of CHDF with MACCs

[279] There is no direct evidence that the CHCC Board passed a resolution approving the merger of CHDF with MACCs. The only evidence of that approval is the statement in the e-mail from Pushka to the IRC on December 10, 2008 that purported to attach a resolution of the CHCC Board approving the merger (see paragraph 266 of these reasons). No such resolution was tendered in evidence. Further, if the CHCC Board did approve the merger, there is no evidence that it considered the material rights being lost by CHDF unitholders or changed (referred to in paragraph 275 of these reasons). Allen testified that he did not recall a discussion of those matters at a CHCC Board meeting.

[280] Accordingly, CHCC has failed to establish that the CHCC Board approved the merger of CHDF with MACCs or, if the CHCC Board did so, that such approval was given by the independent directors on a fully informed basis with knowledge of the matters referred to in paragraph 275 of these reasons.

[281] The IRC recommendation of the merger of CHDF with MACCs is represented by the exchange of e-mails referred to in paragraphs 266 to 268 of these reasons. There is no evidence that the IRC was aware of or considered the material rights being lost by CHDF unitholders or changed (referred to in paragraph 275 of these reasons). CHCC had an obligation to ensure that the members of the IRC were aware of those matters.

[282] CHCC had conflicts of interest as the IFM of CHDF arising from the implementation of the changes referred to in paragraph 275 of these reasons. CHCC had an interest in preserving the NAV of the CHDF because doing so maintained the amount of management fees that it received. Accordingly, it was in CHCC's financial interest to avoid the termination of CHDF on May 31, 2011 and the exercise of the redemption right at NAV if the termination date was extended. Similarly, CHCC had an interest in eliminating the right of CHDF unitholders to redeem their units at NAV once a year. (We have discussed that conflict of interest in paragraphs 226 and 227 of these reasons as it related to amendments to the MACCs Declaration of Trust). Finally, CHCC had an obvious financial interest in changing the management and service fees paid by CHDF in the manner referred to in paragraph 275(c) of these reasons.

[283] CHCC has failed to establish that these conflicts of interest were appropriately addressed by the CHCC Board or the IRC. Further, in our view, it was improper for CHCC to have made the material changes to the rights of CHDF unitholders referred to in paragraph 275 of these reasons by means of the merger of CHDF with MACCs without full disclosure to CHDF unitholders and without unitholder approval or the grant to unitholders of a right to redeem their units at NAV. While CHDF unitholders were given a special right to redeem their units at NAV in connection with the merger, they would not have known whether to exercise that right given the lack of disclosure to them of the material changes being made to their rights (see paragraph 276 of these reasons).

The CHDF permitted merger provision should not have been relied upon in these circumstances to effect the merger of CHDF with MACCs.

[284] We find that, by making the changes to the rights of CHDF unitholders referred to in paragraph 275 of these reasons by means of the merger of CHDF with MACCs, CHCC did not act in good faith and in the best interests of CHDF, contrary to subsection 116(a) of the Act. We also find that, in connection with that merger, CHCC failed to appropriately address the conflicts of interest referred to in paragraph 282 above. As a result of that failure, we also find that CHCC breached its duty to act in good faith and in the best interests of CHDF, contrary to subsection 116(a) of the Act.

XI. THE FAIRWAY TRANSACTION

[285] The Fairway Transaction was carried out over the period from January 20 to 23, 2009 (see paragraphs 29 and 30 of these reasons).

[286] Pursuant to the Fairway Transaction, CHCC caused the Crown Hill Fund to make a loan of $995,000 to a company wholly-owned by Pushka (that company is referred to in these reasons as "CHCC Holdco") that owned all of the outstanding shares of CHCC. CHCC Holdco used the funds to subscribe for additional shares of CHCC. The loan was made to finance CHCC's acquisition of the rights to the Fairway Management Agreement on January 20, 2009. Following the acquisition by CHCC of the rights to the Fairway Management Agreement, CHF was merged with the Fairway Fund on January 23, 2009 (see paragraph 30 of these reasons for additional details of the Fairway Transaction). The merger of CHF with the Fairway Fund was carried out pursuant to the permitted merger provision in CHF's Declaration of Trust without unitholder approval. The Fairway unitholders were granted a special redemption right at NAV in connection with the Fairway Transaction.

[287] Accordingly, CHCC acquired the rights to the Fairway Management Agreement for approximately $1.0 million and obtained the benefit of the management fees payable under that agreement. After the merger of CHF with the Fairway Fund, CHCC received management fees based on the combined NAV of the continuing fund.

[288] The benefits to CHF unitholders of that merger included (i) the spreading of fixed fund costs over the larger number of outstanding units after the merger (i.e., a reduced MER); (ii) any reduction in fixed costs as a result of possible synergies obtained; and (iii) potential increased liquidity as a result of the increase in the number of units outstanding. CHF also received the interest payable on the Fairway Loan and avoided the costs of a public distribution of additional units of CHF.

1. Approval by the CHCC Board of the Fairway Transaction

[289] The following describes the CHCC Board and IRC meetings leading up to the Fairway Transaction.

September 10, 2008 CHCC Board Meeting

[290] A CHCC Board meeting was held on September 10, 2008. All of the directors attended, including Allen who participated by telephone. The meeting lasted two hours and addressed five substantive items of business. Pushka presented a resolution to the CHCC Board that would have allowed MACCs to make a loan to CHCC in order to facilitate the acquisition of management rights for other investment funds that would be merged into MACCs. The minutes of that meeting include the following statements addressing that matter:

> PREPARING MACCs SUSTAINABLE YIELD TRUST FOR MERGER
>
> The President [Pushka] presented a resolution to the Board which would allow MACCs Sustainable Yield Trust to make a loan to the Trustee [CHCC] in order to facilitate the acquisition of additional funds that would later be merged into MACCs.
>
> A discussion ensued regarding how this plan would be beneficial to the unitholders and how the loan would be structured. The independent members of the Board suggested a meeting with legal counsel in order to go over the documents and be reassured that the transaction will not be problematic in the future.
>
> The resolution proposing a loan between the Trustee and MACCs Sustainable Yield Trust was not approved. The issue will be further discussed in a meeting with legal counsel on September 25, 2008 at 2:00 p.m.

[291] The principal focus of the CHCC Board meeting appears to have been on what would be commercially reasonable terms for the loan. However, the CHCC Board deferred passing any resolution pending receipt of legal advice with respect to such a loan transaction.

September 25, 2008 CHCC Board Meeting

[292] A subsequent CHCC Board meeting was held on September 25, 2008 for three hours. All of the directors and Renton attended (that is the same meeting referred to in paragraph 243 of these reasons at which changes to the management and service fees payable by MACCs were approved).

[293] The day before the meeting, Pushka distributed to the CHCC Board by e-mail a draft steps memorandum prepared by Renton which contemplated that CHCC would acquire the management rights to one or more investment trusts (the "**Target Funds**"), in respect of which JovFunds Management Inc. ("**JovFunds**") acted as manager, and that CHCC would then merge MACCs, CHDF and the Target Funds. That transaction was described in the document referred to in paragraph 294 below. We note that the transaction did not proceed in the manner described. Ultimately, CHDF and MACCs

merged on December 30, 2008 and the continuing fund was merged with the Fairway Fund on January 23, 2009, approximately a month later.

[294] One of the documents distributed to the CHCC directors with Pushka's e-mail in advance of the September 25, 2008 CHCC Board meeting was entitled "Related Party Transaction" and provided in part as follows:

> In order to increase the size of the MACCs Sustainable Yield Trust (MACCs) and the Crown Hill Divided Fund (CHDF), it has been proposed that the Manager/Trustee acquire the manager/trustee contracts of other funds and then merge all of those funds with MACCs and CHDF to form a single larger surviving fund. In order to finance this transaction, it is proposed that MACCs will contribute financing to an acquisition vehicle (Holdco) that will acquire the management rights. Holdco will subsequently amalgamate with Crown Hill in connection with the fund merger. As a result of the fund merger and amalgamation, MACCs will dispose of its interest in the management rights to Crown Hill which constitutes a related party transaction. In consideration of MACCs disposing of the rights to Crown Hill , Crown Hill will agree to pay all the costs of the transaction including the amount of acquisition financing contributed by MACCs as well as all legal, audit and other acquisition costs. To evidence this commitment, Crown Hill will issue to MACCs a promissory note on commercially reasonable terms and conditions.
>
> The independent board members expressed concern as to what would constitute commercially reasonable terms and conditions.
>
> Legal counsel was approached and reference was made to a new issue preliminary prospectus whereby the manager appeared to borrow from the fund to pay for the issuance costs. … After closer examination, there was no loan directly from the Fund to the Manager. Rather the Fund paid the costs of the raising of capital and the Manager reimbursed the Fund over time.
>
> A corporate banker at [a Canadian bank] who is responsible for the lending to closed end funds was also approached. His view was in this case, commercially acceptable terms was for the manager to borrow from the fund at prime plus 1.00% to prime plus 1.25% over 7 years. He made reference to two other funds … that have done this in the past. He selected these funds since they are the two largest closed end funds in the country. Their latest promissory notes have been amortized over 7 years at prime in one case and prime minus 0.50% in the other (see below). The banker was asked whether the bank would lend directly to the manager in those cases at those rates, and he said no, that the situation was not comparable. There is no loan from the fund to the manager, rather the manager reimburses the fund for costs incurred in the raising of the capital. Since the fund has a

right of setoff against the manager, it is in a much stronger position than the bank.

…

[295] The minutes of the September 25, 2008 CHCC Board meeting include the following statements:

> PREPARING MACCs SUSTAINABLE YIELD TRUST FOR MERGER
>
> The President [Pushka] presented additional information to the Board with examples of other trusts that had notes payable with their trustees. The President also relayed a conversation he had with a banker at [a Canadian bank] on this issue. The President proposed that instead of the Trust [MACCs] lending to the Trustee [CHCC], the Trust would purchase the JovFunds manager/trustee rights and then enter into a note payable upon the merger of the funds.
>
> A discussion ensued regarding whether this transaction was prohibited or restricted under securities legislation. There appeared to be a restriction that would require regulatory relief. It was suggested that instead of a note payable, the Trust might be able to hold equity in the Trustee. The Board requested that legal counsel review this arrangement.
>
> The issue will be further discussed in a meeting on October 1, 2008 at 2:00 p.m.

October 1, 2008 CHCC Board Meeting

[296] The CHCC Board met again six days later on October 1, 2008. All of the directors were present, including Jackson, who participated by telephone. Renton did not attend the meeting. The meeting lasted for 30 minutes and had only one substantial matter of business. Pushka presented a memorandum from Renton to Pushka dated September 30, 2008, with copies to Allen and Jackson, describing a method for MACCs and CHDF to lend funds to CHCC for the purpose of financing the acquisition by CHCC of a management services agreement for third party investment funds and the subsequent merger of those funds with MACCs and CDHF. That memorandum expressed Stikeman's legal opinion with respect to such a transaction (the "**Stikeman Opinion**"). The Stikeman Opinion is described in detail below.

[297] The minutes provide as follows:

> APPROVING A LOAN TO THE MANAGER FROM MACCs AND CHDF FOR THE PURPOSE OF GROWING THE FUNDS THROUGH AN ACQUISITION
>
> The President presented a memo from legal counsel describing a method for lending funds to the Manager for the purposes of financing a merger

> that would not be restricted or prohibited under securities legislation (see Appendix A). The Board reviewed the memo and discussions ensued as to what would be fair to the trusts. It was decided that the matter would also be brought before the IRC in its meeting on October 8, 2008 to obtain their recommendation on the matter. The Board approved the resolutions in Appendix B.

See paragraph 303 below for more information with respect to the resolutions passed at the meeting.

The Stikeman Opinion

[298] The Stikeman Opinion described the transaction being considered as follows:

> In order to increase the size of the MACCs Sustainable Yield Trust ("MACCs") and the Crown Hill Dividend Fund ("CHDF"), the manager, Crown Hill Capital Corporation ("Crown Hill"), is proposing a transaction pursuant to which it will acquire the management rights (the "Rights") to one or more investment trusts (the "Target Funds") listed on the Toronto Stock Exchange ("TSX") and in respect of which JovFunds Management Inc. ("JovFunds") acts as manager and trustee. JovFunds acts as manager and trustee of the Target Funds pursuant to declarations of trust (the "Declarations"). The purchase of the Rights by Crown Hill will be financed by funds borrowed from MACCs Sustainable Yield Trust ("MACCs") and Crown Hill Dividend Fund ("CHDF"), each a TSX-listed investment trust established under the laws of Ontario.
>
> While an affiliate of Crown Hill, Crown Hill Asset Management Inc. is currently the portfolio manager of both MACCs and CHDF, we understand that a replacement portfolio manager will be appointed prior to the entering into of the loans.
>
> You have asked us to briefly summarize the self-dealing and conflict of interest investment restrictions under Ontario securities law that are applicable to the loans.

[299] The Stikeman Opinion concluded that:

> It is our view that a loan by a non-redeemable investment fund to its manager is not prohibited by Ontario securities law, provided that the manager is not an affiliate of the portfolio manager of the fund.

[300] The Stikeman Opinion addressed the following matters:

(a) section 118 of the Act, which, among other things, prohibited a portfolio manager from making a loan from an investment fund it managed to a "responsible person", including an affiliate of the portfolio manager;

(b) subsection 115(6) of Ontario Regulation 1015 under the Act (the "**Regulation**"), which prohibited the purchase or sale of any security in which an investment counsel or any partner, officer or associate of an investment counsel had a direct or indirect beneficial interest to any portfolio managed or supervised by the investment counsel (section 115 was repealed on September 28, 2009 and replaced by the registration requirements pursuant to National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations and Consequential Amendments to Related Instruments*);

(c) Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**");

(d) NI 81-107 – *Independent Review Committee for Investment Funds*;

(e) TSX requirements; and

(f) the need for filing a material change report.

[301] The Stikeman Opinion concluded that the Regulation was not applicable because "a commercial loan is not typically treated as a security." The opinion noted that a loan from MACCs and CHDF to CHCC would constitute a related party transaction for the purposes of MI 61-101 but would be exempt from the formal valuation and minority approval requirements provided the loans did not exceed 25% of the respective market capitalizations of MACCs and CHDF. The Stikeman Opinion also stated that such loans would be "conflict of interest matters" for the purposes of NI 81-107 and were required to be submitted to the IRC for its recommendation. The opinion stated that the loans would be material to each of MACCs and CHDF and each fund would "be required to issue a press release and material change report and the loan agreement must be filed as a material contract on SEDAR."

[302] The Stikeman Opinion did not expressly address the question of compliance by CHCC with its fiduciary duty or CHCC's conflict of interest in establishing the terms of the loan and in connection with its on-going compliance with those terms. Pushka represented that Stikeman gave the further legal advice to the CHCC Board in connection with the Fairway Transaction contained in the Pushka Memorandum (see paragraphs 304 and 307 below).

[303] The CHCC Board passed resolutions attached to the minutes of the October 1, 2008 Board meeting authorizing each of MACCs and CHDF to (i) change its portfolio manager; and (ii) "… lend funds, up to a maximum of 25% of the "market capitalization" of the Trust for purposes of MI 61-101 to the Trustee [CHCC] *on terms and conditions, including interest rates, fees and expenses that are found by the independent review committee (the "IRC") to be reasonable*, for the purpose of facilitating a merger with other trusts, subject to:

(a) consideration of a recommendation of the independent review committee;

> (b) having an Investment Manager [portfolio manager] independent of the Trustee;
>
> (c) a term life insurance contract to be taken on the President of the Trustee of an amount equal to the loan, such that in the event of his death the life insurance contract would make whole to the Trust the outstanding amount on the loan."
>
> [emphasis added]

January 19, 2009 CHCC Board Meeting

[304] The CHCC Board met again on January 19, 2009 for 15 minutes. All of the directors were present; Allen and Jackson both participated by telephone. The only item of business was consideration of the proposed Fairway Transaction. At the meeting, Pushka presented a memorandum that he had prepared (the "**Pushka Memorandum**") describing the proposed transactions. (The Pushka Memorandum had been submitted to the IRC on January 16, 2009 and was used to seek a recommendation from the IRC; see paragraph 335 of these reasons.) The minutes indicate that Pushka told the directors that "… the IRC had reviewed and approved all transactions related to the loan" from Crown Hill Fund to CHCC Holdco.

[305] The Pushka Memorandum attached to the minutes indicates that CHCC was seeking a recommendation from the IRC with respect to two linked transactions consisting of the Fairway Loan and the merger of the Fairway Fund with CHF "as per the permitted merger criteria". The Pushka Memorandum included a description of the six steps proposed to complete the transactions and states that:

> With respect to the first item [the Fairway Loan], additional information is contained in the following documentation: (a) A term sheet describing the loan; (b) the loan agreement itself; and (c) Crown Hill Fund Declaration of Trust. *In addition, an internal condition is that the Trust will be entering into an Investment Advisory Agreement with Robson Capital Management Inc. effective prior to the loan.* The yield on the Canadian Corporate Bond Index (XCB) is currently 4.873% while the yield on the Canadian Short Term Bond Index is 4.043%. TD Prime Rate is currently 3.50%.
>
> [emphasis added]

[306] The Pushka Memorandum states that the then current NAV of the Crown Hill Fund was "a little over $10 million while the Fairway Fund is expected to have a net asset value of $32 million". As a result, the proposed loan represented approximately 10% of CHF's NAV.

[307] After describing the specific steps involved in the proposed transactions, the Pushka Memorandum states that:

To provide guidance on this matter, legal counsel [Stikeman] has also provided the following observations:

> The loan facility is based on, and is substantially similar to, the loan facility that Crown Hill negotiated between Profit Booking Blue Chip Trust (a predecessor fund to Crown Hill Fund) and [a Canadian bank].
>
> The loan will be a secured obligation and the security will consist of a general security agreement covering all the assets of Crown Hill Holdco and its subsidiaries, a share pledge by Crown Hill Holdco of the shares of Crown Hill Capital Corporation and a guarantee of Crown Hill Capital Corporation of Crown Hill Holdco's obligations under the loan facility.
>
> As requested, we confirm that a loan to Crown Hill Holdco is not prohibited by the declaration of trust and, pursuant to Section 4.3(1)(a) of the Declaration of Trust, the Trustee has the express power to "lend any of the Trust Property at any time held hereunder, and to execute and deliver any deed or other instrument in connection with the foregoing." *This power was set forth in the original declaration of trust dated January 28, 2005.*
>
> Finally, we confirm that the loan transaction has been structured to comply with the conflict of interest provisions in the *Securities Act* (Ontario) and the *Regulation* thereunder as well as Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions*, as such legislation pertains to a non-redeemable investment fund. Crown Hill Fund is not considered to be a mutual fund for purposes of applicable securities legislation.
>
> [emphasis added]

[308] Renton did not attend the January 19, 2009 CHCC Board meeting.

[309] The CHCC Board passed detailed resolutions at the January 19, 2009 meeting:

(a) as trustee and manager of each of CHF and the Fairway Fund, approving the merger of those funds, with CHF to be the continuing fund;

(b) as trustee and manager of CHF, authorizing a loan from CHF to CHCC Holdco to fund the purchase of the Fairway Management Agreement; and

(c) authorizing a guarantee by CHCC of the obligations of CHCC Holdco with respect to the Fairway Loan.

The resolutions referred to in clause (a) above state that CHCC "is of the opinion that the Merger would provide certain benefits to unitholders of [Crown Hill Fund/Fairway Fund], including lower operating costs and increased liquidity."

[310] As noted elsewhere in these reasons, at the relevant time, Pushka owned all of the shares of CHCC Holdco, which in turn owned all of the shares of CHCC.

[311] The statement in the Pushka Memorandum that the original declaration of trust for CHF included the express power to make loans was misleading. As noted above, the MACCs Declaration of Trust became the CHF Declaration of Trust as a result of the merger of CHDF with MACCs on December 30, 2008. MACCs was prohibited from making loans until the amendment to its Declaration of Trust referred to in paragraph 202(b) of these reasons was made on June 6, 2008.

[312] We note that the CHCC Board resolution passed on October 1, 2008 should not have authorized a loan "on terms and conditions, including interest rates, fees and expenses that are found by the independent review committee to be reasonable" (see paragraph 303 above). The CHCC Board had the obligation to determine what those terms and conditions should be. The IRC responsibility was to recommend whether the Fairway Loan achieved a result that was fair and reasonable to CHF. The resolutions passed by the CHCC Board on January 19, 2009 did not refer to terms and conditions found by the IRC to be reasonable. The Fairway Loan was approved on the terms contained "in the Loan Agreement substantially in the form presented to the director of the Corporation."

[313] As noted above, the minutes of the January 19, 2009 CHCC Board meeting indicate that "[t]he Board of Directors was informed that the IRC had reviewed and approved all transactions related to the loan". That representation overstates the role and recommendation of the IRC (see paragraph 347 of these reasons).

[314] The next meeting of the CHCC Board was held on March 27, 2009, which was after the making of the Fairway Loan and the merger of CHF with the Fairway Fund on January 23, 2009. At that meeting, Pushka reported to the CHCC Board on the mergers of CHDF with MACCs (that had occurred on December 30, 2008) and the subsequent merger of CHF and the Fairway Fund (that had occurred on January 23, 2009, approximately one month later; see paragraph 262 of these reasons).

2. Review by the IRC of the Fairway Transaction

[315] The IRC review of the Fairway Transaction is described below.

October 8, 2008 IRC Meeting

[316] The IRC met on October 8, 2008 for an hour and a half. All of the members of the IRC and Pushka were present. The IRC discussed, among other matters, whether CHDF and MACCs could make loans to CHCC to facilitate a proposed fund merger.

[317] The minutes of the meeting provide as follows:

> <u>PROPOSED RELATED PARTY TRANSACTION WITH MACCs and CHDF</u>
>
> The President of the Manager outlined the proposal for the related party transaction with MACCs and CHDF. It was decided by the committee, the President of the Manager would need to arrange for Stikeman's [*sic*] to outline the policy and procedures for such action, in order to give a definitive answer on the proposal. Specifically, provide the IRC with a view as to whether each trust is permitted to make such a loan under their respective trust declarations, and also the terms and conditions of the loans. The President is to deliver this material to the IRC prior to receiving a recommendation.

[318] We understand that, at the October 8, 2008 meeting, the IRC considered a document prepared by Pushka and entitled "Discussion Document to the IRC Regarding Acquisitions and Possible Conflicts" (the "**Discussion Document**") (there is no express reference to the Discussion Document in the minutes of the meeting and there is no evidence that the Discussion Document was submitted to the CHCC Board). The Discussion Document addressed a possible loan by MACCs and CHDF to CHCC to finance the acquisition of a third party fund manager and a subsequent fund merger. The Discussion Document was prepared by Pushka and begins by stating that:

> <u>Background</u>
>
> Crown Hill intends to merge the Crown Hill Dividend Fund into the MACCs Trust and to further increase the size of MACCs. It can do so using a number of methods. The traditional method is via warrants or rights offerings while an alternative method is through a form of merger which has some conflict of interest issues. The costs of each of these methods is [*sic*] described below.

[319] The Discussion Document described the costs in connection with two previous warrant or rights offerings by MACCs, one of which was not successful. It also referred to the costs of a rights offering in 2007 by a third party fund. The alternative method described involved a loan by an investment fund to its trustee/manager to permit the trustee/manager to purchase the management rights of a second investment fund and then merge the two funds.

[320] The Discussion Document concludes that:

> … In the event that the Trustee/Manager were to borrow the funds from the Trust to purchase the other trustee/manager then the cost to the Trust of this transaction would be negligible.
>
> This method is materially superior to the current method of rights offerings. There is no dilution with a merger since the ratio is based on the NAV per unit of each trust. The direct costs are a fraction of what it currently costs.
>
> …

[321] The Discussion Document then addresses the conflict of interest that would arise in such a transaction. That conflict of interest was described as follows:

> …
>
> There is a conflict of interest between the Manager/Trustee of the Trust and the Trust in this situation, since it is in the Manager/Trustee's best interest to grow the size of the Trust since the Manager/Trustee draws an income from it. The larger the Trust, the larger the Manager/Trustee's income.
>
> However, the unitholder's [*sic*] of the Trust receive a substantial benefit from this transaction. The Trust can grow rapidly in size, resulting in lower management expense ratios per unit (since the fixed costs are spread over more assets) and higher liquidity. Growth is extremely cheap for the Trust.
>
> …

[322] The Discussion Document states under the heading "Weighing the Conflicts":

> There are two issues. The first is whether the Trust should embark on growing its size in the first place and the second is determining the most cost effective way for the Trust to do so.
>
> The first issue is addressed by the MACCs unitholder meeting held on June 4, 2008 and the Crown Hill Dividend Fund meeting on August 28, 2008. The changes to the declarations of trust and the impetus behind each meeting was [*sic*] to increase the size of the trusts. Therefore, based on a positive vote in both meetings, one can assume that unitholders are interested in the trusts increasing their size, and in the case of the Crown Hill Dividend Fund, specifically through a merger. *This addresses the primary conflict of interest.* While it is in the Manager/Trustees [*sic*] best interest to increase the size of the Trust, the unitholders have recognized that this is so and have approved of the Manager/Trustee pursuing this course of action.
>
> *The second issue becomes a matter of cost effectiveness*. This method is substantially cheaper to the Trust than warrants and rights offerings.
>
> *Finally, there is a third issue in the form of the related party transaction that is occurring in the form of a loan. The loan should be based on terms and conditions that are considered commercially reasonable. The question then becomes what would constitute commercially reasonable terms and conditions.*
>
> Legal counsel was approached and reference was made to a new issue preliminary prospectus whereby the manager appeared to borrow from the fund to pay for the issuance costs. … The terms and conditions of this loan

> was [*sic*] at a prime rate of interest over 7 years. After closer examination, there was no loan directly from the Fund to the Manager. Rather the Fund paid the costs of the raising of capital and the Manager reimbursed the Fund over time. Nevertheless, there was still a note payable from the Manager to the Trust.
>
> A corporate banker at [a Canadian bank] who is responsible for lending to closed end funds was also approached. His view was in this case, commercially acceptable terms was for the manager to borrow from the fund at prime plus 1.00% to prime plus 1.25% over 7 years. He made reference to two other funds … that have done this in the past. He selected these funds since they are the two largest closed end funds in the country. Their latest promissory notes have been amortized over 7 years at prime in one case and prime minus 0.50% in the other (see below). The banker was asked whether the bank would lend directly to the manager in those cases at those rates, and he said no, that the situation was not comparable. Since the fund has a right of setoff against the manager, it is in a much stronger position than the bank.
>
> …
>
> [emphasis added]

(The last two paragraphs above are substantially the same as the last two paragraphs of the document submitted to the CHCC Board at its meeting on September 25, 2008 that are set out in paragraph 294 of these reasons.)

[323] There is a second document entitled "Results of the October 1, 2008 board meeting" that we understand was prepared by Pushka and submitted to the IRC at its October 8, 2008 meeting.[6] That document consists of Pushka's notes following the October 1, 2008 CHCC Board meeting. We will refer to that document as the "**Results Document**".

[324] The Results Document addresses the following questions:

(a) Is the transaction prohibited or restricted by securities legislation?

(b) Does the transaction achieve a fair and reasonable result for the investment fund?

(c) Has the manager been notified and received a recommendation?

[325] With respect to the question referred to in paragraph 324(a) above, the Results Document concludes that provided "we appoint another portfolio manager prior to the

[6] The Results Document was prepared by Pushka after the CHCC Board meeting on October 1, 2008 and it does not appear to have been discussed at any other CHCC Board meeting. Pushka testified that he could not recall whether he gave the document to the other CHCC directors.

loan then the answer to the first question is no, the transaction would not be prohibited or restricted by securities legislation."

[326] With respect to the question referred to in paragraph 324(b) above, the Results Document notes that there are two steps to the proposed transaction: "… the first step is the lending of the money from the funds to the manager in order to purchase the manager/trustee contracts, and the second step is the merger of the funds."

[327] The Results Document addresses these two steps as follows:

> If one were to break it into the component steps, the first question would be whether lending the manager funds achieves a fair and reasonable result for the fund. The answer to that I believe is no, regardless of the interest rate, since the fund is not in the business, nor does it have a mandate to simply lend funds to the manager for the manager's own purposes. Therefore, I believe that one must look at the transaction as a whole, not break it into the two parts.
>
> The main objective behind both unitholder meetings was to grow the funds since in their current state they are becoming uneconomic. A loan from the funds to the manager should only be done conditional upon the manager using the money to grow the funds. Achieving that objective should be a condition of the loan.
>
> …

[328] The Results Document then addresses the MER of the continuing fund following a merger. The document notes that the current MERs of the relevant funds were as follows:

Crown Hill Dividend	3.62%
MACCs	5.10%
Deans Knight (one of the investment funds managed by JovFunds)	2.01%
Fairway Fund	1.92%

[329] The Results Document then concludes that:

> Therefore, if all four funds were to merge, the MER of the resulting fund would be no higher than 1.92% in the following year.
>
> Therefore, simply from an [*sic*] MER perspective, the merger would have a substantial material benefit to the two funds. There are other benefits that are important but not as easily quantifiable. For example, liquidity

> would be enhanced. Currently, the two funds are extremely illiquid. A fund with $100 million in assets would have substantially higher liquidity.
>
> The remaining issue, is what would be reasonable terms and conditions on the loan. Since this scenario now has a third party investment manager, an IRC, I believe it might be more prudent to have the investment manager and the manager negotiate the loan terms with guidance from the IRC.

[330] Later in the afternoon on October 8, 2008, Pushka sent an e-mail to the members of the IRC indicating that he had spoken to Renton and they had come up with a strategy that would address several unspecified concerns. That strategy contemplated that the management rights held by JovFunds would be acquired by CHCC, financed by MACCs, on a Friday, and the following Monday, MACCs and the Fairway Fund would be merged. The payments for the management rights "would occur the day of and the day after the units entered the Trust – directly linking the loan with the resulting increase in assets. Also, it eliminates deal risk, whereby we receive the funds and then are unable to exercise the merger. JovFunds might not be pleased with this, but I didn't think the deal will happen otherwise."

[331] We note that the strategy referred to in paragraph 330 above is a means to carry out a loan and fund merger transaction in a manner that reduces the risk that, after the loan to and the acquisition by the IFM of the management service rights of a third party fund, no merger of the relevant fund occurs for some reason (such as the failure to obtain necessary unitholder approvals or as a result of a large number of redemptions). That is a very significant risk that was not addressed in the Citadel Transaction (see the discussion commencing at paragraph 524 of these reasons). Accordingly, in the Fairway Transaction, the Fairway Loan was directly linked to the merger of CHF with the Fairway Fund.

[332] On January 15, 2009 at 6:05 p.m., Pushka sent an e-mail to the members of the IRC, copied to Renton, indicating that he was seeking an IRC recommendation with respect to two linked transactions: a loan by CHF to CHCC of approximately $1.0 million so that CHCC could purchase the rights to the Fairway Management Agreement, and the merger of CHF with the Fairway Fund. He included a copy of the current CHF Declaration of Trust and said that Renton would be forwarding to the members of the IRC within the next few hours (i) a term sheet describing the loan; (ii) the loan agreement itself; and (iii) a Stikeman cover letter. Pushka indicated that, as an "internal condition", CHF would be entering into an investment advisory agreement with Robson effective prior to the making of the loan.

[333] In an e-mail to Pushka and the members of the IRC sent the same day at 10:20 p.m., Renton forwarded to the IRC the documents referred to in paragraph 332 above together with a form of resolution to be passed by the IRC. Renton confirmed in the e-mail that a loan to CHCC Holdco "is not prohibited by the [CHF] declaration of trust" and that the trustee had the express power to "lend any of the Trust Property at any time…" under the CHF Declaration of Trust. The e-mail also confirmed that "the loan

transaction has been structured to comply with the conflict of interest provisions" of the Act and MI 61-101. The subject line of the e-mail was: "RE: IRC Recommendation".

[334] We interpret Renton's e-mail as constituting Stikeman legal advice that the Fairway Loan could be made by CHF to CHCC in accordance with Ontario securities law, provided CHAM was replaced as CHF's portfolio manager (see paragraph 604 of these reasons and following for a discussion of whether that opinion would have covered compliance by CHCC with its fiduciary duty).

January 16, 2009 IRC Meeting

[335] The IRC also considered the making of the Fairway Loan at a meeting held for just under one hour the next day (on January 16, 2009). All of the members of the IRC were present by telephone; Pushka and Simoes were also present. The minutes of that meeting indicate that "… Mr. Pushka led the members through a step by step description of the transaction", which was described in the memorandum appended to the minutes (which is the Pushka Memorandum subsequently considered by the CHCC Board on January 19, 2009 and referred to in paragraph 304 of these reasons). That transaction involved two linked transactions: (i) a loan from CHF to "Crown Hill Capital Group" of approximately $1.0 million so that CHCC Holdco could purchase the rights to the Fairway Management Agreement; and (ii) the merger of the Fairway Fund "into the Crown Hill Fund as per the permitted merger criteria …" In this connection, the IRC:

(a) considered the benefits of the loan transaction to CHF and concluded that, in its opinion, after reasonable inquiry, the transaction achieved a fair and reasonable result for CHF having regard to the improved MER, the interest being earned by CHF on the loan (which Pushka had represented as being a greater return than could be achieved by an investment in the market) and the increased liquidity of the fund;

(b) discussed the repayment of the loan, which was expected to "be paid in full after no more than fifty months";

(c) reviewed the term sheet and the loan agreement for the loan;

(d) considered, among other matters, the terms of the security documents, the guarantee by CHCC, the use of proceeds and the relevant provisions of the CHF Declaration of Trust; and

(e) confirmed that no assets of CHF had to be sold to raise the cash necessary to fund the Fairway Loan; Pushka confirmed that CHF held cash of approximately 29% of its NAV.

[336] The IRC was informed by Pushka that a holding company was introduced as the borrower "because the Trust cannot act as an independent entity without the Trustee. Therefore legal counsel suggested the new company be set up as the borrower in order to make the transaction and the drafting of the documents as simple as possible." We take that to mean that the Crown Hill Fund lending to CHCC would have been, in effect,

CHCC, as IFM of the CHF, lending to itself. However, introducing CHCC Holdco as the borrower did not address in any substantive way the nature of the Fairway Loan as a related party transaction. We note, in this respect, that having Robson sign the Fairway loan agreement (between CHF and CHCC Holdco dated January 20, 2009 (the "**Fairway Loan Agreement**")) on behalf of CHF was primarily a matter of appearance. (The loan agreement was signed by Shaul as President and Chief Executive Officer of Robson, as investment manager of CHF, and on behalf of CHCC Holdco by Pushka as President and Chief Executive Officer.)

[337] Pushka reported to the IRC at the meeting that "… in order for the transaction to be completed, a separate Investment Manager [portfolio manager] is needed for the fund. Therefore Robson Capital Management will be acting as the Investment Manager for a fee of 25 basis points".[7] The minutes do not indicate whether the IRC was told the specific reason for the change in portfolio manager, which was to avoid the prohibition in section 118 of the Act against an investment fund making a loan to its portfolio manager or an affiliate of its portfolio manager (see paragraph 149 of these reasons). Fleming testified, however, that he knew that "[y]ou can't lend – portfolio managers are prohibited from borrowing money from the fund."

[338] Pushka did not recall whether he had drawn to the IRC's attention the fact that the fee of the portfolio manager had become a cost borne directly by CHF as a result of the amendments to the MACCs Declaration of Trust on September 25, 2008 (referred to in paragraph 243 of these reasons). Allen did not recall being aware that CHF had that obligation.

[339] The minutes do not indicate that there was any discussion at the meeting as to Robson's qualifications to be appointed as portfolio manager of CHF. No information with respect to Robson's qualifications appears to have been distributed to the members of the IRC prior to or at the meeting.

[340] The minutes state that "[t]he President informed the IRC that once the merger is complete the combined value of CHF (the "Fund") will be approximately $40 million. Therefore the current fixed costs will then be distributed to four times as many assets resulting in a lower MER. In addition the increased size of the Fund should result in increased liquidity for the Fund participants."

[341] Pushka also reported that Stikeman "… were satisfied that the transaction was being effected in compliance with all applicable laws and regulatory policies." In this respect, the Pushka Memorandum contained the "observations" of Stikeman referred to in paragraph 307 of these reasons. Renton was not, however, in attendance at the meeting (and is not shown in any IRC minutes as attending or participating in any other IRC meeting during the relevant time).

[7] We note that the term "Investment Manager" was used in the CHF Declaration of Trust to describe the portfolio manager of the fund. That usage creates some ambiguity because CHCC is referred to as the "Investment Fund Manager". We have used the term "portfolio manager" in these reasons to refer to the "Investment Manager".

[342] The minutes state that Maxwell raised the issue of the risk to CHF unitholders "… if the loan could not be paid back due to a decline in the assets of the Fund." Pushka acknowledged the risk "… but also pointed out that there is a clause in the agreement for a pro rata reduction in the loan from those redeeming. Any units submitted for redemption are charged a percentage of the assets which will go towards payment of the outstanding loan amount."

[343] We note in this respect that the Fairway Loan Agreement included a provision that required CHCC Holdco to prepay the loan to the extent that there were redemptions of CHF units. That provision provided that CHF would deduct from any redemption payment to a unitholder an amount equal to the unitholder's pro rata portion of the Fairway Loan. We do not understand, however, how CHCC could have reduced a redemption payment to a unitholder in these circumstances. The CHF Declaration of Trust governed such redemptions and did not contemplate or permit such a reduction in the redemption price. The terms of the Fairway Loan Agreement could not affect or modify unitholder rights under the CHF Declaration of Trust. Further, the Fairway Loan was an asset of CHF, the value of which was presumably reflected in CHF's NAV. It was not fair or appropriate to charge a unitholder a portion of the loan on a redemption of units. If CHF reduced a redemption payment in this way, it was shifting to the redeeming unitholder a portion of the risk that CHCC Holdco would not be able to repay the Fairway Loan. None of this makes any sense. It is beyond us how such a provision could be inserted in a commercial agreement. In our view, Maxwell asked a good question and received a misleading response.

[344] Pushka also noted that CHCC would be receiving income from the management of other trusts and "therefore it will not be dependent solely on the income from CHF to repay the loan." There is no evidence that CHCC received material income from managing other investment funds.

[345] The minutes indicate that "[t]he President informed the committee that the unitholders of all of the funds involved in the transaction were aware of the mergers since all unitholders had been asked to vote on the matter. All unitholders had notice of the merger and had been given the additional right to redeem their units prior to the merger." We do not understand that comment. Unitholders of CHF did not vote on the merger; it was carried out pursuant to the permitted merger provision in the CHF Declaration of Trust. Further, there is nothing in the evidence indicating that a special redemption right was granted to CHF unitholders in connection with the merger. Pushka confirmed that in his testimony. Such a redemption right was granted to Fairway Fund unitholders.

[346] The following resolution was passed at the January 16, 2009 IRC meeting:

> **RESOLUTION TO APPROVE MERGER OF CROWN HILL FUND**
>
> Be it resolved that the IRC has advised Crown Hill that, in its opinion, after reasonable enquiry, the merger of the CHF with the Fairway Fund achieves a fair and reasonable result for CHF having regard to, among other things,

> 1. the improvement in the MER of the Fund;
>
> 2. that the interest being earned by the Fund will be greater than if the money were invested in the market; and
>
> 3. the increase in liquidity of the Fund.

[347] Appendix B to the minutes is a formal resolution, the substantive terms of which are as follows:

> Pursuant to National Instrument 81-107, the Independent Review Committee has considered and reviewed the proposed actions in connection with the Loan Agreement [the Fairway Loan Agreement] upon the terms set out in the [Pushka Memorandum]. The Independent Review Committee has advised Crown Hill that, in its opinion, after reasonable enquiry, having regard to, among other things, the process proposed for the completion of the Loan Agreement, including the terms of the security documents, the use of proceeds and the declaration of trust of CHF (as described in the [Pushka Memorandum]), the Independent Review Committee recommends that such proposed action achieves a fair and reasonable result for CHF.

There is no evidence that, in recommending the Fairway Loan, the IRC turned its mind to CHCC's conflict of interest in addressing on-going compliance with the terms of the Fairway Loan.

April 8, 2009 IRC Meeting

[348] The IRC met again on April 8, 2009. All of the members of the IRC, Pushka and Simoes were present. The meeting lasted an hour and a half. There were five items of business.

[349] The minutes contain the following statements:

> **GENERAL REVIEW OF FUNDS**
>
> The President [Pushka] informed the IRC that all of the mergers were now complete and had gone well. Since the mergers, liquidity had increased substantially in CHF. Approximately 600,000 units were traded last month as opposed to 40,000 in the month of December, 2008.
>
> The committee was also informed that the OSC had requested all of the documents related to the merger and the loan facility. Legal counsel had sent a package containing all of the documents and there has been no response from the OSC.

3. Comment on the Discussion Document

[350] The Discussion Document (considered at the October 8, 2008 IRC meeting and referred to commencing at paragraph 318 of these reasons) indicates that MACCs unitholders had approved the changes to the MACCs Declaration of Trust at the meeting on June 4, 2008 permitting a merger without unitholder approval, and that CHDF unitholders had approved similar changes to the CHDF Declaration of Trust at the August 28, 2008 unitholder meeting. The Discussion Document states that those approvals addressed "the primary conflict of interest" because it demonstrated that unitholders were in favour of growing the funds through mergers. The "primary conflict of interest" referred to was the increase in management fees that would be payable to CHCC as a result of the merger of CHF with the Fairway Fund. We do not dispute that MACCs and CHDF unitholders approved at those meetings, as a matter of principle, potential future fund mergers. That did not, however, address CHCC's conflict of interest in causing CHF to make the Fairway Loan to CHCC Holdco.

[351] The Discussion Document states that the second issue was a matter of the cost effectiveness of the manner of increasing the size of the fund. We do not dispute that a fund merger may be a more cost effective means by which to increase the assets of an investment fund than a rights offering distributing additional units.

[352] The Discussion Document then characterizes the conflict of interest arising from an investment fund making a loan to its IFM as being primarily a question of whether the loan was made on commercially reasonable terms and conditions. In our view, that conclusion does not follow. The Discussion Document does not identify the fundamental conflicts of interest arising from (i) CHCC, in effect, appropriating assets of CHF for its own financial benefit by causing CHF to make a loan to it; (ii) the financial benefits to CHCC as a result of such a loan (including increased management fees) relative to the benefits that would be received by CHF unitholders from the merger of CHF with the Fairway Fund; (iii) the risk to CHF of holding a loan to its IFM that was an illiquid investment constituting approximately 10% of its assets; or (iv) the need for on-going monitoring of compliance by CHCC with the terms of the loan. It is no answer to these conflicts of interest to say that CHF unitholders would receive some benefit from the subsequent merger of the CHF with the Fairway Fund or from the lower costs of increasing fund assets in this manner. The right question was whether CHCC, as a fiduciary, should have caused CHF to make any loan of fund assets to itself. The considerations referred to in paragraphs 350 and 351 above do not mean that an IFM is entitled to cause a fund it manages to enter into a related party transaction with the IFM to finance the acquisition by the IFM of a management services agreement for a third party fund, even if the objective of that transaction is to facilitate a merger. In our view, the Discussion Document mischaracterized the issues and was an inadequate basis for any decision by the IRC to recommend the making of the Fairway Loan.

[353] We also note that the transactions referred to in the Discussion Document as precedents were circumstances in which "… the Fund paid the costs of the raising of capital and the Manager reimbursed the Fund over time" (see the discussion commencing at paragraph 381 of these reasons). Those examples are quite different from a loan of

fund assets to an IFM for the purpose of permitting the IFM to purchase a management services agreement for a third party fund in order to facilitate a fund merger.

[354] It is clear, however, from the minutes of the October 8, 2008 IRC meeting at which the Discussion Document was discussed, that the IRC wanted to receive advice from Stikeman as to whether such a loan transaction was permitted under the MACCs and CHDF Declarations of Trust and as to "the terms and conditions of the loans" (see paragraph 317 of these reasons).

4. Appointment of Robson

[355] On January 16, 2009, just four days before CHF made the Fairway Loan, Robson was appointed by CHCC as portfolio manager of CHF to replace CHAM. The agreement between CHCC and Robson provided that Robson's fee would be an amount equal to 0.25% (25 basis points) per annum of the NAV of the Crown Hill Fund, other than new assets acquired after February 28, 2009. Robson was entitled to a termination fee if it was terminated as portfolio manager prior to May 31, 2010.

[356] Shaul testified that he reviewed the terms of, and the payback schedule for, the Fairway Loan. It does not appear that he negotiated or provided any other advice regarding the Fairway Loan. Robson signed the Fairway Loan Agreement as portfolio manager of CHF.

[357] Robson was appointed as the portfolio manager of CHF so that CHCC's affiliate, CHAM, would not be the portfolio manager of CHF at the time the Fairway Loan was made and therefore subject to the prohibition in section 118 of the Act. Prior to the appointment of Robson, CHCC and CHCC Holdco were "responsible persons" within the meaning of section 118 of the Act. As a result, CHAM could not cause CHF to make a loan to CHCC or CHCC Holdco because of the prohibition in subsection 118(2)(c) of the Act (see paragraph 146 of these reasons).

[358] Section 118 of the Act was intended to prevent self-dealing transactions between a portfolio manager and the fund it manages. A portfolio manager's principal role is to make investments of fund assets. Among other things, section 118 of the Act prevented a portfolio manager from making a decision to invest fund assets, including by way of loan, in an affiliate of the portfolio manager if that affiliate participated in or had access prior to implementation to investment decisions made by the portfolio manager. In this respect, Pushka was the controlling shareholder, director and sole officer of CHAM. It is clear that section 118 of the Act would have prohibited the Fairway Loan if CHAM had been the portfolio manager of CHF at the time that loan was made. Robson's appointment as CHF portfolio manager was to "structure around" section 118 of the Act so that CHCC could cause CHF to make the Fairway Loan to CHCC Holdco, an affiliate of CHCC.

[359] There is no dispute that CHCC, at a time when its affiliate was the portfolio manager of CHF, proposed that the Fairway Loan be made by CHF to CHCC. Pushka took steps to cause CHF to retain Robson as the portfolio manager of CHF in order to avoid the application of section 118 of the Act. Shaul, as the principal of Robson, knew

when Robson was appointed as portfolio manager that (i) CHCC intended to cause CHF to make the Fairway Loan to CHCC or CHCC Holdco; and (ii) the reason Robson was being appointed portfolio manager was in order to permit CHF to make the Fairway Loan. The decision to make the Fairway Loan was not an independent investment decision made by Robson as portfolio manager of CHF.

[360] Section 118 of the Act is based on the premise that a portfolio manager makes the investment decisions with respect to the assets of an investment fund. CHAM was the portfolio manager of CHF prior to the appointment of Robson. Whatever involvement Robson may have had in the Fairway Transaction, it is clear that CHCC and Pushka made the decision to cause CHF to make the Fairway Loan, and determined the terms and conditions of that loan, at a time when CHAM was the portfolio manager of CHF. Accordingly, as a matter of principle, section 118 of the Act should have prevented the making of the Fairway Loan. The appointment of Robson was a technical response to the issue that did not affect the substance of the matter, which was that CHCC caused CHF to make an investment of fund assets in a loan to CHCC Holdco, an affiliate of CHCC.

5. Conclusion as to the Appointment of Robson

[361] CHCC had a fiduciary duty as CHF's IFM to act in utmost good faith with respect to CHF. The question is not whether CHCC had the legal authority to change the portfolio manager of CHF and had done so by the time the Fairway Loan was made. The question is whether the appointment of Robson was a good faith decision made by CHCC in the best interests of CHF and its unitholders.

[362] We note in this respect that, because a portfolio manager provides investment advice with respect to the investment of a fund's assets, the identity of the portfolio manager is a key consideration for unitholders and any change in the portfolio manager would generally constitute a material change from their perspective. Pushka testified that the supervision of a portfolio manager is a critical responsibility of an IFM.

[363] CHCC had a fundamental conflict of interest in making the decision to appoint Robson because that decision was made in order to facilitate a $1.0 million loan by CHF to CHCC Holdco. While the independent directors of CHCC and the IRC were aware that the change in portfolio manager was to facilitate the Fairway Loan, it does not appear that the relevant issues relating to the change in portfolio manager were fully considered and addressed by either the independent directors of CHCC or the IRC. There is no indication in the minutes of the CHCC Board or IRC meetings that either the independent directors of CHCC or the IRC addressed the question of whether the appointment of Robson was in the best interests of CHF and its unitholders and, in particular, considered Robson's qualifications to be portfolio manager. Allen testified that he did not recall the CHCC Board considering Robson's expertise. For his part, Pushka testified that he was satisfied with Shaul's skills and expertise. He also stated, however, that "I don't think he had as much experience as I would have liked."

[364] While Robson entered into the Fairway Loan Agreement on behalf of CHF, it is clear that CHCC and Pushka made the decision to cause CHF to make that loan,

established the terms of the loan, and caused Robson to be appointed as portfolio manager in order to permit it.

[365] The decision by CHCC to appoint Robson as portfolio manager of CHF was not a decision made in the normal course of business. It had nothing to do with ensuring that CHF received expert portfolio management advice from an experienced portfolio manager. It was an action taken for the sole purpose of permitting a related party transaction between CHF and CHCC Holdco, an affiliate of the IFM of CHF. Accordingly, the discretion of CHCC as IFM under the CHF Declaration of Trust to appoint Robson as portfolio manager was not exercised for the purpose for which it was granted.

[366] We find that the appointment by CHCC of Robson as portfolio manager of CHF in these circumstances was an action taken by CHCC in bad faith. As a result, we find that the appointment of Robson and the entering into of the Fairway Loan in these circumstances was contrary to and breached CHCC's duty to act in good faith and in the best interests of CHF, contrary to section 116(a) of the Act.

6. Nature of the Fairway Transaction

[367] The Fairway Loan involved what amounts to CHCC, as IFM of the CHF, appropriating assets of CHF for its own financial benefit. The appropriation of those assets was structured as a loan from CHF to CHCC Holdco, an affiliate of CHCC, for the purpose of financing CHCC Holdco's acquisition of the rights to the Fairway Management Agreement. Thereafter, CHCC caused CHF to be merged with the Fairway Fund.

[368] Pushka acknowledged in his testimony that the Fairway Transaction was unique and that "no one had done this before". He also acknowledged in his prior statements to Staff that he wanted to get a sense through the Fairway Transaction whether the "market" or securities regulators would have an issue with such a transaction.

[369] When we refer to the Fairway Loan as a related party transaction, we mean that, in effect, CHCC exercised its authority as IFM of CHF to cause CHF to loan fund assets to and for the benefit of CHCC and its affiliates. That constituted a related party transaction for the purposes of MI 61-101. For a fiduciary, that transaction constituted the most fundamental conflict of interest: using trust assets for the benefit of the fiduciary/trustee. We do not agree with the submission made by CHCC that the interests of CHCC and the interests of CHF were aligned in connection with the Fairway Transaction. Their interests were clearly not aligned in the making of the Fairway Loan. The fact that there were potential benefits to CHF from the subsequent merger of CHF with the Fairway Fund did not cause those interests to be aligned.

[370] A fiduciary such as CHCC that manages the assets of an investment fund for the benefit of others cannot use the assets of the fund for its own benefit or advantage except as expressly authorized by the applicable declaration of trust or with the approval of unitholders. CHCC was not authorized under the CHF Declaration of Trust to use the

assets of CHF for its own financial benefit by means of a loan or otherwise, and the CHF unitholders did not approve the making of the Fairway Loan. We note, in this respect, that while the CHF Declaration of Trust permitted the Crown Hill Fund to make loans (as a result of the unilateral amendment to the MACCs Declaration of Trust referred to in paragraph 202(b) of these reasons), it did not expressly permit loans by CHF to its IFM or its affiliates. This issue was not addressed by the CHCC Board or the IRC in approving or recommending the Fairway Loan.

[371] Further, there is no evidence that the IRC considered whether unitholder approval of the Fairway Loan should have been obtained in the circumstances. The fact that unitholders had approved in principle mergers of CHF with other investment funds did not adequately address that question.

[372] It is no answer to these concerns to say that the CHF unitholders would potentially benefit from the merger of the Crown Hill Fund and the Fairway Fund. Those benefits did not address the fundamental conflict of interest inherent in CHCC, as IFM of CHF, causing CHF to make the Fairway Loan to CHCC Holdco. Nor did they address CHCC's conflict of interest in establishing the terms of the Fairway Loan and in monitoring on-going compliance with the terms of the Fairway Loan Agreement. Further, in our view, approval by the independent directors of CHCC of the Fairway Loan and the recommendation of the IRC did not adequately address those conflicts (see the discussion commencing at paragraph 386 of these reasons).

[373] We note that Staff alleges that one of the failures of CHCC in obtaining the Fairway Loan was to not adequately explore other sources of financing for the Fairway Transaction. Staff submits that reliance by CHCC on the analysis and advice reflected in the Discussion Document shows inadequate care and diligence. While we might agree with that submission, we also acknowledge that in October 2008, there were unlikely to have been any external sources of financing available for the Fairway Transaction because of the global financial crisis. That did not mean, however, that CHCC was justified in causing CHF to make the Fairway Loan to CHCC Holdco.

7. Benefits of the Fairway Transaction to CHF Unitholders

[374] There is no doubt that the small size of CHDF as of July 2008 meant that the fixed costs of operating the fund were becoming a burden to unitholders (see the disclosure in the August 08 Circular set out in paragraph 239 of these reasons). As of July 23, 2008, the CHDF NAV was approximately $6.4 million. CHDF and MACCs were merged on December 30, 2008, as a result of which the NAV of the continuing fund increased to approximately $10.2 million. Pushka reported to the CHCC Board on March 27, 2009 that, as a result of the merger of CHDF and MACCs, "liquidity had increased greatly" (see paragraph 262 of these reasons). A similar report was made to the IRC at a meeting held on April 8, 2009. As a result of the merger of CHF with the Fairway Fund on January 23, 2009, the NAV of the continuing fund increased to approximately $44 million. The following table shows these increases in NAV and includes the subsequent increase in NAV as a result of the merger of five of the Citadel Funds with CHF in December 2009:

	Approximate CHF NAV[1]
As of July 23, 2008 (for CHDF)	$6.4 million
After the merger with MACCs on December 30, 2008	$10.2 million
After the merger with the Fairway Fund on January 23, 2009	$44 million
After the mergers with five of the Citadel Funds in December 2009	$237 million

[1] Approximate NAV of the continuing fund.

[375] There is equally no doubt that CHF unitholders obtained benefits from the merger of CHF with the Fairway Fund. Those benefits were increased market liquidity for their units as a result of having more units outstanding and the spreading of fixed fund costs over the larger number of units outstanding. As a result of the merger, CHF increased its NAV from approximately $10.2 million to approximately $44 million. Subsequent to the Fairway Transaction, CHF's MER was reduced to 1.8% for the six months ended June 30, 2009. (The CHDF MER for the period ended June 30, 2008 was 3.62% and for MACCs was 5.10% (see paragraph 183 of these reasons)). Further, the Fairway Transaction did not dilute the interests of CHF unitholders (because the merger of CHF with the Fairway Fund was carried out based on NAV) and the costs were represented by Pushka in the Discussion Document as being a fraction of what they would have been if CHF had carried out a public distribution of additional units (see paragraph 320 of these reasons).

[376] Those benefits were, however, much less significant than the increase in management fees that CHCC received as a result of the acquisition of the rights to the Fairway Management Agreement and the increase in NAV of CHF following the merger of CHF with the Fairway Fund. For the year ended December 31, 2008, the management fees paid by CHF to CHCC were $44,218 and the management fees paid by MACCs to CHCC were $21,767. For the year ended December 31, 2009, the management fees paid by CHF to CHCC had increased to $606,404 (we note that five Citadel Funds were merged with CHF in December 2009) and for the year ended December 31, 2010, they were $2,458,427 (see paragraph 522 of these reasons).

[377] The potential benefits to CHF unitholders in these circumstances did not relieve CHCC from its obligation to carefully consider all of the implications of a loan by CHF to CHCC or its affiliate. That loan was made on fixed terms that provided a return to CHF but it also exposed CHF to an illiquid investment (constituting approximately 10% of its assets) and the risk that the loan might not be repaid by CHCC Holdco. It also permitted CHCC to receive the substantial continuing benefit of increased management fees paid under the Fairway Management Agreement and under the CHF Management Agreement once CHF was merged with the Fairway Fund. One must ask why CHF

should have taken that risk when the benefit of increased management fees accrued solely to CHCC after repayment of the loan. Clearly, the Fairway Loan was an illiquid investment that raised valuation challenges for the purposes of determining CHF's NAV. Further, the Fairway Loan gave rise to the concern that redemptions of CHF units following the merger could affect the repayment of the loan (see paragraph 343 of these reasons). In addition, by entering into the Fairway Loan, CHF had to forego other investment opportunities that may have had a more favourable risk/return profile. The opportunity cost of the Fairway Loan does not appear to have been considered by the CHCC Board or the IRC aside from Pushka's representations referred to in paragraph 335(a) of these reasons.

[378] It is clear that CHCC and Pushka established the terms of the Fairway Loan. Further, neither the independent directors of CHCC nor the IRC addressed the on-going conflict of interest created by having to ensure compliance by CHCC Holdco with the terms of the Fairway Loan Agreement going forward and to address the implications of any potential default. Pushka testified that the independent directors of CHCC were responsible for monitoring compliance with the Fairway Loan Agreement, although he did not suggest that any process or steps were taken for them to do so. CHCC had a direct conflict of interest in bringing any issues with respect to on-going compliance by CHCC Holdco with the terms of the Fairway Loan to the CHCC Board for its consideration. CHF's only mind and management was CHCC in its capacity as IFM.

[379] The terms of the Fairway Loan were reviewed by the independent directors of CHCC and by the IRC, all of whom appear to have concluded that the loan was made on reasonable commercial terms. However, where a fiduciary enters into a related party transaction under which the fiduciary will substantially benefit from the use of trust property, that is not the only question that must be considered. Pushka acknowledged that in the Results Document (see paragraph 327 of these reasons).

[380] At the end of the day, we must determine whether CHCC complied with its fiduciary duty in causing CHF to make the Fairway Loan and enter into the Fairway Transaction. Answering that question does not turn on weighing the relative risks and benefits of the Fairway Transaction to Crown Hill Fund and its unitholders, on the one hand, and Crown Hill Capital and its affiliates, on the other. *As a fiduciary, CHCC was not permitted to use the assets of the Crown Hill Fund for its own benefit or advantage or to put itself in an irreconcilable conflict of interest*.

8. Precedent Transactions

[381] In obtaining CHCC Board approval of the Fairway Loan and the IRC recommendation, Crown Hill Capital referred to three market transactions in which promissory notes were issued by an IFM to a closed-end investment fund that it managed, for the purpose of reimbursing the fund for expenses related to the public distribution of additional fund units (see the document referred to in paragraph 294 and the excerpt from the Discussion Document in paragraph 322 of these reasons). Those transactions were submitted by CHCC to evidence that there is nothing inherently wrong in an investment

fund making a loan to its IFM. We do not accept that submission for the reasons discussed below.

[382] An agreement by a fund manager to reimburse an investment fund for expenses of a public distribution of additional units of the fund, represented by a promissory note, is quite different than a loan from a fund to its IFM to purchase the rights to a management services agreement for an unrelated investment fund. In the former, the IFM is agreeing to pay costs that are expenses directly incurred by the fund in the public distribution. The promissory note is a means for the IFM to reflect its agreement to reimburse the fund over time for at least a portion of the costs of the distribution. While such costs are normally an obligation of the fund, the IFM's decision to reimburse the costs reflects the significant benefit to the IFM of the increased management fees that the IFM will receive as a result of the public distribution of additional fund units. The precedents referred to show that some IFMs have concluded that the benefits to unitholders of a distribution of additional fund units does not justify an investment fund paying all of the distribution expenses when one considers the increased management fees that would be paid to the IFM as a result of the distribution.

[383] In contrast, the Fairway Loan constituted a related party transaction in which assets of CHF were, in effect, appropriated for the financial benefit of its IFM. Pushka acknowledged that the Fairway Loan was a unique market transaction for a closed-end investment fund.

[384] In coming to our findings below, we are not suggesting that the issuance of a promissory note by an IFM to a managed investment fund to reimburse distribution expenses incurred by the fund is inconsistent with the IFM's fiduciary duty. Such a transaction would appear on its face to be in the best interests of the fund and its unitholders. Nor have we concluded that a closed-end investment fund can never make a loan to its IFM. Whether a fund can do so will depend on the particular circumstances, including the terms of the relevant declaration of trust, whether unitholder approval has been obtained and the nature of the obligation represented by a promissory note. We understand in this respect that the investment by CHF in the rights to the Citadel Management Agreements was restructured, as a result of the intervention by Staff, to include a loan by CHF to CHCC (see paragraph 38 of these reasons). We do not question the appropriateness of that loan arrangement in the circumstances.

[385] We have concluded only that the actions of CHCC in causing CHF to make the Fairway Loan, in the circumstances before us, constituted a breach of fiduciary duty by CHCC (see paragraph 394 below).

9. Approval by Independent Directors and Recommendation of the IRC

[386] CHCC submits that the approval of the Fairway Loan by the independent directors of CHCC, and the recommendation of the IRC, appropriately addressed any issue relating to CHCC's compliance with its fiduciary duty in causing CHF to make the Fairway Loan. We do not accept that submission for the following reasons.

[387] First, if we find that CHCC breached its fiduciary duty in causing CHF to make the Fairway Loan, no approval by the independent directors of CHCC and no recommendation of the IRC can remedy that breach (see paragraph 116 of these reasons).

[388] We note in this respect that the role of an independent review committee is to make a recommendation as to whether a conflict of interest matter referred to it by the IFM achieves a fair and reasonable result for the fund. Notwithstanding any recommendation of the IRC, responsibility for a conflict of interest matter remains with the IFM. The role and mandate of an independent review committee is more limited in scope than the role of an IFM and is only one means of addressing the conflicts of interest that may arise in the management by an IFM of an investment fund (see the discussion commencing at paragraph 162 of these reasons). An independent review committee recommendation cannot validate a related party transaction that is not entered into by an IFM in good faith and in the best interests of the investment fund.

[389] Second, in order to rely on the approval by the CHCC Board and the recommendation of the IRC, the onus is on CHCC to establish that the independent directors and the members of the IRC were provided with sufficient information to make a decision on a fully informed basis (see paragraph 115 of these reasons for what we mean by full disclosure).

[390] With respect to the approval by the independent directors of CHCC of the Fairway Loan, we are concerned that:

(a) the Pushka Memorandum and the document referred to in paragraph 293 of these reasons did not fully address the issues arising from the Fairway Loan as a related party transaction (see the discussion commencing at paragraph 305 of these reasons); the CHCC Board appears to have been more focused on whether the Fairway Loan was being made on commercially reasonable terms and on the specific matters set forth in the Stikeman Opinion;

(b) the legal advice obtained in connection with the Fairway Loan did not address the question whether CHCC would be in compliance with its fiduciary duty in making the Fairway Loan (see the discussion commencing at paragraph 604 of these reasons); the Stikeman Opinion related to compliance with the CHF Declaration of Trust and specific conflict of interest provisions of applicable Ontario securities law;

(c) the directors appear not to have fully considered the risks to CHF of an investment of approximately 10% of its assets in an illiquid asset consisting of a loan to its IFM or the need for on-going monitoring of the loan to ensure compliance with the terms of the loan agreement;

(d) the directors appear not to have fully considered the issues surrounding the appointment of Robson as portfolio manager of CHF for the sole purpose of avoiding the application of section 118 of the Act; there is limited evidence

that the directors considered Robson's qualifications to be CHF portfolio manager;

(e) the directors do not appear to have considered whether CHF unitholder approval should have been obtained with respect to the Fairway Loan quite apart from whether such approval was required under MI 61-101; see the reasons why we say the Fairway Loan should have been submitted to CHF unitholders for approval (in paragraph 395 of these reasons);

(f) the directors may not have recognised that CHF's authority to make a loan to CHCC had been obtained without unitholder approval by means of the amendment to the MACCs Declaration of Trust referred to in paragraph 202(b) of these reasons. The Pushka Memorandum stated that the power to make a loan "was set forth in the original declaration of trust dated January 28, 2005"; that was not true (see paragraph 307 of these reasons); and

(g) the directors may not have recognised that they had the ultimate responsibility to determine and approve all of the terms of the Fairway Loan and all of the transactions related to the Fairway Transaction irrespective of any recommendation of the IRC (see paragraphs 312 and 313 of these reasons).

[391] With respect to the recommendation by the IRC of the Fairway Transaction, we are concerned that there is no evidence that the IRC was aware of or fully addressed the matters referred to in paragraphs 390 (c), (d), and (f) above. We are particularly concerned that (i) the IRC does not appear to have considered whether CHF unitholder approval should have been obtained with respect to the Fairway Loan quite apart from whether such approval was required under MI 61-101; (ii) the Discussion Document mischaracterized the issues and, together with the Pushka Memorandum and the Results Document, was an inadequate basis for any decision by the IRC to recommend the making of the Fairway Loan (see paragraphs 324 to 329 and paragraph 352 of these reasons); (iii) Renton did not attend any of the meetings of the IRC to discuss and respond to questions relating to his legal advice contained in the Pushka Memorandum; and (iv) the IRC may have been misled by Pushka's comment referred to in paragraph 342 of these reasons.

[392] In our view, CHCC has not met the onus referred to in paragraph 389 above.

[393] We acknowledge, however, that in approving the Fairway Loan, the CHCC Board had before it the Stikeman Opinion and the Pushka Memorandum and the CHCC Board passed the four detailed resolutions referred to in paragraph 309 of these reasons. That is in marked contrast to the lack of detailed written information before the CHCC Board in connection with the Citadel Transaction and the failure of the CHCC Board to pass any resolutions approving the Citadel Acquisition or the Reorganization (see paragraph 472 of these reasons).

10. Conclusions

[394] We have found that CHCC acted in bad faith when it appointed Robson the portfolio manager of CHF in order to permit the making of the Fairway Loan (see paragraph 366 of these reasons). CHCC thereby acted contrary to and breached its duty to act in good faith and in the best interests of CHF, contrary to subsection 116(a) of the Act. Further, we find that by causing CHF to make the Fairway Loan, by benefiting substantially from the Fairway Loan and by failing to appropriately address the conflicts of interest arising from the Fairway Loan, CHCC also acted contrary to and breached its duty to act in good faith and in the best interests of CHF, contrary to subsection 116(a) of the Act.

[395] In our view, the Fairway Loan should have been submitted by CHCC to CHF unitholders for approval for the following reasons:

(a) the Fairway Loan constituted a material related party transaction substantially benefiting CHCC;

(b) the nature of the Fairway Loan as a CHF investment was totally different from the nature of the other investments in CHF's investment portfolio at the time (see paragraph 396 below);

(c) the amendment to the MACCs Declaration of Trust permitting CHF to make a loan (referred to in paragraph 202(b) of these reasons) was implemented by the CHCC Board without unitholder approval;

(d) in any event, the CHF Declaration of Trust did not expressly authorize a loan by CHF to its IFM; and

(e) the Fairway Loan was a novel transaction with no comparable market precedent.

[396] We note with respect to clause (b) of paragraph 395 above that CHF was required under the CHF Declaration of Trust to invest in "a diversified portfolio of income producing securities" and that "at least 80% of this Portfolio" was to contain securities of large issuers, investment grade debt and large income funds (see paragraph 578 of these reasons). At the time of the Fairway Loan, the assets of CHF were invested primarily in a portfolio of equity securities of relatively large Canadian and U.S. public companies. Even if the granting of the Fairway Loan was technically in compliance with these investment restrictions (because the loan produced income and constituted less than 20% of the portfolio), it was an investment of a nature that was totally different from the other CHF investments at the time and inconsistent with the reasonable expectations of investors as to the nature of such investments. The Fairway Loan was an investment of approximately 10% of its assets in an illiquid investment consisting of a loan to its IFM. We have not, however, considered the question whether that investment breached the investment restrictions in the CHF Declaration of Trust.

[397] We address elsewhere in these reasons reliance by CHCC on legal advice in connection with the Fairway Transaction (commencing at paragraph 604 of these reasons).

XII. THE CITADEL TRANSACTION

1. Background to the Citadel Transaction

[398] On June 3, 2009, CHF indirectly acquired the rights to the management services agreements for the 13 funds in the Citadel Group of Funds (we refer to that acquisition as the "Citadel Acquisition" and those management services agreements as the "Citadel Management Agreements") (see paragraphs 33 to 35 of these reasons).

[399] In carrying out the Citadel Acquisition, CHCC caused CHF to invest $28 million in an Ontario limited partnership (that we refer to as "**CH Administration LP**") that indirectly acquired, for that amount, the rights to the Citadel Management Agreements. The CHF ownership structure after giving effect to the Citadel Acquisition, and as proposed following the Reorganization, is reflected in Schedule "C" to these reasons. That schedule is based on the ownership structure reflected in the June 09 Circular. The actual ownership structure was more complex than that depicted in Schedule "C". However, it is accurate to describe the transaction under which CHF acquired the rights to the Citadel Management Agreements as the indirect acquisition by CHF of those rights.

2. The Reorganization

[400] On or about June 8, 2009, CHCC sent the June 09 Circular to unitholders of CHF seeking approval of the Reorganization at a meeting of unitholders to be held on June 29, 2009. We note that the sending of that circular occurred after the completion of the Citadel Acquisition on June 3, 2009.

[401] The purpose of the Reorganization, as described in the June 09 Circular, was to consolidate the rights to the Citadel Management Agreements, together with the rights to the CHF management services agreement (the "**CHF Management Agreement**") under which CHCC was the IFM of CHF, in a Joint Venture between CHF and CHCC (see paragraph 409 below) and to thereafter, to the extent practicable, merge the funds comprising the Citadel Group of Funds over a period of time with CHF, commencing with those Citadel funds that were closed-end mutual fund trusts with investment objectives similar to those of CHF.[8]

[8] It is not clear based on this disclosure in the June 09 Circular how many of the funds constituting the Citadel Group of Funds CHCC proposed to merge with CHF. It appears from the circular that CHCC intended to merge eight of the Citadel funds with CHF in reliance on permitted merger provisions (although other evidence indicates that only seven Citadel Funds were to be merged on that basis; we have used the latter number elsewhere in these reasons). It is clear that Pushka intended to merge at least the eight Citadel Funds with CHF (see paragraph [36] of these reasons).

[402] The June 09 Circular described the Reorganization as follows:

Summary of the Reorganization

The purpose of the Reorganization (defined below) is to consolidate the Administrative Services Agreements in respect of the Citadel Funds along with the management rights and obligations of the Trustee [CHCC] in respect of the Trust [CHF] pursuant to the Declaration of Trust (the "**Management Rights**") in a joint venture between the Trust and the Trustee and, to the extent practicable, merge the Citadel Funds with the Trust in an effort to lower the Trust's MER and increase the Net Asset Value per Unit.

Crown Hill will transfer its Management Rights in respect of the Trust to the Joint Venture and will no longer be entitled to receive a management fee from the Trust. This transfer will result in the Joint Venture becoming the manager and trustee of both the Trust and the Citadel Funds (before they merge with the Trust). See "Details of the Reorganization – Description of Senior and Subordinated Units".

The "**Reorganization**" involves the following transactions and steps:

(a) the entering into of a joint venture (the "**Joint Venture**") between the Trust and the Trustee to hold Administrative Services Agreements for the thirteen Citadel Funds;

(b) the acquisition by the Trust of a senior interest in the Joint Venture that will entitle the Trust to receive all the management fees earned by the Joint Venture, in respect of the Trust and the Citadel Funds, which range from 0.50% to 1.6% per annum, until the Trust recovers all the expenses of the Citadel Acquisition, an initial $4.0 million return from the Joint Venture plus a return of approximately 6% on both such expense recovery amount and the $4.0 million return (collectively, the "**Preferred Return**"), following which the Trustee will be entitled to receive all management fees earned by the Joint Venture;

(c) the acquisition by the Trustee of a subordinated interest in the Joint Venture in exchange for an assignment of the Trustee's Management Rights in respect of the Trust to the Joint Venture, which subordinated interest will entitle the Trustee to receive all or substantially all the management fees earned by the Joint Venture once the Trust has received the Preferred Return in full;

(d) the amendment of the Declaration of Trust to appoint the Joint Venture as manager; and

(e) *the merger, over a period of time, of the Citadel Funds with the Trust* (with the Trust as the continuing fund) commencing with the Citadel Funds that are closed end mutual fund trusts with investment objectives similar to those of the Trust. [emphasis added]

…

Description of Senior and Subordinated Interests

The Joint Venture will issue both senior and subordinated interests. The Trust will own the senior interests and the Trustee will own subordinated interests of the Joint Venture. As holder of the senior interests, the Trust will be entitled to receive the Preferred Return, in full, in priority to the subordinated interests. Once the Trust has received the Preferred Return in full, which, based on the current size of the Trust and the Citadel Funds, is expected to take approximately four years, Crown Hill will then be entitled to receive all or substantially all of the management fees from the Joint Venture.

(June 09 Circular, pg. 12)

[403] We refer to the proposed transactions described in paragraph 402 above as the "**Reorganization**" (which includes the merger over time of the Citadel Funds with CHF). We refer to the Citadel Acquisition and the Reorganization together as the "**Citadel Transaction**" (in doing so, we recognise that the Citadel Acquisition was completed on June 3, 2009 while the Reorganization was proposed by CHCC but was not completed as a result of the intervention by Staff).

[404] The Reorganization constituted a proposed related party transaction between CHF and CHCC (see paragraph 450 of these reasons).

3. CHCC Board Meetings Related to the Citadel Transaction

[405] The CHCC Board meetings described below considered issues related to the Citadel Transaction.

May 7, 2009 CHCC Board Meeting

[406] On May 7, 2009, Pushka sent an e-mail to the independent members of the CHCC Board, copied to Renton, saying that he was in discussions with the IFM of the Citadel Group of Funds to purchase the rights to the Citadel Management Agreements and that he would thereafter merge the Citadel Funds into CHF. The cost of the transaction would be "roughly $28 million". The transaction could be structured with CHF unitholders making "around a 10% return" and would "entail moving the listing to the CNSX[9]." At the time, the NAV of the Crown Hill Fund was approximately $44 million and the NAV of the Citadel Funds proposed to be merged with CHF was approximately $800 million, more than 18 times larger.

[9] The Canadian National Stock Exchange.

May 15, 2009 CHCC Board Meeting

[407] On May 15, 2009, a meeting of the CHCC Board was held to review the proposed Citadel Transaction. All of the directors were present, including Allen who participated by telephone. Renton also participated by telephone. The meeting lasted almost three hours.

[408] The only item of business was the review of the Citadel Transaction. The minutes state that:

> REVIEW OF CITADEL TRANSACTION
>
> The President [Pushka] explained the transaction to the Board using a power point document that was prepared by Darin Renton of Stikeman Elliott, to illustrate the various steps that would be involved (see Appendix A).
>
> Discussions ensued regarding the number of transactions involved in order to complete the deal with Citadel. The benefits and risks to unitholders were also discussed in detail in particular the risk of the contracts being cancelled once they have been purchased by Crown Hill Fund. As a precaution the Board of Directors suggested that a list be compiled by legal counsel of all the contracts being purchased and confirming that they had been reviewed in detail. Darin Renton of Stikeman Elliott LLP confirmed that the list would be prepared and sent to the Board.
>
> The possibility of moving the fund from the TSX to a new exchange was discussed by the Directors. It was agreed that in order to ensure proper disclosure is achieved that the option of a unitholder meeting would be considered. The Board also requested a list from the President listing the benefits of changing exchanges.
>
> It was agreed by all members that a calculation of the return on the $28 million investment would be compiled and presented at a future meeting.

[409] Pushka explained the proposed transaction to the CHCC Board using a PowerPoint steps memorandum prepared by Stikeman (the "**Stikeman Steps Memo**") that was appended to the minutes as Appendix A. There were six steps to the transaction. Pursuant to steps 1, 2 and 3, CHF was to indirectly acquire the rights to the Citadel Management Agreements for $28 million through CH Administration LP, a limited partnership in which CHF was to own, directly or indirectly, all of the equity. Step 4 contemplated establishing a joint venture (the "**Joint Venture**") between CH Administration LP and an affiliate of CHCC and the assignment by CHCC of the rights to the CHF Management Agreement to the Joint Venture in exchange for subordinated units. *In step 5, CH Administration LP would transfer the rights to the Citadel Management Agreements to the Joint Venture (proposed as a series of transactions) in exchange for senior units of the Joint Venture*. That step constituted a related party

transaction between CHF and CHCC within the meaning of MI 61-101. Step 6 was one of the Citadel Funds merging with CHF (representing the merger of the first of the Citadel Funds with CHF, which was to be followed by the mergers of the other Citadel Funds).

[410] Simoes's notes of the May 15, 2009 Board meeting indicate that the members of the CHCC Board discussed the benefits and risks to CHF of the Citadel Transaction, in particular, the risk that the Citadel Management Agreements could be cancelled after they had been purchased by the Crown Hill Fund and before any mergers of the Citadel Funds with the Crown Hill Fund occurred. The possibility of moving the listing of CHF units and Citadel Fund units from the TSX to the CNSX was also discussed. According to the minutes of the meeting, it was agreed that the option of holding a CHF unitholder meeting to approve the Citadel Transaction was to be considered further at a later meeting. The return payable to CHF on the $28 million investment by the CHF in the rights to the Citadel Management Agreements was also to be discussed at a future meeting.

[411] According to Simoes's notes of the May 15, 2009 CHCC Board meeting, Pushka told the CHCC Board that:

(a) the risk that the Citadel Management Agreements would be cancelled after being purchased by Crown Hill Fund "is pretty low" and that, if those agreements were cancelled, the underlying funds would have to pay break fees to CHF in an aggregate amount of approximately $22 million; Pushka noted that cancelling those contracts would "require extreme effort on the part of the Unitholders";

(b) a number of the Citadel Funds had termination dates;

(c) any loss that might result from the Citadel Management Agreements being terminated would be CHF's loss;

(d) the $28 million purchase price for the rights to the Citadel Management Agreements was negotiated at arm's length between CHCC and the IFM of the Citadel Funds;

(e) annual revenues from the Citadel Management Agreements would be increased from approximately $6.0 to $6.5 million to approximately $9.5 to $10 million if substantially all of the Citadel Funds were merged into CHF;

(f) he did not want Citadel unitholder votes related to the mergers of the Citadel Funds with CHF in advance of the Citadel Acquisition because of the concern that "… the brokerage community won't like it. Would they then pressure their unitholders to reject it? We would possibly lose the vote. What would they do to obstruct it?";

(g) he intended to eliminate the existing service fees (also known as trailer fees) payable by the Citadel Funds to brokers;

(h) with respect to the current redemption and retraction rights of the Citadel Funds, the "larger ones are sticky, most of them are closed. The only fund that has a redemption feature from now until December is the $5M fund" (meaning that the unitholders of the other Citadel Funds had no right to redeem their units prior to the completion of the proposed mergers). Pushka also stated that "[t]he fund [CHF] was $5M in December, and by August of this year, it will be $800 M. There is massive liquidity now and the MER is now a fraction of what it was"; and

(i) Renton had advised that the TSX would not, as a matter of policy, allow a merger of a fund without unitholder approval unless a special redemption right at NAV was granted to unitholders. CHCC proposed to move the listings of both the CHF and the Citadel Funds to the CDNX because that exchange did not have the same policy. Pushka stated that "[i]f we stay on the TSX, it will entail more work and at the end of the day, we will only have 50% of the assets we paid for. I'm not sure we will be able to break even."

[412] Allen asked why CHF would not simply acquire the rights to the Citadel Management Agreements (steps 1 to 3 of the Stikeman Steps Memo) and not contribute them to the Joint Venture (step 5 of the Stikeman Steps Memo). It was that subsequent step that constituted a related party transaction between CHF and CHCC.

[413] In this respect, Simoes's notes of the CHCC Board meeting reflect the following response to Allen's question:

> Pushka: Because merging the funds would increase the revenue from all of this. Remember Citadel Funds generate about $6-$6.5M in revenue a year. Steps 5 and 6 will turn it into $9.5M/year.
>
> Allen: I'm asking this because there has to be a really good reason to go beyond step 3. So we pay $28M for $6.5M a year in revenue and then the manager says that $6.5M can be turned into $9.5M/year?
>
> Pushka: Yes, $9.5M will be raw cash coming in.

[414] We take that exchange to mean that management fee revenue to the Joint Venture, and ultimately to CHCC, would go up substantially as a result of the mergers of the Citadel Funds with CHF because the management fees payable to the IFM under the CHF Declaration of Trust were higher (at 1%) than the management fees payable under the Citadel Management Agreements (all less than 1%). Pushka's statement that "[s]teps 5 and 6 will turn it into $9.5 M/year" was not accurate. It was the subsequent mergers of the Citadel Funds with CHF in step 6 that would have that effect, not the related party transaction in step 5 (which was the transfer by CH Administration LP of the rights to the Citadel Management Agreements to the Joint Venture). *Pushka acknowledged in his*

testimony that the Citadel Acquisition would not have been profitable without the mergers of the Citadel Funds with CHF. Given the increase in management fees as a result of the proposed mergers of the Citadel Funds with CHF, it is difficult to accept as accurate the statement in the June 09 Circular that "… the combined fund will adopt the lower fee structure of the Trust [CHF], being 1.8% of net asset value per annum which is expected to result in a lower MER for former holders of units of Citadel Funds" (June 09 Circular, pg. 2).

[415] Simoes's notes also reflect the following exchanges on this topic:

Pushka:	At the end of the day, the MER for everything decreases.
Allen:	But the MER only goes down because the cost is spread across more units. To calculate the MER, it is the sum of the management fee, plus what I don't get after $28M has been paid back. Why would CHF give up the cash flow after $28M has been paid back?
Pushka:	Ultimate benefit is the rate of return.

…

Allen comments later:	Well, if you think about it, we are paying $28M for this and it won't cost the fund anything. The reason I got onto this part of the conversation is because this transaction is getting the fund two things; reduced MER and increased liquidity. How much should I pay for that?
Pushka:	But the point is that with this transaction you are not paying anything for it.
Allen:	But we are picking up severe risk.
Pushka:	Right, but we are also trying to increase the revenue for the CHF.

…

Pushka:	In the end, it's not costing the fund anything. It would be like a rights offering with zero cost.

[416] Simoes's notes also reflect the following exchange on this topic:

Allen:	Why not merge in Step 3?

Pushka: We need to be able to merge with an affiliate because of the language in each contract. Each fund has to be merged with an affiliate of CHLP. The administrator of the fund being merged, has to be an affiliate of the administrator of the fund being merged into.

Allen: The return is increased from $6.5M to $9.5M. That is only a credible answer if it is the same assets I already own. In order to justify the leakage that goes to Wayne.

Pushka: Yes, it can't do the mergers on its own.

Allen: So, the mergers are what justifies' [*sic*] the leakage to Wayne. For that to be plausible, it has to be clear that it can't be done without Wayne.

[417] We take this exchange to mean that CHCC took the position that the IFM of the Citadel Funds and of CHF had to be the same entity at the time any of the Citadel Funds were merged with CHF if those mergers were to be completed under the relevant permitted merger provisions and without unitholder approval. (We note that Staff disputes whether any such mergers could have been carried out on that basis pursuant to the terms of those provisions.) We understand that Pushka intended to merge seven of the eight Citadel Funds in reliance on the permitted merger provisions. It is important to recognise, however, that CHF did not have to enter into a related party transaction with CHCC transferring its rights to the Citadel Management Agreements to CHCC in order to accomplish that objective. Rather, it meant that CHCC had to be the IFM for both CHF and the Citadel Funds at the time of the mergers. That was accomplished by CHF acquiring the rights to the Citadel Management Agreements pursuant to the Citadel Acquisition and CHCC thereafter becoming the IFM for the Citadel Group of Funds. Accordingly, the mergers of the Citadel Funds with CHF could have been carried out without CHF and CHCC entering into a related party transaction. As a result, the mergers did not justify at all "the leakage to Wayne". Pushka's response to Allen's question was at best misleading.

[418] Staff alleges that the permitted merger provisions of the seven Citadel Funds that were to be merged with CHF without a unitholder vote did not permit CHCC to be substituted as IFM of those Citadel Funds and thereby permit the mergers of the Citadel Funds with CHF. We have not found it necessary to address that allegation.

[419] Pushka and Allen also commented on the fact that the Citadel Transaction involved a related party transaction:

Pushka: But it comes back to the related party issue. We need to make sure everything is legitimate. Then there is the issue with the leakage and the issue of moving exchanges and obtaining unitholder approval for that.

> Allen: It is a weird conversation because the benefits are so great. We are agonizing over this because it is a related party issue.
>
> We have to be careful and make sure that the optics are sanitized on this.
>
> Pushka: So do you want to have the unitholder meeting?
>
> Allen: I'm not sure yet. I would like to know more about this other exchange. I want to hear their pitch. Why should we list with them? It is about making sure this deal is absolutely defensible.

[420] The directors also discussed the reason for moving the listing of the units of CHF and the Citadel Funds from the TSX to CNSX. That reason was to avoid a TSX policy that required a special redemption right at NAV to be granted to unitholders if a fund merger was carried out without unitholder approval pursuant to a permitted merger provision. Simoes's notes reflect the following exchange:

> Pushka: This policy which was drafted by the TSX, is not in the interest of the TSX or the Unitholder [sic], it is in the interest of the dealers. It was the dealers who pushed for this rule.
>
> …
>
> … [t]he people benefiting the most in this market are the professionals. If it was in the interest of the unitholders, it would be an OSC rule not a TSX rule. …
>
> Allen: It makes it look like you are escaping from a senior listing to a junior listing, which has no rules. So it looks like hell. However, if the reason you're doing it is to build liquidity and reduce my MER, it makes no sense to have half the fund redeemed the day after the transaction. If they develop a case where the denial of availability to redeem is a cornerstone, the optics are terrible.

Pushka also commented that he was "[n]ot aware of any who have migrated [to the CNSX]. Someone has to be the first."

[421] Later during the meeting, the discussion returned to the question of why CHF and the Citadel Funds would merge:

> …
>
> Allen: So, now we are asking to merge the funds, why?

Pushka: To increase the return.

…

[422] Simoes's notes of that CHCC Board meeting also indicate that the directors discussed the following topics:

(a) the revenue from the acquisition of the rights to the Citadel Management Agreements and the period of payback of the purchase price;

(b) who was doing the due diligence on the Citadel Management Agreements;

(c) the question of how the Joint Venture's rights in the various Citadel Management Agreements would be valued as assets of CHF; and

(d) making sure the language of the CHF Declaration of Trust allowed a purchase by CHF of the size contemplated.

[423] The minutes of the May 15, 2009 CHCC Board meeting also indicate that the following issues were to be reviewed at the next board meeting:

- List of reviewed contracts [the Citadel Management Agreements] from legal counsel
- Transfer [of listing] from TSX to CNSX
- Valuation of loan/return on investment
- Unitholder meeting.

No resolutions were passed by the CHCC Board at the May 15, 2009 meeting.

[424] In an e-mail from Shaul to BLG the next day (May 16, 2009), Shaul stated, among other things, that "[a]t the Crown Hill Capital board meeting yesterday (Darin participated by telephone), the independent board members were concerned about carrying out such a large transaction (involving delisting and related party transactions) without obtaining Crown Hill Fund unitholder approval." Shaul was not present at that meeting but had spoken to Pushka afterwards.

May 21, 2009 CHCC Board Meeting

[425] The CHCC Board met again on May 21, 2009 to further consider the Citadel Transaction. All three members of the Board were present and Renton and one of his tax partners attended the meeting by telephone. The meeting lasted for an hour and a half.

[426] The minutes indicate that Pushka updated the directors on the status of the Citadel Transaction. He informed the directors that PriceWaterhouseCoopers LLP ("**PWC**") had been retained to review all Citadel documents as part of the due diligence process and

that a purchase of the rights to the Citadel Management Agreements was being considered rather than an acquisition of the company that held those rights.

[427] Renton and his tax partner explained the "tax effects" of the proposed Citadel Transaction.

[428] Pushka informed the Board that a CHF unitholder meeting to consider the Reorganization had been tentatively scheduled for June 29, 2009.

[429] The CHCC Board discussed the rate of return on CHF's proposed $28 million investment in the rights to the Citadel Management Agreements. Pushka explained that CHF would recover all of the expenses of the Citadel Acquisition (which included the $28 million investment), an initial $4.0 million return and an additional 6% of both the expenses of the acquisition and the $4.0 million amount (referred to as the "**Preferred Return**"). The minutes state that "the calculations used to get these numbers were discussed in detail." The CHCC Board was also informed that Stikeman was working on the management proxy circular for the proposed CHF unitholder meeting to be held on June 29, 2009. The circular (that is the circular referred to in these reasons as the June 09 Circular) was to be mailed on June 4, 2009. The minutes state that the circular would also have to be approved by the IRC.

[430] No decisions were made at the May 21, 2009 CHCC Board meeting and no resolutions were passed.

[431] Simoes's notes of the May 21, 2009 CHCC Board meeting indicate that, among other matters, the directors discussed:

(a) the possibility that unitholders of the Citadel Group of Funds might vote to terminate some or all of the Citadel Management Agreements and that such terminations would result in the payment of aggregate termination fees of approximately $18 million to CHF. (We note that amount was substantially less than the $28 million purchase price and less than the $22 million in termination fees that Pushka had originally stated would be payable (see paragraph 411(a) of these reasons));

(b) the transfer of the listing of the units of CHF and the Citadel Funds from the TSX to the CNSX;

(c) the risk in the timeframe between the purchase by CHF of the rights to the Citadel Management Agreements and the merger of the Citadel Funds; the mergers were not expected to occur until sometime in late July, after the June 29, 2009 unitholder meeting;

(d) the return to Crown Hill Fund from its investment in the rights to the Citadel Management Agreements;

(e) that the termination of the existing Citadel portfolio managers could result in penalties of $3.0 million to $3.5 million (it was unclear on the evidence

whether those penalties were included in the $18 million in termination fees referred to in clause (a) above; if they were, CHF would have received only $14.5 million to $15 million if the Citadel Management Agreements had been terminated); and

(f) the effect of the Citadel Transaction on CHF's NAV.

[432] Simoes's notes also reflect the following exchange:

Jackson: Is there any benefit to the Citadel unitholders?

Pushka: Well they are invested in Income Trust's [*sic*] and they will have to do something because in a year and a half the industry will be gone and also the MER is very high on what Citadel is charging now.

Jackson: From our last meeting, the point was to increase liquidity and decrease the MER.

Pushka: Yes, but I would like to make it even more compelling.

Renton: The increase in liquidity is because a bigger fund increases the NAV, but it also depends on the calculation of the reduced MER. Not sure it will be affected.

Pushka: The MER will be down a bit in the CHF.

With a $45M fund there is a limited budget for portfolio management, very limited right now. This would provide us with more resources, we could have someone for each asset class.

[433] The notes also indicate that Renton advised the directors that Stikeman was acting in the Citadel Transaction for CHCC as the IFM of CHF but he said that "… our Calgary office represents Citadel so we can't act on the purchase". Pushka indicated that BLG was "representing the fund, basically representing the PM [portfolio manager] on the purchase since the PM is actually doing the purchase." Later Allen asked, "… who is acting for the fund in the negotiations?" Pushka responded, "[i]t will be BLG on the PM side, Stikeman on our side …" Allen then stated, "[t]he CHF is giving up cash and receiving a promise to pay from the LP. Somebody on behalf of the fund needs to be happy with the ownership structure and its source of income? Who is responsible for that?" Renton replies that "[f]or the first part, the fund owns the GP and the LP and this would be a BLG issue." The notes also reflect Allen stating that "I want to make sure BLG understands that they are responsible for ownership of the LP."

[434] No representative of BLG was present at the meeting.

[435] We take the exchange referred to in paragraph 433 above to mean that the independent directors wanted to be sure that the interests of CHF were adequately represented by legal counsel. As matters turned out, BLG took the position that it was not acting for CHF or its portfolio manager (see paragraph 615 of these reasons). That would have meant that there was no legal counsel acting for and representing the interests of CHF and its unitholders (see paragraph 623 of these reasons).

May 29, 2009 Board Meeting

[436] A CHCC Board meeting was held on May 29, 2009. Allen and Jackson attended by telephone. Pushka was present in person at BLG's offices. The meeting lasted 25 minutes. The purpose of the meeting was to discuss a draft of the June 09 Circular that had been sent to the directors prior to the meeting. The minutes of the meeting indicate that the directors reviewed in detail, and suggested various changes to, the disclosure in the June 09 Circular. Those changes were not identified in the minutes.

[437] The draft of the June 09 Circular distributed to the CHCC directors in the morning on May 29, 2009 contained the statement that "[i]t is anticipated that the Mergers will be spread our [*sic*] over several transactions and although the Mergers will occur as soon as practicable, completion of the Mergers may take several months or years." The final June 09 Circular ultimately stated that the Reorganization contemplated "the merger, over a period of time, of the Citadel Funds with the Trust (with the Trust as the continuing fund) commencing with the Citadel Funds that are closed-end mutual fund trusts with investment objectives similar to those of the Trust."

[438] A resolution was passed unanimously by the CHCC Board approving the June 09 Circular.

[439] Simoes's notes of the meeting indicate that the directors discussed, among other matters, the disclosure in the June 09 Circular with respect to the listing on the CNSX, the Preferred Return to CHF, information related to the description of the senior and subordinated units of the Joint Venture and Stikeman's role as legal counsel to CHCC. The substance of those discussions was not described.

[440] Pushka circulated subsequent drafts of the June 09 Circular to the directors and the members of the IRC in e-mails sent on June 1, 2009. He also circulated a further draft of the circular to Allen and Jackson on June 2, 2009.

June 22, 2009 CHCC Board Meeting

[441] A meeting of the CHCC Board was held on June 22, 2009. All of the directors and Renton were present.

[442] The meeting primarily addressed developments subsequent to the Citadel Acquisition that are not relevant for our purposes, except as noted below.

[443] The minutes of the CHCC Board meeting include the following statement:

> A discussion ensued regarding the consequences of having an outside party (Mr. Paul Bloom) attempt to take over the administrative contracts. The President explained the details of the break fees to the directors. Should Crown Hill Fund be removed as administrator, approximately $16 million in break fees would be paid by the Citadel funds to Crown Hill Fund.

We note that the termination fees were now referred to by Pushka as being $16 million (originally, he had stated that such fees were $22 million, and subsequently, $18 million; see paragraphs 411(a) and 431(a) of these reasons). The amount of those fees was an important consideration in deciding whether CHCC should have caused CHF to make the Citadel Acquisition.

[444] The minutes also indicate that it was decided that a separate independent review committee would be appointed for the Citadel Funds.

The Citadel Acquisition

[445] The June 09 Circular discloses that, on June 3, 2009, CHF indirectly acquired the rights to the Citadel Management Agreements. That acquisition occurred after approval by the CHCC Board of the June 09 Circular at the CHCC Board meeting held on May 29, 2009 but before the meeting of unitholders to be held on June 29, 2009. There is no resolution of the CHCC Board referred to in any of the CHCC Board minutes approving the acquisition by CHF of the rights to the Citadel Management Agreements. That is very surprising given the materiality of the Citadel Acquisition to CHF and the risks to which it gave rise (as discussed more fully below). There is a resolution of the CHCC Board approving the June 09 Circular on May 29, 2009. However, the June 09 Circular relates to a CHF unitholder meeting called *to approve the Reorganization*. The Reorganization did not include the acquisition of the rights to the Citadel Management Agreements which was stated in the June 09 Circular to have occurred on June 3, 2009.

[446] The purchase agreement dated June 3, 2009 (under which CHF indirectly acquired the rights to the Citadel Management Agreements (the "**Purchase Agreement**")) was signed on behalf of CH Administration LP by its general partner (an Ontario numbered company wholly-owned by CHF) and by another Alberta numbered company (the "**Fund Administrator**") which was incorporated to directly acquire and manage the rights to the Citadel Management Agreements and was wholly-owned by CH Administration LP and indirectly by CHF (see paragraph 616 of these reasons). Mathew Tataj ("**Tataj**") signed the Purchase Agreement on behalf of both numbered companies as President. As noted, CHF owned, directly or indirectly, all of the shares of the two numbered companies. We understand that Pushka arranged for Tataj to be the sole director of the numbered companies because he had been advised by legal counsel that he should not be a director in order to ensure that the Citadel Acquisition was not a related party transaction. Accordingly, none of CHCC, Pushka or Robson signed the Purchase Agreement, which had been negotiated by Pushka on behalf of CHF.

[447] As described in the June 09 Circular, the Joint Venture to be established in connection with the Reorganization was to acquire and hold the rights to (i) the Citadel Management Agreements which were to be assigned by CHF to the Joint Venture; and (ii) the CHF Management Agreement which was to be assigned by CHCC to the Joint Venture. CHF was to receive all of the management fees paid to the Joint Venture until it was repaid its $28 million investment and the Preferred Return (through its holding of the senior interest in the Joint Venture). After payment of that amount, CHCC was to receive all management fees paid to the Joint Venture under those agreements (through its holding of the subordinated interest in the Joint Venture). CHF, as the limited partner of CH Administration LP, was to have no active role in the management of that limited partnership or the Joint Venture. That management was ultimately to be provided by Pushka through entities owned or controlled directly or indirectly by him.

The Nature of the Citadel Transaction

[448] There are a number of ways one can appropriately characterize the Citadel Acquisition, the Reorganization and the proposed mergers of the Citadel Funds with the CHF. *In the first instance, one must view them as separate free-standing transactions because the Citadel Acquisition was not conditional upon the completion of the Reorganization or the subsequent mergers of the Citadel Funds with CHF.* The Citadel Acquisition was completed on June 3, 2009 and CHF thereby became subject to all of the risks related to that acquisition (see the discussion commencing at paragraph 524 of these reasons). There was no certainty that the Reorganization and the subsequent fund mergers would occur. The Reorganization would not occur unless CHF unitholders approved it at the June 29, 2009 unitholder meeting (subject to the statement in the June 09 Circular that CHCC intended to carry out a reorganization in any event (see paragraph 532 of these reasons)). The mergers of the Citadel Funds with CHF would not occur unless those mergers were carried out without unitholder approval pursuant to the permitted merger provisions of the applicable declarations of trust or if they were approved by the unitholders of the relevant Citadel Funds.

[449] At the same time, the Citadel Acquisition, the Reorganization and the mergers of the Citadel Funds with CHF were linked transactions. The Citadel Acquisition and the Reorganization were justified by CHCC to CHF unitholders on the basis of the benefits arising from the subsequent mergers of the Citadel Funds with CHF (see the comment on this justification in paragraph 517 of these reasons). Certainly, the Citadel Acquisition was, as CHCC stated in the June 09 Circular, a first step in the process over a period of time of merging the Citadel Funds with CHF. Those mergers would not occur unless CHCC or CHF first acquired the rights to the Citadel Management Agreements.

[450] As a stand-alone transaction, the Reorganization as proposed can be appropriately characterized as, in effect, a sale by CHF to CHCC of its rights to the Citadel Management Agreements for $28 million and the Preferred Return. The sale transaction was effected through the mechanism of the Joint Venture. Once CHF received its $28 million investment and the Preferred Return, its senior interest in the Joint Venture would be cancelled. Thereafter, CHCC would receive through the Joint Venture all management fees paid under the Citadel Management Agreements and the CHF

Management Agreement. CHCC would obtain that right through its subordinated interest in the Joint Venture. As a result, the Reorganization as proposed constituted a related party transaction (within the meaning of MI 61-101) between CHF and CHCC, which was why the Reorganization was referred to the IRC for its review and recommendation and why unitholder approval was sought for that transaction at the June 29, 2009 CHF unitholder meeting.

[451] As linked transactions, the Citadel Acquisition and the Reorganization can also be viewed as CHCC, as IFM of CHF, in effect, appropriating assets of CHF for its own benefit to finance the acquisition of the rights to the Citadel Management Agreements. It appropriated those assets by causing CHF to purchase the rights to the Citadel Management Agreements. CHCC thereafter proposed to acquire the future benefits of those rights through the Reorganization.

[452] This discussion suggests that the legal implications of and the risks associated with the sequencing of the Citadel Acquisition, the Reorganization and the proposed mergers of the Citadel Funds with CHF were not fully considered or addressed by the independent directors of CHCC or the IRC.

4. Discussion of CHCC Board Approvals

The Linked Nature of the Transactions

[453] As discussed above, as linked transactions, the Citadel Acquisition and the Reorganization as proposed can be viewed as CHCC as IFM of the CHF, in effect, appropriating assets of the CHF for its own financial benefit (see paragraph 451 above).

[454] As discussed in paragraph 113 of these reasons, a fiduciary such as CHCC that manages the assets of an investment fund on behalf of investors cannot use the assets of the fund for its own benefit or advantage except as expressly authorized under the applicable declaration of trust or with the approval of unitholders. CHCC was not authorized under the CHF Declaration of Trust to appropriate the assets of the CHF for its own benefit or advantage through those transactions and the CHF unitholders did not approve the Citadel Acquisition and ultimately the Reorganization was not implemented. CHCC substantially benefited from the Citadel Acquisition and the subsequent mergers of five of the Citadel Funds with CHF through greatly increased management fees (see paragraph 522 of these reasons). CHCC would have benefited from the Reorganization if it had been completed.

[455] By causing CHF to enter into the Citadel Acquisition in the circumstances described above, CHCC had a fundamental conflict of interest that engaged its duty of loyalty.

[456] CHCC has the onus of establishing that in causing CHF to enter into the Citadel Acquisition and in proposing the Reorganization, it acted in good faith and in the best interests of CHF. To do so, CHCC must establish that it appropriately addressed the conflicts of interest arising from those transactions. As a result, we must consider whether the independent directors on the CHCC Board approved those transactions, and

whether the IRC recommended them. If they did so, we must also determine whether such approvals and recommendations were made on a fully informed basis.

Board Approval of the Citadel Transaction

[457] The May 15, 2009 CHCC Board meeting (referred to in paragraph 407 of these reasons) was important because it considered the Stikeman Steps Memo which related to the acquisition by CHF of the rights to the Citadel Management Agreements, the Reorganization as proposed and the subsequent mergers of the Citadel Funds with CHF.

[458] Pushka acknowledged in his testimony that the CHCC Board did not pass a resolution approving the Citadel Acquisition. The only relevant Board resolution that was passed approved the June 09 Circular (see paragraph 438 of these reasons). Pushka testified, however, that he had spoken to Allen and they concluded that it was better to address the Citadel Acquisition as part of the CHCC Board's consideration of the Reorganization. (Allen appeared as a witness before Pushka and did not refer to that conversation in his testimony.) As we have noted elsewhere in these reasons, however, even if the CHCC Board approved the June 09 Circular, that circular related to the Reorganization and not the Citadel Acquisition. The Citadel Acquisition was completed after the approval of the June 09 Circular at the CHCC Board meeting on May 29, 2009. The June 09 Circular disclosed that the Citadel Acquisition had occurred on June 3, 2009.

[459] The failure of the CHCC Board to pass a resolution approving the Citadel Acquisition and the Reorganization is more than a technical legal issue. If a board does not know explicitly what approval is being requested or given, it may not be focused on the relevant issues. Approving disclosure in a management proxy circular is not the same as approving a transaction described in that circular. The failure by the CHCC Board to pass a resolution approving either transaction was a serious governance failure. At the end of the day, the independent directors of CHCC did not approve the Citadel Acquisition (no request appears to have been made by CHCC for the CHCC Board to do so) or the Reorganization (which was described in the June 09 Circular as having been approved by the CHCC Board).

[460] It is nonetheless true that the Stikeman Steps Memo presented to and discussed by the CHCC Board addressed the Citadel Acquisition, the Reorganization and the subsequent mergers of the Citadel Funds with CHF. One may submit that, by implication, the CHCC Board approved those transactions. We do not agree with that submission. We will nonetheless consider whether CHCC has established that the CHCC Board had sufficient information before it to make a fully informed decision to approve the Citadel Transaction on the assumption that the CHCC Board did so.

[461] At the May 15, 2009 CHCC Board meeting, Allen asked why CHF would not stop at step 3 of the Stikeman Steps Memo and simply acquire the rights to the Citadel Management Agreements and not contribute them to the Joint Venture. That was the key question since it was step 5 of the Reorganization that involved the transfer by CHF of its rights to the Citadel Management Agreements to the proposed Joint Venture. Step 5 gave rise to the related party transaction between CHF and CHCC. Allen suggested in his

testimony that his question related to the complexity of the transaction and, by implication, not to its related party nature. We do not accept that suggestion.

[462] There appears to have been no satisfactory response to Allen's question why CHF would, in effect, sell the rights to the Citadel Management Agreements to CHCC through the mechanism of the Reorganization. Having taken the risk inherent in acquiring the rights to the Citadel Management Agreements in the first instance, why would CHF transfer the future benefits of those rights to CHCC in a related party transaction?

[463] It is clear that the directors of CHCC understood that the acquisition by CHF of the rights to the Citadel Management Agreements created a significant risk to the Fund (see paragraph 415 of these reasons). Further, the Shaul e-mail referred to in paragraph 424 of these reasons indicates that the CHCC Board was concerned about "carrying out such a large transaction" without unitholder approval. There is no evidence, however, that there was any discussion at the CHCC Board meeting of the fact that the investment by CHF in the rights to the Citadel Management Agreements represented more than 60% of the assets of CHF. Allen testified in cross-examination that the CHCC Board considered the proportion that the investment would be of the NAV of the continuing fund after the mergers of the Citadel Funds with CHF. (We note that upon the merger of a Citadel Fund with CHF, the management services agreement related to the merging Citadel Fund would cease to apply and would be replaced by the CHF Management Agreement, thereby eliminating the risk of termination related to the investment in the rights to the relevant Citadel Management Agreement.) That, of course, assumed that (i) those mergers would actually occur; and (ii) there would be no material reduction in the NAVs of the merging funds. More important, that was not the right question given that CHCC proposed to cause CHF to enter into the Citadel Acquisition before any such mergers were certain to occur. In the circumstances, the Citadel Acquisition had to be assessed as a free-standing transaction on the date it was completed (see the discussion in paragraph 448 of these reasons). The gap in time between the Citadel Acquisition and the proposed mergers of the Citadel Funds with CHF was clearly a crucial issue because of the risks to which it gave rise.

[464] The directors of CHCC understood that the Reorganization involved a related party transaction between CHF and CHCC. But Pushka's exchanges with Allen as to why CHF would enter into such a transaction were misleading (see paragraphs 415 to 417 of these reasons). Further, Pushka's responses ignore the related party nature of the Reorganization and the benefit to CHCC arising from it. His comments suggest that the transaction was "not costing the fund anything" (see paragraph 415 of these reasons). That was an extraordinary characterization of a very material related party transaction.

[465] There appears to have been no discussion at the CHCC Board of the implications of increasing management fees payable by the Citadel Funds from approximately $6.5 million to approximately $9.5 million by means of the proposed mergers of the Citadel Funds with CHF. That increase in fees would have been an adverse consideration in any decision by Citadel Fund unitholders to approve the mergers of the Citadel Funds with CHF. Carrying out those mergers without unitholder approval was going to be controversial if material changes were being made to the rights of Citadel unitholders by

means of the mergers. CHCC and Pushka intended to make such material changes (see paragraph 530 of these reasons). These considerations created very significant risks to the subsequent mergers of the Citadel Funds with CHF for the reasons described in paragraphs 467 and 468 below. The CHCC Board was aware of the proposed increase in management fees as a result of the mergers and that some of the Citadel Funds had termination dates (see paragraphs 411(b) and 413 of these reasons). However, without all of the information related to such changes before them, it would not have been possible for the independent directors to make a fully informed decision whether to approve the Citadel Acquisition and the Reorganization.

[466] We also note that the CHCC Board did not have before it Stikeman's legal analysis as to how the Citadel Acquisition complied with the CHF Declaration of Trust. That analysis would have raised serious questions in the circumstances (see paragraphs 512(d), 580 and 613 of these reasons).

[467] The CHCC Board had a number of different roles and responsibilities in considering the Citadel Acquisition and the Reorganization. The directors had a fiduciary duty to CHCC as a corporate law matter. CHCC had a fiduciary duty to CHF as IFM and a fiduciary duty to unitholders as trustee under the CHF Declaration of Trust. It appears from some of the comments of the CHCC directors that they were more focused on the preservation of or increase in the assets of CHF than they were on the interests of unitholders. We note that preserving or increasing the assets of CHF also preserved or increased the management fees payable to CHCC. Because CHCC was the IFM and trustee of CHF, the directors' obligation was to act in the best interests of CHF and its unitholders as a whole. *A key consideration should have been the prudence of investing more than 60% of the assets of CHF in an illiquid investment as part of a very material related party transaction that substantially benefited CHCC*. In considering the Citadel Acquisition, the CHCC Board should also have been focused on whether such a material transaction should have been submitted to unitholders for approval. We note that the CHCC Board did consider the issue of unitholder approval for the Citadel Acquisition (see paragraphs 423 and 424 of these reasons) but presumably decided that such approval was not necessary or desirable. *The CHCC Board should also have been concerned that the material changes being imposed on the Citadel unitholders through the proposed mergers, including increased management fees, potentially imperilled those mergers*.

[468] It potentially imperilled the mergers because (i) it was unfair to Citadel unitholders for CHCC to rely on a permitted merger provision for a merger where material and adverse changes were being made to the rights of unitholders without giving them a right to approve the merger or a right to redeem their units at NAV; (ii) adversely affecting Citadel unitholders' rights made it more likely that those unitholders would take steps to terminate the Citadel Management Agreements and trigger the obligation to pay termination fees that were substantially less than the $28 million invested by CHF in the rights to the Citadel Management Agreements; and (iii) Citadel unitholders would have been much more likely to redeem their units, particularly if the Commission required that a special redemption right at NAV be granted to unitholders. Pushka acknowledged that the Citadel Acquisition would not have been profitable without the mergers of the Citadel Funds with CHF (see paragraph 414 above).

[469] The circumstances referred to in clauses (ii) and (iii) of paragraph 468 above could also have undermined the value of the rights to the Citadel Management Agreements by reducing the NAV of the fund continuing after the mergers. We note that the amount of the termination fees stated by Pushka to be payable if the Citadel Management Agreements were terminated was revised downward twice, from $22 million to $18 million and then to $16 million. The purchase price of the rights to the Citadel Management Agreements was, of course, $28 million. The amount of those termination fees was an important consideration in deciding whether CHCC should have caused CHF to make the Citadel Acquisition (see paragraph 443 of these reasons).

[470] We also note that the Citadel Acquisition was carried out under some significant time pressure. The first meeting of the CHCC Board to consider the Citadel Transaction was held on May 15, 2009. A subsequent meeting was held on May 21, 2009 and the June 09 Circular was approved on May 29, 2009. That means that a very material, relatively complex and novel transaction involving the acquisition of the management contracts of 13 different investment funds, and the subsequent merger of seven or eight of those funds with CHF, giving rise to numerous issues, was approved by the CHCC Board over a 15-day period. The Citadel Acquisition itself was completed on June 3, 2009. Ringelberg testified that adequately addressing such a complex transaction takes a significant amount of time.

[471] Overall, the governance records of CHCC with respect to the CHCC Board and IRC meetings related to the Citadel Transaction are a shambles (see, for instance, paragraphs 458 and 494 of these reasons). That does not assist the Respondents in satisfying the onus on them. If we cannot conclude based on the evidence that the CHCC Board and/or the IRC acted on an informed basis in addressing the Citadel Transaction, CHCC cannot rely on the purported approvals by the CHCC Board, or the recommendation made by the IRC, as a basis for concluding that (i) CHCC appropriately addressed the conflicts of interest arising in connection with the Citadel Transaction; and (ii) complied with its fiduciary duty.

Conclusions

[472] While it is clear that the CHCC Board considered the overall Citadel Transaction (as reflected in the Stikeman Steps Memo), the CHCC Board did not pass a resolution approving the Citadel Acquisition or the Reorganization. The CHCC Board approved only the June 09 Circular related to the Reorganization. The Citadel Acquisition was, without doubt, a very material transaction that required CHCC Board approval. *As a result, CHCC had no legal authority to cause CHF to enter into the Citadel Acquisition. The responsibility for causing CHF to enter into that transaction lies solely with CHCC and Pushka*. In any event, based on the discussion in paragraphs 461 to 470 of these reasons, we are not satisfied that CHCC and Pushka disclosed sufficient information to the independent CHCC directors to permit them to approve the Citadel Acquisition or the proposed Reorganization on a fully informed basis (had they done so).

5. IRC Meetings Related to the Citadel Transaction

[473] On May 21, 2009, Pushka sent an e-mail to the members of the IRC indicating that CHCC was negotiating a substantial transaction "whereby we may be acquiring $1 billion in assets for $28 million." The e-mail stated that:

> … [t]he purpose behind the transaction is to merge about $850 million in assets into the Crown Hill Fund. Between the purchase of the management contracts and the merger there will likely be two or three IRC reviews of each transaction step. The first step we plan on doing post acquisition is to hold a unitholder meeting of Crown Hill Fund on June 29, 2009. The Information Circular for the meeting is currently being drafted (I haven't seen it yet). *We require the IRC to review the circular and state its view as to the fairness to unitholders. I don't think you will have any difficulty with this since the economics should be clearly in the unitholder's* [*sic*] *interest. … Hopefully we could do this over the telephone if you have scheduling difficulties (or even by e-mail if you are sufficiently comfortable with the Circular. …*
>
> [emphasis added]

[474] On the same day, CHCC wired $28 million to BLG in trust to fund the proposed purchase of the rights to the Citadel Management Agreements.

May 29, 2009 IRC Meeting

[475] A meeting of the IRC was held at BLG's offices on Friday, May 29, 2009 for just under one hour. The three members of the IRC, all of whom participated by telephone, Pushka and Simoes were present.

[476] The minutes are short. It appears that Pushka tabled a draft of the June 09 Circular and orally identified minor changes to the circular requested by the CHCC Board (those changes were not identified in the minutes). The CHCC Board had met earlier that day and had approved the June 09 Circular (see paragraph 436 of these reasons). No resolution was passed at the IRC meeting.

[477] The minutes state that "Mr. Pushka then explained the details of the Citadel transaction to the IRC." The minutes state that "[a]fter a few questions from the IRC it was agreed that another meeting would be held on Monday June 1st so that all members would have the opportunity to review the revised draft of the information circular."

[478] The minutes also state that "Andrew Fleming asked the President to obtain an opinion from Stikeman's. The President said he would speak to Darin Renton."

[479] Simoes's notes of the meeting indicate that Pushka stated, among other things, that:

(a) "What is happening is that we are purchasing a group of funds from Citadel. *The IRC will not need to approve that transaction. ... Because it is an arms* [*sic*] *length investment of the fund with a vendor.*" [emphasis added]

(b) "We will set up a LP [limited partnership] where [CHCC] has a subordinated interest, the Fund transfers the contracts into the Joint Venture LP and gets an immediate $4M return. So the JV LP owes the Fund $32M right away. Current CHF unitholders receive a $4M bump in their Fund, which works out to $.50/unit increase right away. The CHF would grow in size from $42M to $850M."

(c) "As soon as the merger happens, the Fund receives first interest in the income. CHCC will not be getting any income for the first few years."

(d) "The reason for changing to the CNSX is that the TSX has a rule where the target funds have a right to redeem. They will not be able to enforce this so they will restrict the issuance of units of the continuing fund. We would lose a lot of the assets coming from the other funds. The CNSX is a registered exchange by the Ministry of Finance."

(e) "What we are seeking is to do it all at once. If that is not approved then we would pick a couple of funds and do it in parts ... the vote is to do all the mergers at once."

(f) "Remember that there is a PM [portfolio manager] involved as well. Ultimately we are doing this to achieve the greatest economic benefit to the fund. *If Unitholders were against the mergers then we would just run the funds.* But I think the fund could make more money if they are merged." [emphasis added]

[480] In our view, Pushka's characterization of the proposed transaction set out above was misleading. He first states in his e-mail that "I don't think you will have any difficulty with this since the economics should be clearly in the unitholder's interest." That is a shocking characterization of a very material related party transaction under which CHCC would substantially benefit as a result of increased management fees. Further, at the May 29, 2009 IRC meeting, he advised the IRC that it would not need to "approve" the Citadel Acquisition (under which more than 60% of the assets of CHF would be invested in the rights to the Citadel Management Agreements). He stated that the only objective of the transaction was to achieve the greatest economic benefit for CHF. That fails to clearly characterize the Reorganization as a related party transaction under which CHCC would substantially benefit. Pushka also failed to fairly describe the rationale for the TSX policy requiring that a special redemption right at NAV be granted to unitholders where they have not approved a merger and he suggested that the IRC should take comfort from Robson's involvement in the transaction (with respect to the

latter, see the discussion commencing at paragraph 539 of these reasons). Pushka also suggested that if unitholders objected to the fund mergers, CHCC could "just run the [Citadel] Funds". That ignores the question whether the Citadel Acquisition was an appropriate investment for CHF in the first place, particularly if there were no mergers of the Citadel Funds with CHF, and it ignores the investment risks created by that acquisition.

[481] Simoes's notes also indicate that Campbell asked "[i]f 50% of the funds are redeemed, do we still have $28M to pay back?" Pushka responded "[n]o, the obligation is reduced because of the reduction in the fund." Pushka's response was not true. Once CHF purchased the rights to the Citadel Management Agreements, there was no mechanism to reduce the amount of that investment based on redemptions by Citadel unitholders. CHF had the full investment risks upon making the Citadel Acquisition.

[482] Simoes's notes also indicate that Fleming stated that "I would like to get an opinion from Stikeman's on the deal, that would be helpful in making our decision." Fleming suggested in his testimony that he simply wanted to ensure that CHCC was receiving appropriate legal advice with respect to the proposed transaction.

[483] Simoes's notes also reflect the following comments:

Campbell:	But we are voting on the interest [*sic*] of the current Unitholders. Even if the fund purchases the Citadel funds and there is a delay in merging them, if we approve this now then we are approving that you can keep running things until they are all merged in.
Campbell also stated:	From a business point of view, I think it is terrific as long as we keep accruing benefits to Unitholders. If [*sic*] the next one gets more complicated.
Pushka:	There won't be a next one, CHF will have $800M in assets.
Campbell:	It just gets harder and harder to see the benefit for Unitholders. We have a responsibility solely to the unitholders of the trust, our interest is to the Unitholders of CHF only. If having more mass brings a benefit, I don't see any issues.

June 1, 2009 IRC Meeting

[484] A second IRC meeting was held for 30 minutes at BLG's offices on Monday, June 1, 2009 (following the Friday meeting on May 29, 2009). The members of the IRC, all of whom participated by telephone, Pushka and Simoes were present. The minutes indicate that Campbell was disconnected at some point from the meeting as a result of a bad telephone connection. Maxwell followed up with him after the meeting (see paragraph 493 below).

[485] The minutes of the meeting are short. The business of the meeting was the review of the draft June 09 Circular. The minutes indicate that a revised draft of the circular had been sent to the IRC members prior to the meeting.

[486] The minutes state that:

> Mr. Andrew Fleming asked if management had received a letter from Stikeman's saying whether the trust was able to do what it was doing. The President said that Stikeman's [*sic*] will deliver something in the future, as per Mr. Darin Renton.

[487] The minutes also state that "[i]t was agreed that the IRC was to approve the acquisition of the management agreements at this time and not the mergers." That statement is inconsistent with Pushka's statement referred to in paragraph 479(a) above that the IRC did not need to approve the acquisition of the rights to the Citadel Management Agreements and what the IRC actually approved at the meeting (which was the Reorganization). Fleming was clear in his testimony that the IRC did not address the Citadel Acquisition.

[488] The IRC passed the following unanimous resolution:

> Be it resolved that the Independent Review Committee of the Trust [CHF] has reviewed the reorganization and recommended that, in its opinion, the terms of the Reorganization that raise a conflict of interest achieve a fair and reasonable result for the Trust.

[489] As noted elsewhere in these reasons, the Reorganization was defined in the June 09 Circular as not including the Citadel Acquisition. In passing the resolution above, the IRC had before it a draft of that circular.

[490] Simoes's notes of the meeting indicate that:

(a) Fleming said: "Last time we discussed getting a letter from Stikeman saying that the trust is able to do what it is doing. Where are we on that?" Pushka responded "Yes, Darin said he will get that but he doesn't know when";

(b) various relatively minor changes were proposed to the language in the draft June 09 Circular (those changes were not identified in the minutes);

(c) Fleming asked "[b]ut what if the merger does not happen." Pushka responded "[b]ut the increased liquidity and increased NAV will still happen." (That statement is obviously not true. Pushka stated in his testimony that the statement was Simoes's mistake as note taker. He acknowledged the obvious point that there would be no increase in liquidity or NAV if there were no mergers of the Citadel Funds with CHF.)

[491] Simoes's notes also reflect the following exchanges:

> Fleming: Yes, but we are approving the acquisition and whether it achieves a fair and reasonable result. We need to decide if putting the management rights into a joint venture achieves a fair result.
>
> Pushka: Well it's not paying the management fee to me.
>
> Fleming: But it's still paying a management fee.
>
> Pushka: Yes but it is paying into an LP, from which it is getting the money back.
>
> Fleming: So the trust gets its own management fee.
>
> Pushka: Right.
>
> Fleming: So it [CHF] gets that, plus $4M, plus the management fee, plus the increase in liquidity and reduced MER. So the trust is not spending any money to get this. It's probably beneficial to the trust to get its own management fees back even if the transaction doesn't work. So, approving the transfer into an LP. [*sic*]

Fleming's comment above seems to initially suggest that the IRC was approving the Citadel Acquisition, although he noted that the IRC was deciding whether putting the management rights into a joint venture achieved a fair result. The exchange fails to reflect the fact that CHF would be investing $28 million in acquiring the rights to the Citadel Management Agreements prior to the Reorganization. It also fails to reflect the fact that the proposed Reorganization constituted a related party transaction that conferred substantial benefits on CHCC. Further, if the transaction was not a financial success, CHF could lose all or a portion of its investment.

[492] Pushka also stated that the timeline for the merger of the Citadel Funds was "[w]ell, if this is approved and the details approved, then we'll get everything together in early July and pull the trigger late in July."

[493] In an e-mail from Campbell to Maxwell, Fleming and Simoes dated June 1, 2009, Campbell confirmed his approval of the resolution passed at the June 1, 2009 IRC meeting. Campbell had been participating by telephone in the meeting and had been disconnected before the resolution was passed. He made a comment in that e-mail that "[i]t is much better eliminating the verbiage re the possibility of some of the Citadel Funds not merging immediately."

6. Discussion of IRC Recommendation

IRC Recommendation

[494] There is some inconsistency in the evidence as to exactly what transaction or transactions the IRC was considering. The minutes of the June 1, 2009, IRC meeting state that "it was agreed that the IRC was to approve the acquisition of the management agreements at this time and not the mergers" (see paragraph 487 above). That statement was inconsistent with Pushka's earlier statement (referred to in paragraph 479(a) above) that the IRC "will not need to approve that transaction…". The resolution actually passed by the IRC indicates that the IRC "reviewed the reorganization [*sic*] and recommended that, in its opinion, the terms of the Reorganization that raise a conflict of interest achieve a fair and reasonable result for the Trust" (see paragraph 488 above). Accordingly, the IRC recommended the Reorganization as achieving a fair and reasonable result for CHF. We note in this respect, however, that the Reorganization purported to include the mergers over time of the Citadel Funds with CHF. The IRC recommendation of the Reorganization was, however, not contingent on those mergers actually occurring.

[495] At the June 1, 2009 IRC meeting, the members of the IRC reviewed the disclosure in the June 09 Circular which related to obtaining unitholder approval of the Reorganization, as defined. The Reorganization involved the transfer of the rights to the 13 Citadel Management Agreements to the Joint Venture to be established between CHF and CHCC. That was a related party transaction. The Reorganization did not include the prior acquisition by CHF of the rights to the Citadel Management Agreements pursuant to the Citadel Acquisition. Further, as noted above, the June 09 Circular referred to the acquisition by CHF of the rights to the Citadel Management Agreements as having occurred on June 3, 2009. That was after the IRC meeting held on June 1, 2009 but before the June 09 Circular was sent on June 8, 2009. *That meant that the IRC, on its own initiative in reviewing the June 09 Circular, or if the matter had been referred to it by CHCC, could have considered the issues related to the Citadel Acquisition and the risks created by completing it before any of the mergers of the Citadel Funds with CHF were certain*.

[496] There are comments reflected in the notes of the June 1, 2009 meeting that make clear that the members of the IRC recognized that there was a risk that, following the Reorganization, some of the Citadel Funds might not be merged with CHF (see paragraphs 490(c) and 493 above).

[497] Because the Citadel Acquisition was not submitted to the IRC for review, there was no consideration given by the IRC to the question whether that investment was prudent for CHF in the first place and whether CHF unitholder approval should have been obtained for it. These were important questions given the nature and size of the Citadel Acquisition. The CHCC Board had given some consideration to these issues (see paragraph 424 of these reasons).

[498] We understand that, as a result of the position taken by the seller of the rights to the Citadel Management Agreements, CHCC could not delay the Citadel Acquisition to

permit a CHF unitholder vote on the Reorganization. There is an e-mail dated May 17, 2009 from Renton to Julie Hesse (of BLG) (which was also sent to Pushka, Shaul, Page and others) that states that "[d]ue to the timing of the acquisition, we have to seek unitholder approval for the related party transaction after the fact." However, completing the Citadel Acquisition before any fund mergers were certain shifted all of the investment and other risks to CHF and deferred the benefits to CHF and its unitholders arising from those mergers (see paragraph 517 of these reasons as to the benefits of the Reorganization to CHF unitholders). The decision to proceed with the Citadel Acquisition in these circumstances appears to have been a unilateral decision made by CHCC and Pushka without legal authority from the CHCC Board (see paragraph 472 of these reasons). It was not a decision considered by the IRC.

[499] We note that Pushka had previously stated to the IRC that it was not being asked to approve the acquisition of the rights to the Citadel Management Agreements because that acquisition was an arm's length transaction (see paragraph 479(a) of these reasons). While the rights to the Citadel Management Agreements were, of course, purchased by CHF from a third party, that acquisition was funded by CHF and increased management fees to CHCC when it became the IFM of the Citadel Funds, and the acquisition was linked to the Reorganization which constituted a material related party transaction under which CHCC would substantially benefit. That benefit to CHCC created a conflict of interest on the part of CHCC in causing CHF to carry out the Citadel Acquisition. Further, because the Citadel Acquisition was not directly submitted to the IRC for its consideration, CHCC did not have to explain to the IRC why more than 60% of the assets of CHF were being invested in the rights to the Citadel Management Agreements. It is a wholly inadequate justification for not submitting the Citadel Acquisition to the IRC for its consideration for Pushka to say that the Citadel Acquisition on a stand-alone basis was an arm's length transaction.

[500] Given the focus of the June 1, 2009 IRC meeting on the disclosure in the June 09 Circular and that the resolution passed by the IRC addressed only the Reorganization, we conclude that the IRC did not consider or recommend the acquisition by CHF of the rights to the Citadel Management Agreements pursuant to the Citadel Acquisition. That is an important conclusion because it means that there was no IRC consideration of the decision by CHCC to cause CHF to acquire the rights to the Citadel Management Agreements for $28 million. That investment was clearly material; it constituted more than 60% of the assets of the CHF. It also exposed CHF to very significant investment and other risks. By completing the Citadel Acquisition on June 3, 2009, CHF unitholders were given little choice but to approve the Reorganization (that was a related party transaction that conferred substantial benefits on CHCC) at the June 29, 2009 unitholder meeting (see paragraph 532 of these reasons). It was a crucial decision by CHCC and Pushka to have caused CHF to complete the Citadel Acquisition on June 3, 2009. It was irresponsible of CHCC and Pushka to have done so (see paragraph 554 of these reasons).

[501] In our view, CHCC should have referred the Citadel Acquisition and the Reorganization to the IRC as one linked transaction giving rise to a conflict of interest matter. CHCC did not do so. By completing the Citadel Acquisition before obtaining unitholder approval of the Reorganization, and by requesting an IRC recommendation

only with respect to the Reorganization, CHCC and Pushka did not act in good faith and in the best interests of CHF.

[502] Further, it is clear that the principal basis upon which the Citadel Transaction was justified as benefiting CHF and its unitholders arose only upon the mergers of the Citadel Funds with CHF (see paragraph 574(c) of these reasons). Those benefits would not accrue to CHF and its unitholders unless the Reorganization was approved by unitholders, and was completed, and the subsequent fund mergers actually occurred. We also note that, if there were no mergers of the Citadel Funds with CHF, the Citadel Acquisition was clearly contrary to the terms of the CHF Declaration of Trust (see the discussion commencing in paragraph 580 of these reasons).

Information before the IRC and IRC Review

[503] The IRC made a recommendation with respect to the Reorganization that was described in the June 09 Circular. We are not satisfied that the IRC had sufficient information before it to do so on a fully informed basis.

[504] First, it is not clear whether the IRC understood that the Reorganization would result, in effect, in a sale of the rights to the Citadel Management Agreements to CHCC (see, for instance, the exchange set out in paragraph 491 of these reasons). CHF paid $28 million for the rights to those agreements and CHCC proposed to transfer those rights to the Joint Venture in exchange for $28 million and the Preferred Return. Once those amounts were paid to CHF, the rights in the Citadel Management Agreements passed to CHCC through its subordinated interest in the Joint Venture. There appears to have been no discussion at the IRC of the value of the rights to the Citadel Management Agreements and what CHCC was, in effect, paying to acquire them. That is not simply a question of the Preferred Return that CHCC expected CHF to receive. Further, there are statements in Simoes's notes that suggest that the IRC viewed the Reorganization as being justified provided there was some benefit to CHF and its unitholders (see paragraph 483 of these reasons).

[505] We recognise, in this respect, that CHCC proposed to assign its rights to the CHF Management Agreement to the Joint Venture in return for the subordinated interest in the Joint Venture. That meant that the payments required to be made by the Joint Venture to CHF were supported both by the rights to the Citadel Management Agreements and by the rights in the CHF Management Agreement. It was not clear, however, how the Fairway Loan was addressed as part of the Reorganization. There is no mention of the Fairway Loan in the June 09 Circular. Any transfer of the rights to the CHF Management Agreement should have addressed that obligation.

[506] Further, while there was a discussion of the Preferred Return, there does not appear to have been a discussion of how it was determined or what the appropriate tax treatment would be. The Preferred Return was determined by Pushka, a party who would benefit from a lower return to CHF. Further, the June 09 Circular states that one of the benefits of the mergers is "an increase in the Net Asset Value of approximately $0.50 per Unit" (see paragraph 573 of these reasons). That increase in NAV was a result of the

Preferred Return, which constituted the return to CHF of having, in effect, sold its rights in the Citadel Management Agreements to CHCC in a related party transaction (see paragraph 519 of these reasons).

[507] Robson's involvement in the Citadel Acquisition as portfolio manager appears to have been limited. Shaul grudgingly acknowledged having approved the transaction in the sense that he did not raise an objection to it (see paragraph 539 of these reasons). His testimony was somewhat at odds with Pushka's reassurance to the IRC relating to the involvement of the portfolio manager (referred to in paragraph 479(f) of these reasons). Shaul did not attend any of the CHCC Board or IRC meetings during the relevant time.

[508] The resolution passed by the IRC and the disclosure in the June 09 Circular with respect to the recommendation of the IRC indicates that the IRC recommended "… the terms of the Reorganization that raise a conflict of interest" (see paragraph 488 of these reasons). That characterization provided no guidance to unitholders as to what those terms were. While we understand that the IRC would not have wanted to give a blanket recommendation with respect to the Reorganization, it seems to us that the result was that the June 09 Circular did not adequately disclose to unitholders the nature of the related party transaction and the conflicts of interest on the part of CHCC that were inherent in it (see paragraph 574(b) of these reasons).

[509] The CHCC Board understood that the Citadel Acquisition involved "severe risk" to CHF. There was at least a possibility that unitholders of the Citadel Funds might requisition unitholder meetings and vote to terminate some or all of the Citadel Management Agreements. If that occurred, CHF would receive only approximately $16 million (for rights that CHF paid $28 million to acquire; see paragraph 528 of these reasons). There is no evidence that the IRC was made aware of this information. Further, when Campbell asked what would happen if 50% of the units of the Citadel Funds were redeemed, Pushka responded that the obligation to repay the $28 million would be reduced. That response was not true (see paragraph 481 of these reasons). In our view, this information was very relevant even if the IRC ultimately was approving the Reorganization and not the Citadel Acquisition.

[510] It does not appear that the Stikeman Steps Memo was given to or reviewed by the IRC. As a result, the IRC did not consider the entire Citadel Transaction and it does not appear to have asked the key question why CHF was not concluding the transaction after step 3 (that is to say, before the related party transaction with CHCC). That question had been raised by Allen at the CHCC Board (see paragraph 461 of these reasons) and was at the core of understanding the nature of the Reorganization as a related party transaction.

[511] There is no evidence that the IRC received any direct legal advice from BLG, the law firm that Pushka testified was acting on behalf of the portfolio manager of the CHF in connection with the Citadel Transaction (see paragraph 598 of these reasons and the discussion of BLG's representation commencing at paragraph 615). The interests of the CHF portfolio manager and the IRC should have been aligned in that their responsibility was to protect the interests of CHF and its unitholders. *Stikeman had a conflict of interest in providing advice to the IRC with respect to the Reorganization because it was acting*

for CHCC, a party to that related party transaction that would substantially benefit from it. That should have raised the important question for the IRC whether it should have obtained independent legal advice. In the circumstances, it was not reasonable for the IRC to have relied only on Stikeman's legal advice because of Stikeman's conflict of interest in representing CHCC. It is somewhat ironic that the two IRC meetings to consider the Reorganization were held at BLG's offices (although all of the IRC members participated by telephone and no one from BLG participated).

[512] We are also concerned with the following matters:

(a) While Fleming was aware that the proposed transaction was a large one, there does not appear from the evidence to have been a discussion at the IRC that the $28 million cost of the Citadel Acquisition represented more than 60% of the assets of the CHF. That was a crucial factor in assessing whether the Citadel Acquisition was prudent and in the best interests of CHF. That fact alone should have set off warning bells and should have galvanized the IRC into taking a much more active role in reviewing that transaction (see paragraph 514 below). Further, there does not appear to have been any discussion of (i) how CHF would fund that purchase price from the assets of the fund; (ii) how that investment would be valued for purposes of NAV; or (iii) the illiquid nature of the investment. While we have concluded that the IRC did not address the Citadel Acquisition, it seems to us that these were important issues *given that the Citadel Acquisition had not been completed* at the time the IRC made its recommendation with respect to the Reorganization.

(b) It appears that the only explanation given to the IRC of the Reorganization was given by Pushka orally and by reference to a draft of the June 09 Circular. There is no evidence that the Stikeman Steps Memo was given to the IRC. This is important because it means that the members of the IRC would have been more focused on the disclosure in the June 09 Circular than on the nature and implications of the Citadel Acquisition and the Reorganization.

(c) The IRC knew that the listings of the units of CHF and the Citadel Funds were being moved from the TSX to the CNSX. There is no evidence that there was a discussion by the IRC as to why the TSX had a policy requiring that a special redemption right at NAV be given to unitholders of a fund where a merger was being carried out without a unitholder vote. That raised a question of basic fairness to unitholders of the Citadel Funds that should have been a concern of the IRC because of the risk that those mergers might not occur. The IRC recommended a related party transaction that involved active steps by CHCC to avoid the application of the TSX policy by moving the listings to the CNSX.

(d) The IRC did not hear directly from Stikeman its legal advice with respect to the Reorganization and, as noted above, did not receive the Stikeman Steps

Memo. While the IRC requested an opinion from Stikeman (on at least two occasions), and Pushka indicated that one would be obtained, no written opinion was delivered before the IRC recommended the Reorganization (or, as it turned out, afterward). Notwithstanding Fleming's testimony, we do not know whether the IRC had a specific concern at the time with respect to the legality of the Citadel Acquisition or the Reorganization or merely wanted to ensure that CHCC obtained appropriate legal advice. *Further, the IRC was not made aware of the Stikeman legal analysis underpinning its opinion that the Citadel Acquisition complied with the CHF Declaration of Trust.* The IRC should not have recommended the Reorganization without seeing, or ensuring the delivery of, a satisfactory written opinion from Stikeman. The IRC should have received that advice even if Stikeman had a conflict of interest because it was acting for CHCC (see paragraph 514 below).

(e) It is shocking that Pushka would suggest to the IRC that it could approve the June 09 Circular by telephone or e-mail because "the economics should be clearly in the unitholder's [*sic*] interest…" (see paragraph 473 of these reasons). He did not fairly describe the Reorganization as a related party transaction under which CHCC would substantially benefit. To the contrary, Pushka appears to have suggested that he would not benefit from it (see paragraph 491 of these reasons).

[513] At the end of the day, the IRC recommended the Reorganization after two telephone meetings separated by a weekend that lasted a total of one and a half hours. It appears that the only written material they had before them was Pushka's e-mail referred to in paragraph 473 of these reasons and drafts of the June 09 Circular. In our view, the IRC had insufficient information before it to make a recommendation with respect to the Reorganization on a fully informed basis.

Conclusion

[514] An independent review committee must exercise due care. Under subsection 3.11(1) of NI 81-107, an independent review committee can request from an IFM any further information it determines to be useful or necessary to carry out its duties and it can engage independent legal counsel and other advisors for the same purpose (see paragraph 164 of these reasons). In this case, the Reorganization constituted a material related party transaction under which CHCC would substantially benefit. Before making its recommendation, the IRC should have (i) received detailed information as to the steps and transactions involved in the overall Citadel Transaction to ensure that it fully understood those steps and transactions (such as reflected in the Stikeman Steps Memo presented to the CHCC Board); (ii) received advice directly from Renton as legal counsel for CHCC and from Shaul as CHF portfolio manager; and (iii) obtained independent legal advice (because Stikeman had a conflict of interest because it was acting for CHCC in the Citadel Transaction). The IRC was too passive in relying on the information communicated by Pushka and on the oral representations made by him. Nonetheless, it appears to us that the IRC relied on Pushka in good faith.

[515] At the end of the day, it was CHCC that had the obligation under subsection 2.4(1)(a) of NI 81-107 to "provide the independent review committee with information sufficient for the independent review committee to properly carry out its responsibilities…" (see paragraph 158 of these reasons). As a result, CHCC and Pushka had a heavy responsibility to ensure that the IRC understood the Citadel Transaction, including the risks to CHF created by the Citadel Acquisition, the nature of the Reorganization as a related party transaction, the benefits to CHCC, and all of the material issues that those transactions raised. In our view, CHCC and Pushka failed to adequately discharge that responsibility.

[516] The Citadel Acquisition was not referred by CHCC to the IRC for its consideration and the IRC did not make any recommendation with respect to it. Further, given the failure of CHCC to provide sufficient information to the IRC to permit the IRC to recommend the Reorganization on a fully informed basis, we find that CHCC has not established that it can rely upon the IRC's recommendation of the Reorganization as a basis for the conclusion that CHCC appropriately addressed the conflicts of interest arising from it.

7. Risks and Benefits of the Citadel Transaction

Benefits of the Citadel Transaction

[517] The acquisition by CHF of the rights to the Citadel Management Agreements and the Reorganization were justified by Pushka to the CHCC Board and to unitholders in the June 09 Circular on the basis of the increased liquidity of the CHF units after the merger of the Citadel Funds with CHF, the spreading of the fund's fixed costs over a larger number of units thereby reducing MER, and the Preferred Return that would likely result in an increase in CHF's NAV if Citadel Funds, with a NAV of at least $600 million, merged with CHF (see paragraph 573 of these reasons). *All of those benefits as described in the June 09 Circular arose only upon the mergers of the Citadel Funds with CHF.*[10] It seems to us that linking the Reorganization to the fund mergers in this way was an improper attempt by CHCC to obscure the related party transaction and to inappropriately justify it based on future contingent events (i.e., the mergers of the Citadel Funds with CHF). Doing so was not an omission or misunderstanding on the part of CHCC or Pushka.

[518] In any event, Staff submits that the benefits to CHF unitholders of increased liquidity and a lower MER were not significant given the benefits already achieved by the mergers of MACCs with CHDF and of CHF with the Fairway Fund. In this respect, Ringelberg testified that, when the size of a fund reaches approximately $40 to $50 million, the expenses of the fund are generally "running at a fair rate". At the time of the Citadel Acquisition, CHF had approximately $44 million of assets under administration. The Citadel Funds proposed to be merged with CHF had between $600 and $800 million of assets under administration (the June 09 Circular assumed mergers of Citadel Funds with an aggregate NAV of $600 million). However, Pushka acknowledged

[10] We recognise in this respect that if CHF unitholders approved the Reorganization, then CHF would receive the Preferred Return whether or not subsequent mergers of the Citadel Funds with CHF actually occurred.

in his testimony that there were marginal additional benefits to unitholders of the CHF in terms of the increased liquidity of their units and improved MER. Pushka testified that:

> The whole idea of lower MER, higher liquidity starts becoming -- it was leaving me a little cold at that point. You know, we already had a lower MER. We already had some higher liquidity. Now, we could knock the MER down a little bit more and we could bump the liquidity up more, but that was not enough to – if I were a unit holder I wouldn't be impressed by that marginal change. There had to be something more substantial.

Later, in cross-examination, he stated that:

> What left me cold was if we had simply, by going through the Citadel acquisition method of the fund funding the acquisition, it’s just an improvement to MER from 1.8 percent to let’s say 1.6 percent or 1.5. It’s unlikely that we would have got below that. It left me cold. The increased liquidity would have been fine, but again, it still would have left me cold. There needed to be something more for the Crown Hill Fund unitholders for taking on that risk.

That “something more” was the increase in CHF’s NAV as a result of the Preferred Return.

[519] To the extent that the Citadel Transaction was justified by Pushka based on the potential increase in CHF’s NAV, that increase was based on the Preferred Return and assumed that Citadel Funds with a NAV of at least $600 million would be merged with CHF. We note in this respect that (i) the Preferred Return was the return to CHF of having, in effect, sold its rights in the Citadel Management Agreements to CHCC in a related party transaction; (ii) the amount of the Preferred Return was established by Pushka, who had a conflict of interest in doing so; and (iii) if the Reorganization was not approved by CHF unitholders and did not proceed, CHF would not receive the Preferred Return. In that event, CHF unitholders would receive only the marginal benefits of a lower MER and increased liquidity. Further, in the event that the Reorganization did not proceed, CHF would be left holding the rights to the Citadel Management Agreements, subject to the investment and other risks to which that investment was subject. Pushka acknowledged in his testimony that the Citadel Acquisition would not have been profitable without the mergers of the Citadel Funds with CHF.

[520] Accordingly, the benefits to CHCC of the Citadel Acquisition, the proposed Reorganization and the mergers of the Citadel Funds with the CHF were very substantial and disproportionate relative to the potential benefits accruing to CHF and its unitholders as a whole.

[521] Pushka advised the CHCC Board that the annual management fees payable by the Citadel Group of Funds were approximately $6.0 to $6.5 million. Pushka also advised the CHCC Board that he expected those fees to increase to $9.5 to $10 million as a result of the mergers of the Citadel Funds with CHF. Lo testified that for the period from June

2009 to November 2009, those management fees were approximately $550,000 to $600,000 a month. Pushka testified that the increase in fees was in part a function of the elimination of trailer fees.

[522] We note, in this respect, that the management fees paid by CHF (and its predecessor, CHDF) to CHCC for the year ended December 31, 2008 were $44,218. The MACCs management fees for the year ended December 31, 2008 were $21,767. The CHF management fees for the year ended December 31, 2009 had increased to $606,404 (because of the increase in NAV as a result of the mergers of MACCs with CHDF and the merger of CHF with the Fairway Fund) and further increased to $2,458,427 for the year ended December 31, 2010 (because of the increase in NAV resulting from the merger of five of the Citadel Funds with the CHF in December 2009). Accordingly, it is clear that CHCC benefited substantially from those transactions and disproportionately relative to the benefits to CHF and its unitholders as a whole.

[523] Accordingly, the benefits to CHF and its unitholders of the Citadel Transaction as a result of a lower MER and increased liquidity were marginal at best, which Pushka acknowledged (see paragraph [518] above). To the extent that the Citadel Transaction was justified on the basis of the increased CHF NAV, it assumed mergers of the Citadel Funds, with a NAV of at least $600 million, with CHF and rested on a related party transaction that conferred substantial benefits on CHCC. It appears to us that the independent directors of CHCC and the IRC took at face value Pushka's representations as to the potential benefits to CHF and its unitholders of the Citadel Transaction. Those representations raised more questions than they resolved. The Citadel Acquisition and the Reorganization cannot be justified simply because there may have been some marginal benefits to CHF and its unitholders as a result of proposed subsequent merger transactions.

Risks of the Citadel Acquisition

[524] Staff alleges that CHCC breached its fiduciary duty to CHF by causing CHF to acquire the rights to the Citadel Management Agreements and by doing so before the unitholder vote on the Reorganization and before any of the Citadel Fund could be merged with CHF. There were a number of very substantial risks to CHF created by CHCC's decision to complete the Citadel Acquisition before the unitholder vote on the Reorganization and before any mergers of the Citadel Funds with CHF were certain.

Investment Risk

[525] There was the investment risk of putting more than 60% of CHF's assets into an illiquid investment that created challenges for valuing as part of CHF's NAV. That investment was quite different, in both size and character, from the other passive CHF "income producing" investments. The CHF 2008 annual report refers to the investment philosophy of CHF as "conservative". As of December 31, 2008, approximately 80% of the assets of CHF were invested in a diversified portfolio of shares of Canadian and U.S. public companies and income funds (the balance was in cash and short-term investments). At that time, no single investment exceeded approximately 4.2% of the

assets of CHF (excluding the cash and short-term investments). The CHF Declaration of Trust required that the CHF have a "diversified portfolio" of income-producing assets. Unitholders would have been rightly shocked to learn that more than 60% of CHF's assets were invested in an illiquid asset that required the active management of other third party investment funds (see the discussion commencing at paragraph 576 of these reasons whether the Citadel Acquisition complied with the CHF Declaration of Trust).

[526] On the face of it, the investment of more than 60% of CHF assets in the rights to the Citadel Management Agreements was highly imprudent. In our view, that investment was well outside the range of reasonable investment alternatives for CHF.

[527] One of the risks involved in acquiring the rights to the Citadel Management Agreements without contemporaneous mergers of the Citadel Funds with CHF related to the economics of that acquisition. Pushka expected increased revenues as a result of the mergers because of CHF's higher management fee structure (see paragraph 411(e) of these reasons). That was one of the grounds upon which Pushka relied in recommending the Citadel Transaction to the CHCC Board. That was a very material consideration regardless of whether or not the Citadel Acquisition would have been profitable without that increase in management fee revenue. Those management fees also supported the repayment to CHF of its $28 million investment and the Preferred Return (see the discussion below of transaction and regulatory risks).

Transaction Risks

[528] If the unitholders of the Citadel Funds voted to terminate the Citadel Management Agreements, the relevant Citadel Funds would have been obligated to pay CHF (assuming that CHF was holding the rights in those agreements) aggregate termination fees of approximately $16 million (based on Pushka's statement at the CHCC Board meeting on June 22, 2009; see paragraph 443 of these reasons). Those termination fees were substantially less than the $28 million paid by CHF for the acquisition of the rights to the Citadel Management Agreements. Pushka advised the CHCC Board that terminations of those agreements were unlikely. Nonetheless, they were a real risk given the controversial nature of the proposed mergers from the perspective of the Citadel unitholders and the material changes that were proposed to be made to the rights of Citadel unitholders, including increased management fees, through the mergers (see paragraph 530 below).

[529] While CHF acquired the rights to the 13 Citadel Management Agreements, Pushka knew that not all of the funds would be merged with CHF. For example, two of those funds had sufficiently different investment strategies so as to make a merger with CHF not suitable. Pushka intended to merge seven of the eight Citadel Funds with CHF pursuant to applicable permitted merger provisions. He did not intend to give unitholders of those funds a right to vote on the mergers or a right to redeem their units based on NAV.

[530] Pushka knew that the mergers of the Citadel Funds with CHF would be controversial given the changes being made to the Citadel unitholders' rights, including

the increased management fees, through the mergers. All of the Citadel Funds to be merged with CHF had management fees of less than 1% (the level of the IFM fees for CHF), four of the funds had yearly redemption rights at NAV, eight had mandatory repurchase rights and six had termination dates.[11] All of these rights would be lost or materially changed as a result of a merger with CHF because the CHF Declaration of Trust would then apply to the continuing fund. (We have addressed earlier in these reasons a number of the relevant terms of the CHF Declaration of Trust (see paragraphs 191, 202 and 243 of these reasons)). We have expressed our view with respect to the appropriateness of making material and adverse changes to the rights of unitholders by means of a fund merger without full disclosure and without obtaining unitholder approval or granting unitholders a special redemption right at NAV (see paragraphs 283 and 552 of these reasons). Further, the elimination of trailer fees paid to brokers was not going to be viewed by those brokers as a positive development. Pushka and Shaul were aware that eliminating those fees would be contentious.

[531] While the independent directors of CHCC were aware of the proposed increase in management fees payable by the Citadel Funds and that certain other material changes were to be made to the rights of Citadel unitholders, it does not appear that they were aware of or considered the full extent of the rights Citadel unitholders would lose as a result of the proposed fund mergers. There is no evidence that the IRC was informed of any of this information.

[532] Approval by CHF unitholders was required for the Reorganization. Pushka knew that and caused CHF to complete the acquisition of the rights to the Citadel Management Agreements before that approval was sought or obtained. By doing so, CHCC created very substantial risks for CHF and its unitholders and gave those unitholders little practical choice but to approve the Reorganization. In fact, the June 09 Circular stated that:

> **IF THE REORGANIZATION IS NOT APPROVED**
>
> If the Reorganization Resolution is not approved, it is unlikely that the anticipated increase in the net asset value of $0.50 per Unit will be achieved in a timely fashion, if at all. If the Reorganization Resolution is not approved, the Trustee intends to proceed with a reorganization of the business and affairs of the Trust and mergers of the Citadel Funds with the Trust without Unitholder approval, to the extent permitted under MI 61-101. Should the Reorganization Resolution not be approved, the Trustee expects that such transactions will be much more time consuming and expensive to complete.
>
> (June 09 Circular, pg. 16)

[11] There is some inconsistency in the evidence and testimony as to which Citadel Funds were to be merged with CHF without a unitholder vote in reliance on permitted merger provisions and as to what rights the unitholders of the various Citadel Funds would lose as a result of the mergers. Part of this inconsistency may be due to Pushka's changing view as to which Citadel Funds he proposed to merge and some differences in assessing the nature of the rights attached to those funds. The important point is that Pushka intended to significantly increase the IFM fees of all of the Citadel Funds merged with CHF and that the unitholders of a number of those funds would lose other material rights as a result of the mergers.

CHCC was essentially telling CHF unitholders that CHCC intended to carry out the Reorganization whether or not the unitholders approved it.

[533] CHCC became the IFM of the Citadel Funds after the Citadel Acquisition on June 3, 2009. As a result, CHCC became subject to a fiduciary duty owed to the Citadel Funds and their unitholders as a whole. As a result, CHCC had a conflicted position as IFM for both the CHF and the Citadel Funds subsequent to the Citadel Acquisition. Given the adverse effects of the mergers of the Citadel Funds with CHF on the rights of Citadel unitholders, we do not see how CHCC could have completed the mergers in the best interests of the Citadel unitholders without their approval or without giving them a right to redeem their units at NAV. Pushka intended to merge seven of the Citadel Funds with CHF pursuant to permitted merger provisions and without unitholder approval. In any event, an independent review committee was required to be established for the Citadel Funds and that committee was required, given CHCC's role as IFM of CHF and of the Citadel Funds, to fully consider such mergers from the perspective of the best interests of the Citadel Funds and their unitholders as a whole.

[534] By causing CHF to purchase the rights to the Citadel Management Agreements without the contemporaneous mergers of the Citadel Funds with CHF, CHCC subjected CHF to substantial investment and transactional risks without any certainty that the benefits arising from those mergers would be obtained. While CHCC subjected CHF to those risks, very substantial benefits accrued to CHCC in the form of increased management fees (see paragraph 522 of these reasons). *CHCC made the decision to risk CHF's assets in a transaction pursuant to which CHCC would substantially benefit.*

[535] Both the CHCC Board and the IRC knew, in advance of the Citadel Acquisition on June 3, 2009, that the rights to the Citadel Management Agreements were to be acquired by CHF before the unitholder vote on the Reorganization and before any mergers of the Citadel Funds with the CHF. The CHCC Board understood that created "severe risk" to CHF. Pushka does not appear to have fully explained that risk to the IRC.

Regulatory Risk

[536] The Citadel Transaction was novel and was very substantially larger than the Fairway Transaction. The Reorganization also constituted a related party transaction under MI 61-101 that required minority unitholder approval. CHCC knew that Staff had raised concerns with respect to the use of CHF's assets to make the Fairway Loan and, while CHCC had responded through its legal counsel, there was no assurance that Staff would be satisfied with that response (see paragraph 349 of these reasons).

[537] Seven of the eight Citadel Funds were proposed to be merged with CHF without unitholder approval pursuant to permitted merger provisions. Pushka knew that the TSX did not permit fund mergers pursuant to permitted merger provisions without unitholder approval unless the unitholders were given a special redemption right at NAV. CHCC had granted such a right to CHDF unitholders when it merged with MACCs (see paragraph 274 of these reasons). CHCC proposed to avoid granting such rights in the case of the Citadel Funds by transferring the listing of CHF and the Citadel Funds to the

CNSX. Further, as discussed above, CHCC proposed to make material changes to the rights of Citadel unitholders by means of the mergers and it had no intention of giving those unitholders a right to vote on the mergers or a special right to redeem at NAV.

[538] These considerations created a very substantial risk that securities regulators would intervene in the Reorganization and the subsequent mergers of the Citadel Funds with CHF. The transactional and regulatory risks described above created uncertainty whether CHCC's plans for the Reorganization and the mergers of the Citadel Funds with the CHF could be implemented as CHCC intended. CHCC and Pushka were well aware of these risks when CHCC caused CHF to complete the Citadel Acquisition, thereby imposing the risks on CHF and its unitholders.

8. Robson Involvement in the Citadel Transaction

[539] Shaul initially denied in his testimony that he approved the Citadel Acquisition as portfolio manager of CHF or viewed that transaction as part of his responsibilities as portfolio manager. He testified that he viewed the Citadel Acquisition "to be an action by the administrator by the manager/trustee, as opposed to a typical investment decision, if you will by a portfolio manager." He stated, however, that "[w]ell, I guess you can say I approved in the sense that I didn't raise any objection to it." He took the position, however, that he devoted considerable time and attention to whether the Citadel Acquisition was a suitable investment for CHF. He testified that he was satisfied that the return "was fair and attractive to unitholders of Crown Hill Fund". He also testified that he reviewed various aspects of the Citadel Acquisition, including the attributes of the Citadel Funds.

[540] Pushka testified that Shaul accompanied him to Alberta to negotiate the Citadel Acquisition and that Pushka would not have proceeded if Shaul had objected to the transaction. We note, in this respect, that in an e-mail dated May 16, 2009 from Julie Mansi [of BLG] to Shaul, which was copied to Page, it was stated that "[w]e understand that Robson as the investment adviser does in fact believe that the Citadel transaction (including the funding of CH LP) is in the interests of the unitholders of Crown Hill Fund and the merged fund…" That is, however, different than saying that Robson, as portfolio manager of the CHF, made an independent investment decision to have CHF invest more than 60% of its assets in the rights to the Citadel Management Agreements. That was clearly not the case.

[541] It is quite telling that the portfolio manager of CHF would take the position that it had not expressly approved the Citadel Acquisition.

[542] In any event, it is clear that CHCC and Pushka made the decisions to cause CHF to enter into the Citadel Acquisition and to propose the Reorganization. Pushka was the driving force behind those transactions and he negotiated and caused them to be carried out.

Controversy arising from Announcement of the Citadel Acquisition

[543] After the announcement of the Citadel Acquisition, the Commission received a number of complaints from investors in a number of the Citadel Funds with respect to the proposed mergers of the Citadel Funds with CHF. Those complaints focused on whether the mergers were fair to Citadel unitholders and included concerns that (i) Citadel unitholders in seven of the Citadel Funds were not being given an opportunity to vote on the mergers (because those mergers were to be carried out pursuant to permitted merger provisions without unitholder approval); (ii) the mergers would result in material changes in the nature of the unitholders' investments and their rights, without their consent; (iii) in a number of the Citadel Funds, an annual redemption right at NAV was being lost; (iv) the change in listing from the TSX to the CNSX constituted a denigration of the existing listing and was being done to avoid the TSX's regulatory requirements intended to protect the interests of unitholders; (v) there were no or limited benefits to the Citadel unitholders from the mergers; and (vi) unitholders should at least be given the right to redeem their units at NAV.

[544] In this respect, Bloom first became aware that the rights to the Citadel Management Agreements had been sold as a result of CHCC's announcement on June 4, 2009. Bloom testified that, when he reviewed CHCC's press release that day, he was "horrified".

[545] Bloom testified that he was concerned that the Citadel Funds were to be merged into CHF which was going to be delisted from the TSX and listed instead on the CNSX, an exchange which Bloom considered to have reduced visibility and less liquidity. He was also concerned that Citadel unitholders were not being given the opportunity to vote on whether they wanted the Citadel Funds to merge and unitholders were not being given a special redemption right at NAV.

[546] Bloom also testified that in the week or so following CHCC's announcement of the Citadel Acquisition, the market price "plummeted" for units of the six funds for which Bloom was portfolio manager. He testified that "at one point in time they went down to a 20 percent or more discount to the net asset value". In cross-examination, Bloom acknowledged that that loss of market value could also have been the result of an analyst's sell recommendation for the units of some of the Citadel Funds.

[547] We recognise that Bloom had a personal interest in the outcome of the Citadel Acquisition because he was portfolio manager of six of the largest Citadel Funds. CHCC's press release was silent as to who would be the portfolio manager for the various Citadel funds going forward. That would have been a very important issue from Bloom's perspective that directly affected his financial interest.

[548] In any event, CHCC and Pushka knew that the Citadel Acquisition and the proposed mergers of the Citadel Funds with CHF would likely be considered controversial by the unitholders of the Citadel Funds. That created real risks to the subsequent mergers of those funds with CHF.

9. Special Redemption Right at Net Asset Value

[549] We understand that, at the relevant time, the TSX had an unwritten policy requiring that unitholders of a closed-end investment fund be given a special redemption right at NAV where a merger of the fund was to be completed pursuant to a permitted merger provision without unitholder approval.

[550] Shaul stated in an e-mail to Pushka and Page on May 15, 2009 that:

> One aspect of the deal that we might have glossed over: the plan is to delist the Crown Hill Fund from the TSX and list on CDNX instead. This would take place before the merger with the Citadel Funds. The reason for this is a concern that the TSX might require that the unitholders of the Citadel Funds be granted a right to vote on the merger together with a special right to redeem at NAV even though the merger is being done under the permitted merger provisions of the Citadel Funds, and might grant these rights even for those Citadel Funds that do not currently have any annual redemption at NAV. This is a concern because of the position that the TSX took on the Fairway (Jovian) transaction. The granting of this redemption right would reduce the size of the resulting merged fund, thus reducing the liquidity and cost benefits of the transaction.

[551] Pushka characterized this TSX policy to the CHCC Board as being in the best interests of dealers rather than unitholders (see paragraph 420 of these reasons). His theory appears to be that granting such a redemption right gives dealers an arbitrage trading opportunity between the market price of the units and the NAV. His view also appears to be that redemptions reduce the number of units outstanding and NAV, and are therefore generally contrary to the best interests of unitholders. We do not agree with those submissions.

[552] Granting unitholders a special right of redemption at NAV in such circumstances is a matter of basic fairness. *While circumstances may, of course, vary, it does seem to us that if a change is being made to the attributes of a fund that materially and adversely affects the rights of unitholders, and those unitholders are not being given an opportunity to approve that change by a unitholder vote (including by a vote on a proposed merger), the unitholders should at least be given the right to redeem their units at NAV* (that principle would not apply to unitholders of the continuing fund whose rights are not being affected). Providing such a redemption right also imposes a discipline on IFMs not to propose changes or transactions that unitholders may not view as being in their best interests. Providing such a redemption right may result in redemptions and a reduction in the size of the fund but that is not the point. The proposed mergers of the Citadel Funds with CHF were going to materially and adversely affect the rights of a number of the Citadel unitholders. That was an issue CHCC had to consider because it meant that the Citadel unitholders in the seven Citadel Funds who were not going to have the opportunity to vote on the mergers were going to be treated unfairly. That also potentially affected the likelihood of the mergers and the NAV of the continuing fund after the mergers.

[553] Not only did CHCC not want to grant a redemption right at NAV, it took active steps to avoid doing so by moving the listings of CHF and the Citadel Funds to the CNSX. By shifting the listings to the CNSX, unitholders of the Citadel Funds lost the benefit and protection of the TSX policy in connection with the mergers with CHF, and CHF lost the future benefit and protection of the TSX policy.

[554] One reason expressed by the CHCC Board for not granting a special redemption right at NAV was that CHF, having purchased the rights to the Citadel Management Agreements for $28 million, did not want the Citadel unitholders to undermine the value of those rights by redeeming their units at NAV and thereby reducing the management fees payable after the merger (see Pushka's comment on this issue in paragraph 411(i) of these reasons). That highlights, however, the highly risky strategy adopted by CHCC of causing CHF to acquire the rights to the Citadel Management Agreements before the Reorganization was voted on by CHF unitholders and before any mergers of the Citadel Funds with CHF were certain. It also suggests that little consideration was given to the best interests of CHF and its unitholders when the Citadel Acquisition was completed. It was irresponsible for CHCC and Pushka to have caused CHF to complete the Citadel Acquisition in these circumstances.

10. Benefits to Citadel Fund Unitholders of Merger with CHF

[555] The proposed mergers of the Citadel Funds with CHF appear to have been of limited benefit to the unitholders of the Citadel Funds. For unitholders of the largest Citadel Funds, increasing liquidity and spreading fixed costs over a larger number of units would have provided little in the way of benefits. We note in this respect that the total NAV of the Citadel Funds was more than 18 times the CHF NAV. Further, providing a special redemption right at NAV would have created a problem for CHCC because part of its strategy was to carry out the mergers of the Citadel Funds with CHF to, among other things, increase the management fees payable by the Citadel Funds (see paragraph 413 of these reasons). Neither the CHCC Board nor the IRC appears to have fully considered the proposed mergers of the Citadel Funds with CHF from the point of view of the Citadel unitholders. (The only direct comment on this issue appears to be Pushka's statement set out in paragraph 432 of these reasons.) It was important to consider this issue if only to assess the risk that such mergers might not occur. Further, as noted above, subsequent to the Citadel Acquisition, CHCC had a fiduciary duty to the unitholders of the Citadel Funds because it had become the IFM of those funds.

[556] The evidence is clear that CHCC wanted to avoid both giving the Citadel unitholders a right to vote on the mergers where a permitted merger provision was available (because such a vote would give unitholders a veto) or giving those unitholders a special redemption right at NAV (that could result in redemptions and a substantial reduction in the NAV of the Citadel Funds and in the management fees supporting payments by the Joint Venture to CHF). That could have resulted in the transaction not breaking even (see paragraph 411(i) of these reasons). We also note in this respect that the Citadel Funds had experienced a high level of redemptions in 2008.

[557] These considerations potentially affected the risks of the Citadel Acquisition to CHF, the amount of the management fees supporting repayment of CHF's investment and the Preferred Return, the likelihood that the mergers of the Citadel Funds with CHF would occur, the potential value of the rights to the Citadel Management Agreements and the benefits to CHF unitholders of the Citadel Transaction.

[558] Staff also alleges that CHCC breached its fiduciary duty as IFM to the *Citadel unitholders* as a result of its conduct in connection with the Citadel Transaction (see paragraph 40(n) of these reasons). That allegation was not strongly advanced by Staff in its oral submissions. In any event, there were no mergers of the Citadel Funds with CHF, or other transactions directly affecting the Citadel Funds and their unitholders, during the relevant time. Accordingly, we have not addressed Staff's submissions on this issue.

11. Reliance on Prior Review of the Fairway Transaction

[559] The Respondents also submit that any decision by the CHCC Board to approve the Citadel Acquisition and propose the Reorganization has to be understood in the context of the previous advice and consideration of issues related to the Fairway Transaction. With respect to IRC consideration of the Citadel Transaction, Fleming testified that the experience from previous transactions (and the advice and documents considered) was "brought to bear on the Citadel Transaction".

[560] We do not agree with those submissions for the reasons set out below.

[561] The Citadel Transaction was fundamentally different from the Fairway Transaction for at least the following reasons:

(a) The Citadel Acquisition involved the investment of more than 60% of CHF assets in the rights to the Citadel Management Agreements. That raised a fundamental question whether that acquisition was consistent with CHF's investment strategy and whether it was prudent in the circumstances. It also gave rise to more difficult issues such as how the rights to the Citadel Management Agreements would be valued for purposes of NAV calculations.

(b) CHF had achieved sufficient size prior to the Citadel Acquisition such that there was substantially less benefit to CHF unitholders from the mergers of the Citadel Funds with CHF in terms of increased liquidity and improved MER (see paragraph 518 of these reasons). In fact, the CHF MER went up after the Citadel Acquisition, likely as a result of one-time costs (for the period ended June 30, 2009, CHF's MER was 1.8%; for the period ended December 31, 2009, CHF's MER was 3.35% and for the period ended June 30, 2010, CHF's MER was 2.12%) (see paragraph 183 of these reasons). In contrast, the financial benefits to CHCC were substantial and disproportionate (see paragraph 522 of these reasons).

(c) CHCC's decision to cause CHF to acquire the rights to the Citadel Management Agreements before any mergers of the Citadel Funds with

CHF were certain was a crucial decision that raised a host of issues and significantly increased the risks of the Citadel Transaction for CHF. By contrast, the Fairway Loan was made only after the special rights of redemption at NAV granted to the Fairway unitholders had been exercised or expired and the merger of CHF with the Fairway Fund occurred only three days after the making of the Fairway Loan (see paragraphs 330 and 331 of these reasons). The Fairway Loan was directly linked to the merger of CHF with the Fairway Fund.

(d) The proposed merger of CHF with up to eight different Citadel Funds made that acquisition much more complex. It meant, among other things, that each of the different Citadel Funds was potentially affected differently in terms of what changes would occur to unitholder rights as a result of the merger. That includes the question whether the investment strategies of each Citadel Fund were sufficiently similar to those of CHF so as to make a merger appropriate.

(e) The structure of the Citadel Transaction was quite different from and was substantially more complex than the Fairway Loan and the merger of CHF with the Fairway Fund. The Citadel Transaction raised a host of difficult securities and tax issues.

[562] At the end of the day, we have to determine whether, in all the circumstances, CHCC has established that (i) the CHCC Board approved the Citadel Acquisition and the Reorganization and, if so, whether the independent directors of CHCC had sufficient information before them to do so on a fully informed basis; and (ii) whether the IRC had sufficient information before it to recommend the Reorganization on a fully informed basis. In answering those questions, the previous consideration by the CHCC Board or the IRC of the Fairway Transaction provides little assistance to the Respondents.

12. Conclusions

[563] In the result, CHCC and Pushka caused CHF to enter into the Citadel Acquisition and to propose the Reorganization (i) under which CHF invested more than 60% of its assets; (ii) in an illiquid investment (the rights to the Citadel Management Agreements) that required the active management of third party investment funds; (iii) creating significant financial, transactional and regulatory risks for CHF; (iv) in circumstances in which the benefits to CHF unitholders from the mergers of the Citadel Funds with CHF were marginal (increased liquidity and potentially decreased MER) and contingent on future mergers that were not certain to occur; (v) justified in part on the basis of an anticipated increase in the NAV of the continuing fund that resulted from the Preferred Return established by CHCC and contingent on approval by CHF unitholders of the Reorganization; and (vi) where substantial benefits in increased management fees would accrue to CHCC. It is impossible to disentangle the personal motives of, and financial benefits to, CHCC and Pushka from the best interests of CHF and its unitholders in these circumstances. A fiduciary simply cannot put itself in such a conflicted position.

[564] CHCC had a fundamental conflict of interest in causing CHF to acquire the rights to the Citadel Management Agreements. The benefits to CHCC of that transaction were substantial and disproportionate to any potential benefits to CHF and its unitholders from any subsequent mergers of the Citadel Funds with the CHF. By causing CHF to enter into the Citadel Acquisition, CHCC exposed CHF to the very substantial risks described above and gave unitholders little choice but to approve the Reorganization at the June 29, 2009 unitholder meeting.

[565] CHCC and Pushka had a heavy responsibility to make full disclosure to the independent directors of CHCC and to the IRC of all the circumstances related to the Citadel Transaction, including the risks to CHF it created. Pushka consistently played down the risks of the Citadel Acquisition and, in a number of instances, misled the independent directors of CHCC and the members of the IRC (see paragraph 632 of these reasons). In any event, we find that CHCC and Pushka failed to disclose to the independent directors of CHCC and to the IRC sufficient information to permit them to make an informed decision with respect to the Citadel Transaction.

[566] CHCC has not established that the independent directors of CHCC in fact approved the Citadel Acquisition or the Reorganization, or that CHCC provided sufficient information to permit them to do so on a fully informed basis. Similarly, CHCC has not established that it provided sufficient information to the IRC to permit it to make a recommendation with respect to the Reorganization on a fully informed basis. In the result, the consideration by the independent directors of CHCC of the Citadel Transaction, and the IRC recommendation of the Reorganization, do not assist CHCC in establishing that it appropriately addressed the conflicts of interest arising from that transaction.

[567] Determining whether CHCC complied with its fiduciary duty in connection with the Citadel Transaction does not turn on weighing the relevant risks and benefits of the Citadel Transaction to CHF and its unitholders, on the one hand, and CHCC and its affiliates, on the other hand. CHCC had an obligation as a fiduciary to act with utmost good faith and in the best interests of CHF and to put the interests of CHF ahead of its own. CHCC failed to do so.

[568] We find that, by causing CHF to enter into the Citadel Acquisition, by benefiting from that transaction, by proposing the Reorganization and by failing to appropriately address the conflicts of interest arising from the Citadel Acquisition and the Reorganization, CHCC acted contrary to and breached its duty to act in good faith and in the best interests of CHF, contrary to subsection 116(a) of the Act.

[569] We would add that those breaches by CHCC of its fiduciary duty would not have been resolved or remedied by the unitholder vote at the proposed June 29, 2009 unitholder meeting given the inadequate disclosure in the June 09 Circular (see paragraph 574 below).

XIII. DISCLOSURE IN THE JUNE 09 CIRCULAR

[570] The June 09 Circular disclosed the acquisition by CHF of the rights to the Citadel Management Agreements on June 3, 2009 and sought approval from CHF unitholders of the Reorganization (see paragraphs 400 to 402 of these reasons for a description of the Reorganization). Unitholder approval of the Reorganization was sought because the Reorganization would have constituted a related party transaction between CHCC, as CHF's IFM, and CHF, within the meaning of MI 61-101.

[571] The letter to unitholders accompanying the June 09 Circular stated that:

> *While the Citadel Acquisition is believed to be a profitable transaction, it is also a step in a process to cause the Citadel Funds that are closed end trusts to merge with the Trust (the "***Mergers***").* The merging of the funds would generate an immediate profit for the Trust as well as an increase in liquidity and a reduced MER. The listing on the CNSX is intended to facilitate the Mergers pursuant to the permitted merger provisions of the Citadel Funds' declarations of trust without the requirement for unitholder approval.
>
> The CNSX is a cost-effective, stock exchange alternative to the TSX for trading equities. A listing on the CNSX will facilitate the Mergers and help the Trust lower costs, while maintaining its tax status as a mutual fund trust. The CNSX is a designated stock exchange for purposes of the *Income Tax Act* (Canada). The change in listing will not affect the Trust's continuous disclosure obligations under applicable securities laws and will provide Unitholders with substantially the same ability to trade their Units as compared to a TSX listing.
>
> …
>
> [emphasis added]

[572] The June 09 Circular described the purpose of the Reorganization to be the consolidation of the rights to the Citadel Management Agreements along with the rights to the CHF Management Agreement in a joint venture between CHF and CHCC and, to the extent practicable, the merger of the Citadel Funds with CHF in an effort to lower the CHF MER and increase its NAV (see paragraph 402 of these reasons).

[573] The June 09 Circular described the effect of the Reorganization and the reasons for CHCC's recommendation as follows:

> **Effect of the Reorganization**
>
> Upon completion of the Reorganization, the Trust (including any merged Citadel Funds) will be managed by the Joint Venture. *The Mergers will increase the Trust's assets under management, which is expected to achieve economies of scale, a lower MER and an increase in the Net Asset Value.* Upon completion of the Mergers the existing Unitholders will hold

a smaller percentage of the Units then outstanding. However, as a result of the Trust holding a senior interest in the Joint Venture, and assuming the merger with the Trust of Citadel Funds with an aggregate net asset value of at least $600 million, Crown Hill anticipates an increase in the Net Asset Value of approximately $0.50 per Unit for the existing Unitholders. [emphasis added]

Recommendation of the Trustee

The board of directors of the Trustee has unanimously determined that the Reorganization is in the best interests of the Trust and the Unitholders because it should result in the following benefits to the Trust:

- ***Increased NAV***: As a result of the Trust holding a senior interest in the Joint Venture, and assuming the merger with the Trust of Citadel Funds with an aggregate net asset value of at least $600 million, Crown Hill anticipates an increase in the Net Asset Value of approximately $0.50 per Unit for the existing Unitholders.

- ***Lower General and Administration Costs per Unit***: Fixed annual operating costs will be spread across a larger base of assets, which will reduce operating costs per Unit and should improve returns.

- ***Enhanced Liquidity***: Following the Mergers, the combined fund will have a larger market capitalization and a greater number of Units and Unitholders which is expected to provide greater liquidity to Unitholders.

In addition, the combined fund will adopt the lower fee structure of the Trust, being 1.8% of Net Asset Value per annum, which is expected to result in a lower MER for former holders of units of Citadel Funds. [emphasis added]

The board of directors of the Trustee unanimously recommends that Unitholders vote FOR the Reorganization Resolution set forth in the attached Appendix "A", approving the Reorganization. In arriving at this determination, the board of directors considered, among other things, the reasons set forth above.

As required under section 5.3 of NI 81-107 the Trustee presented the terms of the Reorganization that raise a conflict of interest for the purposes of NI 81-107 to the Trust's independent review committee for a recommendation. See "Interest of Informed Persons in the Reorganization". The independent review committee reviewed such conflict of interest matters and, having regard to, among other things, the process proposed for implementing the Reorganization, including the requirement to obtain Unitholder approval, *recommended that the terms of the Reorganization that raise a conflict of interest achieve a fair and reasonable result for the Trust*. While the independent review committee

has considered the Reorganization from a "conflict of interest" perspective, it is not the role of the independent review committee to recommend that Unitholders vote in favour of the Reorganization. Unitholders should review the Reorganization and make their own decision. [emphasis added]

(June 09 Circular, pg. 14 and 15)

[574] In our view, the June 09 Circular was materially misleading for the following reasons:

(a) The June 09 Circular did not adequately disclose the nature of the related party transaction involved in the Reorganization, including the parties to that transaction, the value of the rights being transferred to the Joint Venture and the benefits to CHCC from the transaction. *The purpose of the Reorganization was stated to be the consolidation of the rights to the Citadel Management Agreements and to the CHF Management Agreement in a joint venture and, to the extent practicable, the merger of the Citadel Funds over a period of time with the CHF in an effort to lower CHF's MER and increase the NAV per unit* (see paragraph 572 above). That is a gross mischaracterization of a very material related party transaction under which CHCC would substantially benefit. In order to understand the Reorganization, a reader of the June 09 Circular had to understand the nature of the interests of CHF and CHCC in the Joint Venture and what happened to those interests. Nowhere was it clearly disclosed that CHF was, through the Reorganization, in effect, selling the rights to the Citadel Management Agreements, which it had acquired on June 3, 2009, to CHCC for $28 million plus the Preferred Return (see paragraph 450 of these reasons).

(b) The circular states that "[t]he Trustee is a related party of the Trust under MI 61-101. Accordingly, certain terms of the Reorganization are related party transactions under MI 61-101". The circular also states that the IRC "recommended that the terms of the Reorganization that raise a conflict of interest achieve a fair and reasonable result for the Trust" (see paragraph 573 above). It was not, in our view, clear from the June 09 Circular what terms of the Reorganization raised a conflict of interest, what related party transaction was being submitted for approval by unitholders and what transaction the IRC was recommending as achieving a fair and reasonable result for unitholders. It was not sufficient to simply refer to the Reorganization as a related party transaction.

(c) All of the reasons justifying the Reorganization set out in the circular (see paragraph 573 above) relate to the benefits to unitholders of *the subsequent mergers of the Citadel Funds with CHF*, including an increase in NAV assuming the merger of Citadel Funds with an aggregate NAV of at least $600 million. Those reasons do not relate to why the Reorganization, as a

stand-alone related party transaction, was in the best interests of CHF and its unitholders. Further, it is not adequate disclosure to simply state that "… the Citadel Acquisition is believed to be a profitable transaction" and "is also a step in a process to cause the Citadel Funds that are closed end trusts to merge with the Trust [CHF] …"

(d) The June 09 Circular fails to disclose the significant risks related to the investment by CHF in the rights to the Citadel Management Agreements and the size of that investment relative to the CHF NAV. In our view, that disclosure was relevant even though it related to the Citadel Acquisition (which had already occurred and was disclosed as having occurred in the June 09 Circular) and not the Reorganization. The circular does not disclose the very significant risks that (i) CHCC might not be able to merge some or all of the Citadel Funds with the CHF as it intended; (ii) material redemptions by Citadel unitholders might occur; and (iii) some or all of the Citadel Management Agreements might be terminated (giving rise to termination payments that would be less than, on an aggregate basis, the amount paid by CHF to acquire the rights in the Citadel Management Agreements (see paragraph 528 of these reasons).

(e) It was only the fifth item of the form of resolution approving the Reorganization that contemplated "the merger, over a period of time, of the Citadel Funds with the Trust [CHF] … commencing with the Citadel Funds that are closed end mutual fund trusts with investment objectives similar to those of the Trust" (June 09 Circular, Appendix "A"). It was misleading to unitholders to suggest that the resolution to be voted on at the unitholder meeting related to and was approving those subsequent mergers.

(f) The June 09 Circular fails to disclose that the transfer of the listings of CHF and the Citadel Funds to the CNSX was for the sole purpose of avoiding giving unitholders of seven of the Citadel Funds a special redemption right at NAV in connection with the proposed mergers of those funds with CHF. The June 09 Circular states that the change in listing was "intended to facilitate the Mergers pursuant to the permitted merger provisions of the Citadel Funds' declaration of trust without the requirement for unitholder approval". The strategy of avoiding the grant of a special redemption right at NAV was likely to be controversial and created significant transactional and regulatory risks that were not disclosed.

(g) The June 09 Circular fails to disclose how the Fairway Loan was to be addressed as part of the Reorganization. CHCC should not have been able to assign its rights to the CHF Management Agreement to the Joint Venture without addressing the prior claim of CHF to management fees paid under that agreement.

(h) The June 09 Circular fails to disclose the basis upon which the Citadel Acquisition complied with CHF's investment strategy and restrictions contained in its Declaration of Trust.

(i) The June 09 Circular fails to clearly explain the rationale for the $4.0 million return to be paid to CHF as part of the Preferred Return and the tax treatment of that amount.

[575] For the reasons set forth in paragraph 574 above, we find that the June 09 Circular was materially misleading and failed to provide sufficient information to permit a reasonable CHF unitholder to make an informed judgment whether to vote to approve the Reorganization, contrary to Ontario securities law.

XIV. BREACH OF CROWN HILL FUND DECLARATION OF TRUST

[576] At the time of the Citadel Acquisition, the CHF Declaration of Trust provided as follows:

> **Section 5.2 Investment Strategy.**
>
> (1) The Trust Property, together with borrowings under the Loan Facility, will be invested in a diversified portfolio of income producing securities. At least 80% of this Portfolio will contain:
>
> (a) equity securities of an issuer whose market capitalization exceeds $1.0 billion;
>
> (b) debt securities considered investment grade, at the time of investment;
>
> (c) Income Funds each of which has, at the date of investment by the Trust, a minimum Float Capitalization of $400 million.
>
> …
>
> [Capitalized terms are as defined in the CHF Declaration of Trust.]

[577] In general, the investment strategy of CHF prior to the Citadel Acquisition can be fairly characterised as conservative. The CHF Annual Information Form dated March 31, 2009 stated that "the overall strategy will continue to be conservative. However, due to the substantial decline in the market the strategy has been adjusted to be more opportunistic. This could involve larger cash positions from time-to-time, fixed income positions and more frequent trading."

[578] Section 5.2(1) of the CHF Declaration of Trust required the investment of trust assets in "a diversified portfolio of income producing securities" and that "at least 80% of this Portfolio" would be comprised of equity securities of large issuers, investment grade debt and large income funds. CHCC submits that CHF's indirect ownership of the rights to the Citadel Management Agreements constituted an interest in income-producing

securities. We note, however, that (i) at the time the Citadel Acquisition was proposed, the assets of CHF were invested primarily in a portfolio of equity securities of significant Canadian and U.S. public companies; and (ii) the $28 million paid by the CHF to indirectly acquire the rights to the Citadel Management Agreements constituted more than 60% of the assets of the fund. It is clear that an investment by CHF of more than 60% of its assets in the rights to the Citadel Management Agreements was not permitted under Section 5.2(1) of the Declaration of Trust because, as a result of that investment, (i) the portfolio was not *diversified*; and (ii) 80% of the portfolio did not consist of the securities referred to in Sections 5.2(1)(a), (b) and (c) of the CHDF Declaration of Trust.

[579] However, Section 5.2(2) of the CHF Declaration of Trust provided that:

> (2) The Manager may adjust the strategy in Section 5.2(1) in order to facilitate a merger with another trust or fund.

CHCC unilaterally added that section to the CHF Declaration of Trust without unitholder approval on June 6, 2008 (see paragraph 202(d) of these reasons).

[580] Renton testified that it was his opinion that the indirect purchase by CHF of the rights to the Citadel Management Agreements was permitted under the CHF Declaration of Trust because it constituted an "adjustment" to CHF's investment strategy made to facilitate a merger with another fund, as permitted under Section 5.2(2) of the Declaration of Trust. He also testified that he was not asked to give a written opinion to that effect at the time of the Citadel Acquisition. There is no evidence that the basis of that opinion was ever discussed with the independent directors of CHCC or the IRC.

[581] In our view, Section 5.2(2) of the CHF Declaration of Trust permitted relatively minor adjustments to the investment strategy of CHF in order to facilitate a merger with another investment fund with similar investment objectives, without giving rise to non-compliance by CHF with its investment strategy established in its Declaration of Trust. In our view, that section cannot reasonably be interpreted to permit the investment of more than 60% of the assets of CHF in the rights to the Citadel Management Agreements. Such an interpretation stretches the meaning of an "adjustment" beyond all reasonable bounds. We note, in this respect, that the ordinary meaning of "to adjust" in the Oxford English Dictionary is "to alter or move slightly".

[582] We also note that CHF indirectly purchased the rights to the Citadel Management Agreements on June 3, 2009. It was not a condition of that purchase that any of the Citadel Funds be merged with CHF. At the time, CHCC was not expecting to merge any of the Citadel Funds until later in July (see paragraph 492 of these reasons) and no mergers of the Citadel Funds with CHF ultimately occurred until December 2009. The June 09 Circular stated that "[w]hile the Citadel Acquisition is believed to be a profitable transaction, it is also a step in a process to cause the Citadel Funds that are closed end trusts to merge with the Trust [CHF]" (June 09 Circular at pg. 9; see paragraph 571 of these reasons). We have discussed elsewhere in these reasons the risk that such mergers might not occur. We also note in this respect that the Fairway Loan and the CHF merger with the Fairway Fund had been directly linked (see paragraph 331 of these reasons).

[583] In our view, the acquisition by CHF of the rights to the Citadel Management Agreements must be assessed against the applicable investment restrictions in the CHF Declaration of Trust as a separate free-standing transaction at the time the Citadel Acquisition was completed. That is because CHF had the full investment risk of that acquisition on June 3, 2009 and there was no certainty at that time that any mergers of the Citadel Funds with CHF would occur (see the discussion in paragraph 448 of these reasons).

[584] In the circumstances, we find that the indirect acquisition by CHF of the rights to the Citadel Management Agreements was not made "in order to facilitate a merger with another trust or fund" within the meaning of Section 5.2(2) of the Declaration of Trust. At best, that acquisition was only the first step in an uncertain process intended to eventually lead to the merger of some of the Citadel Funds with CHF.

[585] A more sensible interpretation of Section 5.2(2) is that any adjustment to CHF's investment strategy was intended to (i) be relatively minor; (ii) be consistent with the basic investment strategy of CHF; and (iii) take place only upon, or contemporaneously with, the actual merger of another investment fund with CHF.

[586] Finally, we note that while CHF acquired the management rights to the 13 funds in the Citadel Group of Funds, it was never contemplated that all of those funds would be merged with CHF. It appears that Pushka initially contemplated the possibility of merging 11 of those funds with CHF (although that is not clear from the June 09 Circular) but it appears he subsequently focused on the eight Citadel Funds. Ultimately, only five of the Citadel Funds were merged with CHF in December 2009. That means that the investment strategy of the CHF was "adjusted" to hold, on a continuing basis, the management services agreements for a number of funds in the Citadel Group of Funds without any intention of merging those funds with CHF.

[587] As a result, we find that CHF's indirect acquisition of the rights to the Citadel Management Agreements was contrary to and breached the investment strategy contained in Section 5.2(1) of the CHF Declaration of Trust and did not qualify for the exception in Section 5.2(2) of that Declaration of Trust. Accordingly, we find that the indirect acquisition by CHF of the rights to the Citadel Management Agreements was contrary to and breached Section 5.2(1) of the CHF Declaration of Trust. It follows that, by causing CHF to enter into the Citadel Acquisition, CHCC acted contrary to and breached its fiduciary duty to CHF, contrary to subsection 116(a) of the Act.

[588] We discuss below the question of reliance by CHCC on the advice of Stikeman in this respect (commencing at paragraph 604 of these reasons).

XV. NO WRITTEN POLICIES AND PROCEDURES TO ADDRESS CONFLICTS OF INTEREST

1. Submissions

[589] Staff alleges that, during the relevant time, CHCC failed to have written policies and procedures to address conflicts of interest contrary to section 2.2 of NI 81-107. The

Respondents do not deny that allegation but submit that such policies were immaterial to Staff's allegations in this matter that CHCC breached its fiduciary duty under section 116 of the Act. The Respondents submit that CHCC was not required to have policies that addressed the principal conflicts of interest that are at issue in this proceeding.

[590] Section 2.2 of NI 81-107 requires that "[b]efore proceeding with a conflict of interest matter or any other matter that securities legislation requires the manager to refer to the independent review committee, the manager must:

> (a) establish written policies and procedures that it must follow on that matter or on that type of matter, having regard to its duties under securities legislation; and
>
> (b) refer the policies and procedures to the independent review committee for its review and input."

[591] Section 1 of the commentary to that section indicates that a manager should identify "the conflict of interest matters *it expects will arise* and that will be required by securities legislation to be referred to the IRC under section 5.1 and review its policies and procedures for those matters with the IRC." [emphasis added] That commentary also indicates that the manager will "establish policies and procedures for other matters *it expects will arise* and that will be required by securities legislation to be referred to the IRC …" [emphasis added]

[592] CHCC submits that the Fairway Loan and Citadel Transaction were not conflict of interest matters it "expected" to arise and therefore no IRC policies and procedures were required to be established under section 2.2 of NI 81-107.

[593] In our view, that commentary does not affect the mandatory requirement of section 2.2 of NI 81-107 and, in any event, cannot be relied upon to justify having no policies or procedures at all to address conflict of interest matters under section 2.2 of NI 81-107.

2. Conclusions

[594] It is clear that the Fairway Loan and the Reorganization were conflict of interest matters required to be referred by CHCC to the IRC under section 5.1 of NI 81-107 (see paragraph 156 of these reasons). CHCC did not establish any written policies and procedures addressing those matters or types of matters. As a result, we find that CHCC failed during the relevant time to have written policies and procedures to address matters such as the Fairway Loan and the Reorganization, contrary to section 2.2 of NI 81-107.

XVI. CHCC RELIANCE ON LEGAL ADVICE

1. Reliance on Legal Advice as a Defence

[595] CHCC submits as a defence to Staff's allegations with respect to the Fairway Transaction and the Citadel Transaction that it relied in good faith on Stikeman's legal

advice in connection with those transactions. That advice included compliance with applicable Ontario securities law and compliance with the CHF Declaration of Trust. If CHCC reasonably relied on that advice in causing CHF to enter into those transactions, that is a relevant consideration in this matter (see paragraph 153 of these reasons). CHCC also submits that Robson as portfolio manager of CHF relied on BLG's legal advice with respect to the Citadel Transaction. Accordingly, we must determine for whom Stikeman and BLG were respectively acting, what legal advice they gave and to what extent it was reasonable for CHCC to rely on that advice.[12]

2. For Whom were Stikeman and BLG Respectively Acting?

[596] Stikeman was CHCC's principal legal counsel but had a conflict of interest in acting for CHCC in connection with the Citadel Acquisition because its Calgary office was acting for the seller of the rights to the Citadel Management Agreements. We understand that is why BLG was retained. Pushka testified that, subject to that conflict, Stikeman acted for CHCC as IFM of CHF in connection with the Citadel Transaction (see the further discussion in paragraph 598 below). He testified that BLG acted for Robson as portfolio manager of the CHF in connection with the Citadel Transaction. Both Renton and Page had somewhat different views as to their respective retainers, which we discuss below. No retainer letters were entered into by Stikeman or BLG at the time and no such letters were submitted in evidence.

[597] It is clear that Stikeman acted for CHCC as IFM of CHF in connection with the Fairway Transaction. It does not appear that BLG acted in connection with that transaction.

[598] Pushka testified that prior to May 20, 2009, Stikeman acted for Crown Hill Capital as manager of CHF in connection with the Citadel Transaction and that BLG acted for Robson as portfolio manager of CHF in connection with that transaction. That testimony is consistent with the statements attributed to Pushka in Simoes's notes (see paragraph 433 of these reasons). Pushka testified that both firms addressed whether the Citadel Transaction complied with Ontario securities laws and the CHF Declaration of Trust. Pushka says that, after May 20, 2009, Stikeman and BLG were each involved in different elements of the implementation of the Citadel Transaction. For instance, Stikeman had responsibility for the preparation of the June 09 Circular and advised on disclosure issues. BLG established certain of the entities for purposes of the Citadel Acquisition, including CH Administration LP and the Fund Administrator, and had responsibility for the preparation of the Purchase Agreement under which the rights to the Citadel Management Agreements were indirectly acquired by CHF.

3. Further Testimony as to Stikeman's Representation

[599] Renton testified that he was "second chair" to BLG in connection with the Citadel Acquisition and that he acted for CHCC and gave advice in connection with the Citadel Acquisition only on specific technical issues and certain due diligence. He says Stikeman

[12] A limited waiver of solicitor-client privilege was given by CHCC in connection with the Fairway Transaction, and up to June 2, 2009 in connection with the Citadel Transaction.

prepared the proxy circular for the unitholder meeting called to consider the Reorganization. That circular discloses that Stikeman was counsel to CHCC and "provided legal advice to the Trustee with respect to corporate, securities and tax law matters in connection with the matters detailed in this circular." That would have included at least the Reorganization. There is an e-mail dated May 13, 2009 from Renton to Pushka saying "as discussed, we can do due diligence and big picture stuff which includes how you will merge the funds and terminate service providers. BLG will do the asset purchase." Simoes's notes of the CHCC Board meeting held on May 21, 2009 show Renton saying that his client was CHCC as IFM of the CHF (see paragraph 433 of these reasons).

[600] Fleming testified that he believed that Stikeman was acting for CHCC and CHF in connection with the Citadel Transaction. It is clear that the IRC was relying on Stikeman's legal advice to CHCC in connection with the Citadel Transaction. Renton did not, however, attend any of the IRC meetings during the relevant time. Pushka generally purported to communicate the Stikeman legal advice to the IRC in connection with the Citadel Transaction.

[601] Allen testified that he believed that Stikeman was acting for CHCC in connection with the Citadel Transaction.

4. Conclusions as to Stikeman's Representation

[602] In our view, the evidence demonstrates that:

(a) Stikeman acted for CHCC as IFM of CHF in connection with the Fairway Transaction and gave legal advice as to the ability of CHF to make the Fairway Loan;

(b) Renton prepared the Stikeman Opinion that concluded that the Fairway Loan did not contravene Ontario securities law;

(c) Stikeman gave advice to CHCC on the overall structuring of the Citadel Transaction including tax advice; that advice was reflected in the Stikeman Steps Memo prepared by Renton and submitted to the CHCC Board;

(d) Renton gave the opinion (referred to in paragraph 580 of these reasons) that the Citadel Acquisition complied with the CHF Declaration of Trust;

(e) Stikeman conducted some due diligence with respect to the Citadel Transaction (although BLG and PWC also conducted due diligence); and

(f) Stikeman acted for CHCC in connection with the preparation of the June 09 Circular for the CHF unitholder meeting called to consider the Reorganization.

[603] While there is some conflicting evidence, it appears to us that Stikeman was acting for CHCC as IFM of CHF in connection with the Citadel Transaction with the

exception of the preparation and negotiation of the Purchase Agreement and related documents under which CHF indirectly acquired the rights to the Citadel Management Agreements. It is clear that Stikeman had the lead role in structuring the Citadel Transaction.

5. Reliance on Stikeman Legal Advice

[604] We have concluded that it was reasonable, given Stikeman's expertise, for CHCC and the members of the CHCC Board to rely on Stikeman's legal advice that the Fairway Transaction and the Citadel Transaction complied with applicable Ontario securities law. Renton suggested in his testimony that his advice extended to compliance by CHCC with its fiduciary duty and duty of care in respect of those transactions. He testified, however, that he did not specifically consider the question of whether CHCC complied with its fiduciary duty in connection with those transactions.

[605] In our view, Stikeman's legal advice did not extend to the question whether CHCC complied with its fiduciary duty or duty of care in approving and carrying out the Fairway Transaction and the Citadel Transaction. We reach that conclusion for the following reasons.

[606] First, Stikeman's legal advice did not expressly address whether CHCC complied with its fiduciary duty or duty of care in connection with the Fairway Transaction or the Citadel Transaction. For instance, the Stikeman Opinion addressed six securities law issues in connection with the Fairway Loan, none of which related to CHCC's fiduciary duty or duty of care imposed under section 116 of the Act (see the discussion of the Stikeman Opinion commencing at paragraph 296 of these reasons). It is not sufficient for this purpose that Renton may have been aware that CHCC had fiduciary obligations under section 116 of the Act or otherwise. The question is whether his legal advice addressed compliance with those obligations. With the exception of Renton's comment referred to in paragraph 604 above, there is no evidence before us that he did so.

[607] Second, whether CHCC complied with its duty to act in good faith and in the best interests of CHF is not, at its core, simply a question of legal interpretation. That question is more focused on the subjective motivation of the fiduciary (see, for instance, the statement of the Supreme Court of Canada in *Peoples* set out in paragraph 117 of these reasons). Whether CHCC acted in good faith goes principally to its intentions and motivations in the circumstances. Whether it acted in the best interests of CHF and its unitholders is a matter of judgement based on all the circumstances. Those circumstances include the conflicts of interest that arose from the actions and transactions described in these reasons and how those conflicts were addressed. No experienced lawyer would give an unqualified opinion that a person complied with its fiduciary duty or duty of care in connection with a particular transaction. If any such legal opinion was given, it would be carefully circumscribed in its application and explicit as to the assumptions, facts and circumstances upon which it was based and as to the qualifications to which it was subject.

[608] The duty of care under subsection 116 (b) of the Act establishes an objective standard based on what a reasonably prudent person would do in comparable circumstances. Accordingly, the question of whether CHCC and Pushka complied with their duty of care in connection with the Fairway Transaction and the Citadel Transaction is determined based on an objective standard that can be more comfortably addressed by a legal opinion. Even in that case, however, an experienced lawyer would be careful in rendering such an opinion and would explicitly address the assumptions, facts and circumstances upon which it was based and the qualifications to which it was subject. As noted above, there is no evidence that Renton turned his mind to these issues.

[609] We recognise that we must address in this proceeding the question of whether CHCC complied with its fiduciary duty and duty of care in the circumstances before us. However, we are doing so after 14 hearing days, having heard the testimony of nine witnesses, each of whom was cross-examined, and having reviewed a very substantial contemporaneous documentary record. If anything, this proceeding underscores why a lawyer would be extremely wary of giving an opinion as to whether a person has complied with its fiduciary duty or duty of care.

[610] Finally, we do not accept that, because a lawyer gives a general opinion as to compliance with Ontario securities law, that such an opinion impliedly extends to questions of compliance by a person with its fiduciary duty or duty of care (even though such duties are imposed under Ontario securities law). We do not believe that the accepted understanding or interpretation of such a general opinion would extend its application to such matters.

Conclusions

[611] Based on the analysis above, we find that CHCC was not entitled to rely on the Stikeman legal advice given in connection with the Fairway Transaction as extending to whether CHCC complied with its fiduciary duty in approving and carrying out that transaction.

[612] We reach the same conclusion with respect to the Stikeman legal advice given in connection with the Citadel Transaction. That is to say that CHCC is not entitled to rely on the Stikeman legal advice given in connection with the Citadel Transaction as extending to whether it complied with its fiduciary duty in approving and carrying out the Citadel Acquisition and in proposing the Reorganization.

[613] Stikeman also gave the opinion that the acquisition by CHF of the rights to the Citadel Management Agreements complied with the CHF Declaration of Trust. In our view, that opinion was not credible in the circumstances in which it was given (see the discussion commencing at paragraph 576 of these reasons). Accordingly, in our view, it was not reasonable for CHCC to have relied upon that opinion.

[614] Subject to our conclusions in paragraphs 611 to 613 above, we find that CHCC is entitled to rely on the Stikeman legal advice that the Fairway Transaction and the Citadel Transaction complied with applicable Ontario securities law. As a result, the fact that

CHCC obtained that legal advice from Stikeman is some evidence that supports the submission that CHCC acted in good faith and with due care in connection with the approval and implementation of the Fairway Transaction and the Citadel Transaction. We set out our conclusions as to whether CHCC complied with its fiduciary duty in connection with those transactions elsewhere in these reasons.

6. Further Testimony as to BLG's Representation

[615] Page testified that BLG acted for CH Administration LP as purchaser in connection with the Citadel Acquisition and not for CHF or its portfolio manager. He testified that BLG provided tax structuring advice and responded only to specific issues referred to it for consideration. Page acknowledged, however, that he gave some gratuitous advice to Robson as portfolio manager of CHF and he testified that "… we certainly provided advice that we intended for the benefit of Robson."

[616] CH Administration LP and the Fund Administrator were established to indirectly acquire and manage the rights to the Citadel Management Agreements. CH Administration LP and the Fund Administrator were necessary as part of the transaction because CHF could not directly carry on an active business such as management of the Citadel Funds.

[617] Page testified that a retainer agreement was subsequently entered into confirming that BLG acted for CH Administration LP in connection with the Citadel Acquisition. That retainer letter was not submitted to us in evidence.

[618] There is a handwritten note by Page made at a meeting on May 8, 2009 among Pushka, Page and Shaul which states that "Robson as investment manager for Crown Hill needs independent advice."

[619] Allen testified that he believed that BLG was acting for CHF in connection with the Citadel Transaction. The notes of the CHCC Board meeting held on May 21, 2009 indicate that Allen stated "I want to make sure BLG understands that they are responsible for ownership of the LP" (see paragraph 433 of these reasons). That referred to the ownership by CHF of CH Administration LP. We note that BLG did not attend any of the meetings of the CHCC Board or the IRC during the relevant time and Page testified that BLG did not provide any legal advice to the CHCC Board or the IRC in connection with the Citadel Transaction.

[620] In an e-mail dated May 14, 2009, Puskha requested that Shaul forward certain comments with respect to the Citadel Transaction to Page. That e-mail is consistent with Pushka's view that BLG was acting for Robson as portfolio manager of the CHF in connection with the Citadel Transaction.

[621] There is also an e-mail dated May 15, 2009 from Julie Hesse (of BLG) to Page which indicates that BLG was responsible for the drafting related to steps 1 to 3 of the Stikeman Steps Memo. That includes the investment by CHF in CH Administration LP. In a later internal e-mail on the same day, Page asked another BLG partner whether that partner was "comfortable with us as counsel to both Robson and the IRC."

[622] In our view, the evidence shows that BLG:

(a) gave some legal advice in connection with the structuring of the Citadel Transaction, including tax advice; Page also reviewed and commented on the Stikeman Steps Memo setting out the steps proposed to be taken to implement the Citadel Transaction;

(b) gave some advice to Robson as portfolio manager of the CHF;

(c) conducted some due diligence with respect to the Citadel Transaction (as did Stikeman and PWC); and

(d) drafted and negotiated the Purchase Agreement entered into in connection with the acquisition by CH Administration LP of the rights to the Citadel Management Agreements.

[623] It does not seem likely that BLG would have been retained simply to represent the limited partnership being established as the purchaser in structuring the Citadel Acquisition. CH Administration LP was established as part of a transaction that in substance constituted the indirect acquisition by CHF of the rights to the Citadel Management Agreements. If BLG was not acting for the portfolio manager of CHF, that would mean that no legal counsel was acting for or representing the interests of CHF or its unitholders in connection with the Citadel Acquisition. All parties viewed the Citadel Acquisition as the indirect acquisition by CHF of the rights to the Citadel Management Agreements. Further, the $28 million purchase price clearly came from CHF and much of the tax advice focused on the tax treatment related to the repayment of that amount and the payment of the Preferred Return to CHF.

7. Conclusions as to BLG's Representation

[624] While little turns on it for our purposes, we believe that it was reasonable for CHCC, Pushka, the CHCC Board and the IRC to have concluded that, from approximately May 8, 2009, BLG was acting for Robson as portfolio manager of CHF in carrying out the Citadel Acquisition and the proposed Reorganization. In our view, BLG's advice would have extended to compliance with Ontario securities law but not to whether Robson complied with its fiduciary duty or duty of care in connection with the Citadel Transaction. Page testified that BLG was not asked to give that advice and we conclude that BLG had not, by implication, done so for the reasons discussed in paragraphs 605 to 610 related to Stikeman's advice.

[625] It is not clear to us what other legal advice BLG may have given in the circumstances. Page testified that BLG was not asked to address whether the Citadel Acquisition complied with the CHF Declaration of Trust. He testified that BLG assumed that the transaction was in compliance based on prior transactions. Further, there is no evidence that BLG gave any advice to the IRC in connection with the Citadel Transaction.

[626] At the end of the day, however, it is not necessary for us to come to a conclusion as to for whom BLG was acting and what specific legal advice it gave because BLG was not, in any event, acting for CHCC, Pushka, the CHCC Board or the IRC in connection with the Citadel Transaction.

XVII. ALLEGATIONS NOT MADE IN THE STATEMENT OF ALLEGATIONS

[627] The Respondents submit that the following allegations made by Staff in this proceeding were not supported by allegations in the Statement of Allegations:

(a) other than the failure to have written policies and procedures, the allegation that CHCC failed to comply with NI 81-107;

(b) the allegation that the acquisition of the rights to the Citadel Management Agreements would have been unprofitable but for the subsequent mergers of the Citadel Funds with CHF and that CHCC paid too much for the rights to the Citadel Management Agreements;

(c) the allegation that it was misleading to state in the June 09 Circular that the Citadel Acquisition was believed to be a "profitable" transaction;

(d) in complaining about the amendments to the MACCs Declaration of Trust referred to in paragraph 202 of these reasons, the allegations related to the amendment of redemption rights and the process by which the amendments were made;

(e) the allegation that the Citadel Transaction was structured as it was, rather than as a loan, as a mechanism to shift risk to the CHF;

(f) the allegation that the Citadel Transaction was too risky for CHF to undertake;

(g) the allegation that the CHCC Board failed to consider market risk, credit risk and liquidity risk, as those risks were described in CHF financial statements;

(h) the allegation that CHF was at risk of certain adverse tax consequences from the structuring of the Citadel Transaction;

(i) the allegation that CHCC would not have been able to rely on the permitted merger provisions contained in the declarations of trust of certain of the Citadel Funds in order to merge those funds with CHF without unitholder approval; and

(j) the allegation that the investment restrictions in the CHF Declaration of Trust were violated by reason of a failure to comply with the *Tax Act* (Canada).

[628] We have carefully considered the Respondents' submissions in making the findings set out in paragraph 639 of these reasons. We are not making any findings against the Respondents with respect to or based on any of the matters referred to in clauses (a), (b), (c), (e), (g), (h), or (j) of paragraph 627 above.

[629] In our view, the amendments to the MACCs Declaration of Trust (referred to in paragraph 627(d) above) were an issue raised by the Statement of Allegations as were the risks inherent in the acquisition by CHF of the rights to the Citadel Management Agreements (referred to in paragraph 627(f) above). The possibility that CHCC would not be able to rely on the permitted merger provisions (referred to in paragraph 627(i) above) was another risk related to the Citadel Acquisition. It was not necessary for Staff to have particularized all of those matters in the Statement of Allegations in order to advance them in submissions before us.

[630] There are a number of issues and matters that we have addressed in these reasons because of CHCC's submission that each of the actions and transactions challenged by Staff were approved by the independent directors of CHCC and/or were recommended by the IRC. We have found it necessary to address fully those submissions.

[631] We also consider it appropriate to identify and discuss certain matters in these reasons that were not directly alleged in the Statement of Allegations (including matters referred to in paragraph 627 above). We do so because those matters were clearly raised by the evidence and the circumstances before us and because they have broader regulatory implications (see, for instance, paragraphs 222 to 224, 232, 233, 250, 251 (as to the failure to refer matters to the IRC), 283 (as to reliance on the permitted merger provision), 343 and 395 of these reasons). Our comments with respect to those matters are *obiter dicta* and we do not make any findings against the Respondents with respect to them. Our only findings against the Respondents are those set out in paragraph 639 of these reasons.

XVIII. PUSHKA'S ROLE AND RESPONSIBILITY

[632] It is clear that CHCC and its affiliates were a one-man band. Pushka was the directing mind, the sole shareholder (directly or indirectly), a director, Chief Executive Officer and the only senior officer of CHCC. Pushka initiated, caused to be carried out and directed all of the actions and transactions involving CHCC, its affiliates and CHF (and its predecessors) described in these reasons. Among other things, Pushka:

(a) caused to be made the amendments to the MACCs Declaration of Trust referred to in paragraphs 191 and 202 of these reasons;

(b) initiated and caused the mergers of CDHF with MACCs, the merger of CHF with the Fairway Fund and the mergers of CHF with five of the Citadel Funds;

(c) established the terms of the Fairway Loan, the Reorganization and the Preferred Return, and negotiated and caused the Citadel Acquisition to be carried out;

(d) determined the nature and extent of the information submitted to the CHCC Board and the IRC in considering the matters referred to in clauses (a), (b) and (c) above including preparation of the Discussion Document, the Pushka Memorandum and the Results Document;

(e) caused the preparation of, and approved the disclosure in, the June 08 Circular, the August 08 Circular and the June 09 Circular;

(f) instructed Stikeman;

(g) communicated the Stikeman legal advice to the IRC in connection with the Citadel Transaction; and

(h) made representations to the independent directors of CHCC and the members of the IRC referred to in these reasons, and responded orally to questions by them.

In our view, Pushka orchestrated all of these events and transactions, manipulated them to obtain his intended outcomes and knew exactly what he was doing. At times, he misled the independent directors of the CHCC Board and the members of the IRC (see paragraphs 311, 342, 343, 345, 414, 415 to 417, 443, 480, 481, 499 and 517 of these reasons) but, in any event, he failed to make full disclosure to them. CHCC cannot rely on any approval by the CHCC Board or any recommendation of the IRC where less than full disclosure was made. Overall, Pushka's conduct was appalling for a person in a fiduciary relationship with CHF (and its predecessors).

[633] During the relevant time, Pushka was, among his various roles, the President and Chief Executive Officer and a director of CHCC. He authorized, permitted or acquiesced in all of the actions, decisions and transactions made or approved by CHCC that are the subject matter of this proceeding. As a result, where we have concluded that CHCC did not comply with Ontario securities law, Pushka is deemed pursuant to section 129.2 of the Act to also have not complied with such law.

[634] Further, in our view, Pushka, by reason of his roles and actions referred to in paragraph 632 above, also owed a fiduciary duty and duty of care directly to CHF.

XIX. PUBLIC INTEREST CONCLUSION

[635] Staff alleges that the conduct of CHCC referred to in the Statement of Allegations was contrary to the public interest and harmful to the integrity of Ontario capital markets.

[636] The Commission's public interest jurisdiction is preventative in nature and prospective in orientation. It is intended to be exercised to prevent future harm to investors and Ontario capital markets. It may also be exercised to deter the Respondents and others from similar conduct (see paragraph 94 of these reasons).

[637] The conduct of CHCC and Pushka referred to in paragraphs 632 and 639 (a) to (f) of these reasons is unacceptable for a fiduciary with an obligation to act in good faith and

in the best interests of CHF (including its predecessor funds). CHCC and Pushka had an obligation to act with utmost good faith and to put the best interests of CHF ahead of their personal interests. They failed to do so. We have found that CHCC and Pushka breached the provisions of Ontario securities law referred to in paragraph 639 (a) to (f) of these reasons.

[638] Based on the foregoing, we find that CHCC and Pushka also acted contrary to the public interest.

XX. FINDINGS AND CONCLUSIONS

[639] We make the following findings against the Respondents:

(a) CHCC acted contrary to and breached its fiduciary duty under subsection 116(a) of the Act in making the amendments to the MACCs Declaration of Trust referred to in paragraph 202 of these reasons (see paragraph 236 of these reasons).

(b) CHCC acted contrary to and breached its fiduciary duty under subsection 116(a) of the Act by (i) making the changes to the rights of CHDF unitholders referred to in paragraph 275 of these reasons by means of the merger of CHDF with MACCs; and (ii) failing to appropriately address the conflicts of interest arising in connection with that merger (see paragraph 284 of these reasons).

(c) CHCC acted contrary to and breached its fiduciary duty under subsection 116(a) of the Act by (i) causing CHF to make the Fairway Loan (see paragraph 394 of these reasons); and (ii) causing CHF to enter into the Citadel Acquisition and by proposing the Reorganization (see paragraph 568 of these reasons).

(d) The June 09 Circular was materially misleading and failed to provide sufficient information to permit a reasonable CHF unitholder to make an informed judgment whether to vote to approve the Reorganization, contrary to Ontario securities law (see paragraph 575 of these reasons).

(e) The indirect acquisition by CHF of the rights to the Citadel Management Agreements was contrary to and breached Section 5.2(1) of the CHF Declaration of Trust. Accordingly, by causing CHF to enter into the Citadel Acquisition, CHCC acted contrary to and breached its fiduciary duty to CHF, contrary to subsection 116(a) of the Act (see paragraph 587 of these reasons).

(f) During the relevant time, CHCC failed to have written policies and procedures to address matters such as the Fairway Loan and the Reorganization, contrary to section 2.2 of NI 81-107 (see paragraph 594 of these reasons).

(g) During the relevant time, Pushka was, among his various roles, the President and Chief Executive Officer and a director of CHCC and he authorized, permitted or acquiesced in all of the actions, decisions and transactions made or approved by CHCC that are the subject matter of this proceeding. As a result, where we have concluded above that CHCC did not comply with Ontario securities law, Pushka is deemed pursuant to section 129.2 of the Act to also have not complied with such law (see paragraph 633 of these reasons).

(h) By reason of our findings in clauses (a) to (g) above, we also find that each of CHCC and Pushka acted contrary to the public interest.

[640] The Respondents should contact the Secretary of the Commission within 30 days of this decision to schedule a sanctions hearing.

Dated at Toronto this 23rd day of August, 2013.

"James E. A. Turner"

James E. A. Turner

"Christopher Portner"

Christopher Portner

"Judith N. Robertson"

Judith N. Robertson

SCHEDULE "A"

Crown Hill Capital Corporation
Chronology of Events

Date	Event
May 19, 2004	Crown Hill Dividend Fund is established by declaration of trust.
January 28, 2005	MACCs Sustainable Yield Trust is established by declaration of trust.
ACQUISITION OF MACCs, CHANGES TO MACCs DECLARATION OF TRUST AND MERGER OF CHDF WITH MACCs	
On or about February 1, 2008	CHCC acquires the rights to the management services agreements for MACCs and becomes IFM and trustee of MACCs.
February 19, 2008	***Meeting of the CHCC Board:*** Pushka informs the CHCC Board that CHCC has purchased the management services agreements for MACCs. That acquisition was financed by CHCC.
March 5, 2008	***Meeting of the IRC:*** IRC advised that CHCC will hold a MACCs unitholder meeting to make changes to its declaration of trust to permit mergers of MACCs with other investment funds, including the CHDF, without unitholder approval. IRC expresses agreement in principle with the concept of merging MACCS and CHDF.
March 25, 2008	***Meeting of the CHCC Board:*** Pushka reviews changes to the management proxy circular for the MACCs unitholder meeting to be held on June 4, 2008.
April 30, 2008	Notice of special meeting of MACCs unitholders and management proxy circular are sent for a unitholder meeting to be held on June 4, 2008.
June 4, 2008	***Unitholder meeting of MACCs:*** MACCs unitholders approve amendments to MACCs Declaration of Trust which include changes to broaden the investment objectives and investment strategy; to remove the requirement for unitholders to approve mergers with another investment fund; and to permit the CHCC Board by unanimous resolution to make amendments to the MACCs Declaration of Trust, as circumstances dictate.
June 4, 2008	***Meeting of the CHCC Board:*** CHCC Board meeting approves amendments to MACCs Declaration of Trust giving effect to the results of the MACCs unitholder meeting earlier that day.

Date	Event
June 6, 2008	***Meeting of the CHCC Board:*** Pushka describes changes to MACCs Declaration of Trust. Pushka advises that CHDF has experienced another year of high redemptions. Tentative date for CHDF unitholder meeting is set for August 28, 2008. Meeting to permit CHCC to merge with other investment funds without unitholder approval. Resolution passed to amend MACCs Declaration of Trust to, among other matters, remove annual redemption right at NAV, remove mandatory obligation to purchase units in the market, remove prohibition on making loans, permit adjustments in investment strategy to facilitate a merger, and permit notice to unitholders by filing on SEDAR.
July 25, 2008	Notice of special meeting of CHDF unitholders and management proxy circular are sent for a unitholder meeting to be held on August 28, 2008.
August 28, 2008	***Meeting of CHDF unitholders:*** Unitholder meeting held to approve amendments to CHDF Declaration of Trust to permit merger of CHDF with one or more other investment funds without unitholder approval provided the merger meets certain criteria. Merger criteria include: • the funds being merged must have similar investment objectives as set out in their declarations of trust; • merger must be with an “affiliated trust”; • IFM must have determined there will be no increase in MER as a result of the merger; • the exchange rate must be determined with reference to NAV; and • mergers must be capable of being accomplished on a tax-deferred "rollover" basis.
August 28, 2008	***Meeting of the CHCC Board:*** CHCC Board approves amendments to CHDF Declaration of Trust giving effect to the results of the unitholder meeting held earlier that day.
September 25, 2008	***Meeting of the CHCC Board:*** CHCC Board approves, among other things, increasing IFM management fees up to 1%, not to cause MER to exceed 4%, eliminating the service fee, portfolio manager’s fee to be paid by CHF and change in quorum for unitholder meeting. Pushka abstains from voting on the resolution. (This is the same CHCC Board meeting referred to below in connection with the consideration of a loan by MACCs and CHF to CHCC to facilitate a merger.)
November 10, 2008	CHCC publicly announces its intention to merge CHDF with MACCS.

Date	Event
December 10 -11, 2008	Pushka e-mail to the IRC refers to CHCC Board approval of merger of MACCs and CHDF. Members of the IRC approve the merger by e-mail. Approval given based on reduced MER and increased liquidity. Pushka advises that the Fairway Transaction is deferred until new year.
December 30, 2008	CHDF merges with MACCs. MACCs Declaration of Trust is amended and restated as the declaration of trust for the continuing fund, named the Crown Hill Fund. News release issued announcing completion of the merger of CHDF with MACCs.
INITIAL CONSIDERATION OF A LOAN BY MACCs AND CHDF TO CHCC TO FACILITATE MERGER	
September 10, 2008	***Meeting of the CHCC Board:*** Pushka presents a resolution to allow MACCs to make a loan to CHCC to facilitate merges with MACCs. Discussion of benefits to unitholders and structure of loan. CHCC Board requests advice from legal counsel regarding transaction. No resolution is passed.
September 25, 2008	***Meeting of the CHCC Board:*** CHCC Board considers draft steps memo prepared by Renton. Discussion of a fund making a loan to its IFM to facilitate a merger. Pushka identifies examples of other investment funds with promissory notes payable to their IFMs. CHCC Board requests that legal counsel review the proposed arrangement.
October 1, 2008	***Meeting of the CHCC Board:*** Pushka reviews the Stikeman Opinion describing method for an investment fund to lend to its IFM for the purpose of financing a merger with another investment fund. Transaction is identified as a related party transaction. Stikeman view expressed "… that a loan by a non-redeemable investment fund to its manager is not prohibited by Ontario securities law, provided that the manager is not an affiliate of the portfolio manager of the fund." CHCC Board passes resolutions authorizing MACCs and CHDF to lend up to 25% of market capitalization to CHCC on terms found by IRC to be reasonable, subject to appointing a portfolio manager to replace CHAM.

Date	Event
October 8, 2008	***Meeting of the IRC:*** Pushka outlines proposal for a loan by MACCs and CHDF to CHCC to facilitate mergers with third party funds. IRC reviews Discussion Document and the Results Document. IRC requests opinion from Stikeman whether each fund is permitted to make a loan under its declaration of trust and as to the terms and conditions of the loans. No resolutions are passed.
October 8, 2008	E-mail from Pushka to the IRC that he had spoken to Renton and they had developed a strategy to address certain concerns.
FAIRWAY TRANSACTION	
October 30, 2008	Unitholders of Fairway Fund vote to approve an amendment to the declaration of trust to, among other things, grant trustee authority without unitholder approval to merge the fund with one or more other investment funds, provided merger meets certain criteria.
January 15, 2009	Pushka sends an e-mail to members of the IRC seeking a recommendation for two linked transactions: a loan of $1.0 million by CHF to CHCC Holdco and the merger of CHF and the Fairway Fund.
January 16, 2009	***Meeting of the IRC:*** Pushka describes the transaction based on the Pushka Memorandum. Term sheet, loan agreement and security documents reviewed. IRC advised that a separate portfolio manager is required; Robson to be appointed as CHF portfolio manager. IRC confirms that CHF cash is available to fund Fairway Loan. IRC recommends the Fairway Transaction as achieving a fair and reasonable result for CHF having regard to improved MER, interest on the loan being greater than a market investment and increased liquidity.
January 16, 2009	Robson appointed as portfolio manager of CHF.

Date	Event
January 19, 2009	***Meeting of the CHCC Board:*** Pushka presents the Pushka Memorandum describing the proposed Fairway Transaction. The Pushka Memorandum contains "observations" of legal counsel that the loan is not prohibited by the CHF Declaration of Trust and complies with Ontario securities law. CHCC Board informed that IRC had reviewed and approved all transactions related to the loan. CHCC Board passes resolutions approving the merger of CHF with Fairway Fund, authorizing a loan by CHF of approximately $1.0 million to CHCC Holdco and authorizing a guarantee by CHCC.
January 20, 2009	CHF makes Fairway Loan and CHCC acquires management rights to Fairway Fund.
January 23, 2009	CHF merges with the Fairway Fund.
March 3, 2009	Letter from Staff to CHCC raising questions with respect to the Fairway Transaction and requesting relevant documents.
March 6, 2009	Stikeman responds to Staff and provides requested documents.
March 27, 2009	***Meeting of the CHCC Board:*** Pushka advises the CHCC Board that the mergers have been completed and have gone well. Since the merger, liquidity has increased substantially (600,000 units traded in the previous month as compared to 40,000 in December 2008).
April 8, 2009	***Meeting of the IRC:*** Pushka advises the IRC that the mergers have been completed and have gone well. Since the merger, liquidity has increased substantially (600,000 units traded in the previous month as compared to 40,000 in December 2008). Pushka advises that Staff has requested all documents related to the Fairway Loan and the merger and that legal counsel has sent the material.
	CITADEL TRANSACTION
May 7, 2009	Pushka advises independent members of the CHCC Board by e-mail of discussions to purchase the rights to the Citadel Management Agreements and merge the Citadel Funds with CHF. Cost would be "roughly" $28 million.
May 8, 2009	Approximate date BLG is retained.

Date	Event
May 15, 2009	***Meeting of the CHCC Board:*** Pushka explains the Citadel Transaction using the Stikeman Steps Memo. Directors discuss in detail the proposed transactions including the benefits and risks, the return on the $28 million investment, the risk that the Citadel Management Agreements could be terminated, the related party nature of the transaction, and moving TSX listing of CHF and Citadel Funds to the CNSX. No resolutions are passed.
May 20, 2009	Limited Partnership Agreement entered into between CHF and 2206687 Ontario Inc. to establish CH Administration LP. CHF, as limited partner, not to take part in management of the business.
May 21, 2009	***Meeting of the CHCC Board:*** Pushka updates the CHCC Board on the proposed Citadel Transaction. Pushka reports that PWC has been retained to carry out due diligence. CHCC Board discusses a number of issues, including the benefits and risks of the transaction, payment by Citadel Funds of termination payments if Citadel Management Agreements are terminated, the risk in the timeframe between the purchase of the rights to the Citadel Management Agreements and the mergers of the Citadel Funds with CHF, due diligence and moving listing to CNSX. CHF unitholder meeting to approve the Reorganization is tentatively set for June 29, 2009. No resolutions are passed.
May 21, 2009	E-mail from Pushka to the members of the IRC informing the IRC of the proposed Citadel Transaction. Pushka states CHCC requires IRC to review the management information circular and state its views as to fairness to unitholders. CHCC wires $28 million to BLG in trust.
May 29, 2009	***Meeting of the CHCC Board:*** Draft June 09 Circular is reviewed and changes suggested. The June 09 Circular is approved.
May 29, 2009	***Meeting of the IRC:*** Pushka advises of minor changes made to the June 09 Circular by the CHCC Board. Pushka explains details of the Citadel Transaction. The members of the IRC discuss various elements of the transaction, including the Preferred Return and various risks. Fleming requests an opinion from Stikeman.

Date	Event
	No resolutions are passed.
June 1, 2009	Further drafts of the June 09 Circular are sent to the CHCC independent directors and the IRC for comment.
June 1, 2009	***Meeting of the IRC:*** IRC recommends that "the terms of the Reorganization that raise a conflict of interest achieve a fair and reasonable result for the Trust." Pushka tells IRC that a Stikeman opinion will be delivered in the future.
June 2, 2009	Further drafts of the June 09 Circular are distributed to Allen and Jackson.
June 3, 2009	CHF indirectly acquires the rights to the Citadel Management Agreements for a purchase price of $28 million. CHCC issues news release.
June 8, 2009	June 09 Circular sent to CHF unitholders for a unitholder meeting on June 29, 2009 to vote on the Reorganization.
June 15 - 25, 2009	Staff raises various issues with the Citadel Transaction. Stikeman responds.
June 22, 2009	***Meeting of the CHCC Board:*** CHCC Board discusses termination fees payable if Citadel Management Agreements are terminated. Pushka says $16 million in termination fees would be payable.
June 29, 2009	The June 29, 2009 meeting of CHF unitholders is adjourned without voting on the Reorganization as a result of Staff's intervention.
December, 2009	Five of the Citadel Funds are merged with CHF.

Note: Staff and the Respondents agreed that any events subsequent to the end of June 2009 would not be the subject matter of this proceeding. Solicitor-client privilege was waived with respect to the Fairway Transaction, and with respect to the Citadel Transaction to June 2, 2009.

SCHEDULE "B"

TERMS DEFINED IN THE REASONS

Acronym	Term	Definition
	Act	The *Securities Act*, R.S.O. 1990, c. S.5, as amended
	Allen	Thomas I. A. Allen, an independent director on the CHCC Board
	Amending Power	The authority granted by the Amending Resolution permitting the CHCC Board to make changes (by unanimous resolution) to the MACCs Declaration of Trust, as circumstances dictate and without unitholder approval
	Amending Resolution	The extraordinary resolution authorizing the CHCC Board to, among other things, make changes (by unanimous resolution) to the MACCs Declaration of Trust, as circumstances dictate and without unitholder approval
	August 08 Circular	The CHDF management proxy circular for a special meeting of unitholders held on August 28, 2008 to permit mergers without unitholder approval
BLG	Borden Ladner Gervais LLP	Legal counsel that gave certain advice in connection with the Citadel Transaction
	Bloom	M. Paul Bloom, portfolio manager for six of the largest Citadel Funds at the time of the Citadel Acquisition
CBCA		*Canada Business Corporations Act*
CHAM		Crown Hill Asset Management Inc., portfolio manager of CHF until it was replaced by Robson; an affiliate of CHCC; it was also portfolio manager of CHDF and MACCs prior to the mergers discussed in these reasons
CHCC	Crown Hill Capital	Crown Hill Capital Corporation, the IFM and trustee for Crown Hill Fund
	CH Administration LP	CH Fund Administrator LP, an Ontario limited partnership (owned by CHF), that indirectly acquired the rights to the Citadel Management Agreements for $28 million

Acronym	Term	Definition
	CHCC Board	The board of directors of CHCC, consisting of Pushka, Allen and Jackson
CHDF		Crown Hill Dividend Fund, a predecessor of CHF
CHF	Crown Hill Fund	A publicly traded closed-end investment trust of which CHCC was IFM and trustee at the relevant time
	Campbell	John N. Campbell, a member of the CHF IRC
	CHCC Holdco	The borrower under the Fairway Loan; the controlling shareholder of CHCC
	CHF Declaration of Trust	The CHF declaration of trust as amended and restated from time to time
	CHF Management Agreement	The management services agreement for CHF under which CHCC acted as IFM
	Citadel Acquisition	The transaction under which CHF indirectly acquired the rights to the Citadel Management Agreements for a purchase price of $28 million
	Citadel Funds	The eight investment funds proposed to be merged with the Crown Hill Fund consisting of: Citadel Diversified Investment Trust, Citadel HYTES Fund, Citadel Premium Income Fund, Equal Weight Plus Fund, Citadel S-1 Income Trust Fund, Citadel SMaRT Fund, Citadel Stable S-1 Income Fund, and Series S-1 Income Fund
	Citadel Group of Funds	The 13 Citadel investment funds, comprised of the Citadel Funds plus the Energy Plus Income Fund, the Financial Preferred Securities Corporation, the Sustainable Production Energy Trust, the CGF Mutual Funds Corporation and the CGF Resources 2008 Flow-Through LP
	Citadel Management Agreements	The management services agreements for the Citadel Group of Funds
	Citadel Transaction	The Citadel Acquisition and the proposed Reorganization (defined by CHCC to include the merger over time of the Citadel Funds with CHF, and related transactions)
	Commission	Ontario Securities Commission

Acronym	Term	Definition
	conflict of interest matter	For purposes of NI 81-107, "a conflict of interest matter" includes "a situation where a reasonable person would consider a manager, or an entity related to the manager, to have an interest that may conflict with the manager's ability to act in good faith and in the best interests of the investment fund"
	Discussion Document	A document prepared by Pushka in connection with the Fairway Transaction and entitled "Discussion Document to the IRC Regarding Acquisitions and Possible Conflicts"; considered at an October 8, 2008 IRC meeting
	Fairway Fund	The Fairway Diversified Income and Growth Trust
	Fairway Loan	The CHF loan of $995,000 to CHCC Holdco to permit that company to acquire the rights to the Fairway Management Agreement
	Fairway Loan Agreement	The loan agreement between CHF and CHCC Holdco dated January 20, 2009 relating to the Fairway Loan
	Fairway Management Agreement	The management services agreement for the Fairway Fund
	Fairway Transaction	The Fairway Loan and the merger of the Fairway Fund with the Crown Hill Fund (together with related transactions); the continuing fund was named the Crown Hill Fund
	Fleming	Andrew Fleming, a member of the CHF IRC
	Fund Administrator	1472278 Alberta Ltd., the entity established in connection with the Citadel Transaction to directly acquire and administer the rights to the Citadel Management Agreements
IFM		An investment fund manager; a person or company that directs the business, operations or affairs of an investment fund
	independent review committee	A committee that, under NI 81-107, is required to be part of the governance structure of public investment funds in Canada. Its role includes making recommendations in connection with conflict of interest matters referred to it by the IFM of an investment fund

Acronym	Term	Definition
	investment fund	A mutual fund or a non-redeemable investment fund
	IRC	The independent review committee of Crown Hill Fund, consisting of Campbell, Fleming and Maxwell
	Jackson	Terry A. Jackson, an independent director on the CHCC Board
	Joint Venture	A joint venture between CHF and CHCC proposed to be established as part of the Reorganization
	JovFunds	The third party IFM of the Fairway Fund
	June 08 Circular	The MACCs management proxy circular for a special meeting of unitholders held on June 4, 2008 to, among other things, permit mergers of MACCs without unitholder approval
	June 09 Circular	The CHF management proxy circular for a special meeting of unitholders to be held on June 29, 2009 to consider the Reorganization; that meeting did not proceed as a result of the intervention of Staff
	Lo	Yvonne Lo, a Senior Forensic Accountant, Enforcement Branch of the Commission
	Maxwell	Mark Maxwell, a member of the CHF IRC
MACCs		MACCs Sustainable Yield Trust, a predecessor of CHF
	MACCs Amendments	The changes to the MACCs Declaration of Trust made by the CHCC Board on September 25, 2008 (other than the change in auditors)
MER	management expense ratio	The percentage of an investment fund's average net asset value paid by the fund each year to pay the costs of managing the fund, including IFM management fees
	Merger Criteria	The merger criteria established pursuant to the CHDF permitted merger provision approved by CHDF unitholders at an August 28, 2008 unitholder meeting
	MI 61-101	Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions*

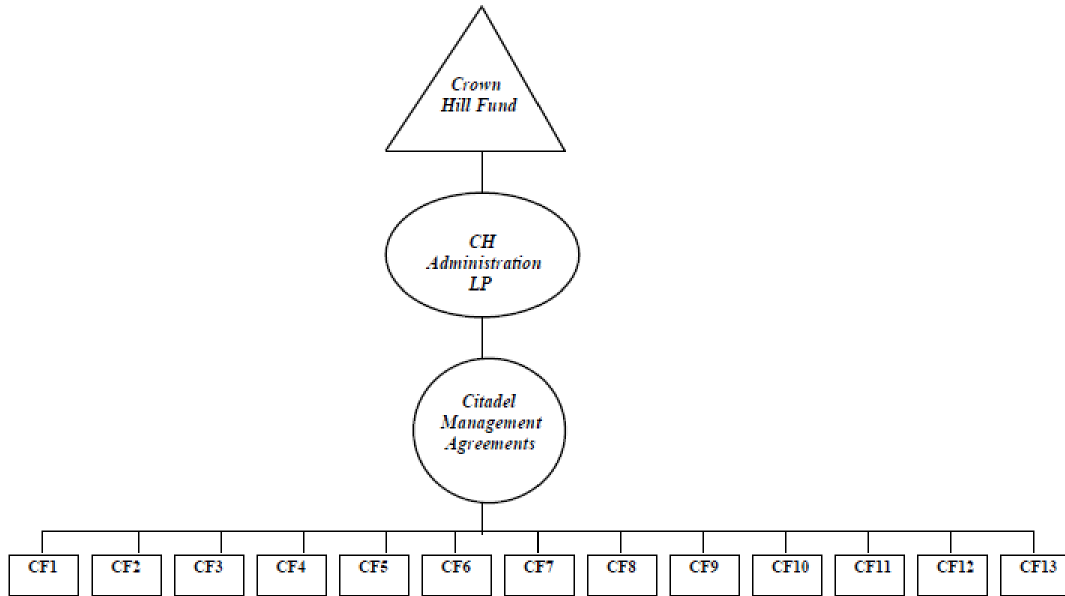
Acronym	Term	Definition
	NI 81-107	National Instrument 81-107 – *Independent Review Committee for Investment Funds*
	non-redeemable or closed-end investment fund	A non-redeemable or closed-end investment fund is an issuer whose primary purpose is to invest money provided by its security holders, that does not invest for certain specified purposes and that is not a mutual fund
OCBA		*Ontario Business Corporations Act*
	Page	Alfred L. J. Page, a securities lawyer and senior partner with BLG
	permitted merger provision	A provision in an investment fund's declaration of trust that permits the IFM to merge the investment fund with another fund without obtaining unitholder approval. There may be conditions imposed by the permitted merger provision on the ability to rely on it, such as the Merger Criteria
	Preferred Return	The return on CHF's investment in the rights to the Citadel Management Agreements consisting of the expenses of the acquisition (including the $28 million purchase price) and $4.0 million, plus 6% on those expenses and the $4.0 million
	Pushka	Wayne Lawrence Pushka, the President and Chief Executive Officer and a director of CHCC and the directing mind of CHCC and its affiliates
	Pushka Memorandum	A memorandum submitted by Pushka to the IRC at a meeting on January 16, 2009 and to the CHCC Board at a meeting on January 19, 2009, describing the proposed transactions to be carried out in connection with the Fairway Transaction
	Purchase Agreement	The purchase agreement dated June 3, 2009 under which CHF indirectly acquired the rights to the Citadel Management Agreements
PWC	PriceWaterhouseCoopers LLP	Accounting firm retained by CHCC to carry out certain due diligence in connection with the Citadel Acquisition
	Regulation	Subsection 115(6) of Ontario Regulation 1015 under the Act which prohibited the purchase or sale of a security in which an investment counsel had a beneficial interest to any portfolio managed by the investment counsel

Acronym	Term	Definition
	Renton	Darin R. Renton, a securities lawyer and partner with Stikeman, who provided certain legal advice to CHCC in connection with the Fairway Transaction and the Citadel Transaction
	Reorganization	CHCC publicly announced on June 4, 2009 that it proposed to carry out a "Reorganization" under which the CHF Management Agreement and the Citadel Management Agreements would be consolidated in the Joint Venture as the first step in the process to facilitate the mergers over time of the Citadel Funds with CHF; the Reorganization constituted a related party transaction between CHF and CHCC under MI 61-101
	Respondents	CHCC and Pushka, collectively
	"responsible person"	a "responsible person" means a portfolio manager and every individual who is a partner, director or officer of a portfolio manager together with every affiliate of a portfolio manager and every individual who is a director, officer or employee of such affiliate or who is an employee of the portfolio manager, if the affiliate or the individual participates in the formulation of, or has access prior to implementation to investment decisions made on behalf of or the advice given to the client of the portfolio manager
	Results Document	Document containing Pushka's notes of the October 1, 2008 CHCC Board meeting; the Results Document was submitted to the IRC at its October 8, 2008 meeting
	Ringelberg	Victoria Ringelberg, qualified as an expert witness for the limited purpose of: (i) identifying the issues that are typically considered when investment funds are merged; and (ii) commenting on whether closed-end investment funds typically purchase rights to the management services agreements of other closed-end investment funds
	Robson	Robson Capital Management Inc., the portfolio manager of CHF appointed on January 16, 2009
	Shaul	Jeffrey C. Shaul, principal of Robson

Acronym	Term	Definition
	Simoes	Ligia Simoes, an administrative assistant with CHCC, who prepared minutes of various CHCC Board and IRC meetings; her notes with respect to certain of those meetings were tendered in evidence
SPPA		The *Statutory Powers Procedure Act*, R.S.O. 1990, c. s.22
	Staff	Staff of the Commission
	Statement of Allegations	The statement of allegations dated July 11, 2011 in this matter
	Stikeman	Stikeman Elliott LLP, legal counsel to CHCC
	Stikeman Opinion	The Stikeman legal opinion that a loan by a non-redeemable investment trust to its IFM was not prohibited by Ontario securities law, provided the manager was not an affiliate of the portfolio manager
	Stikeman Steps Memo	The memorandum prepared by Stikeman that described the steps to be carried out in connection with the Citadel Transaction; submitted to a CHCC Board meeting on May 15, 2009

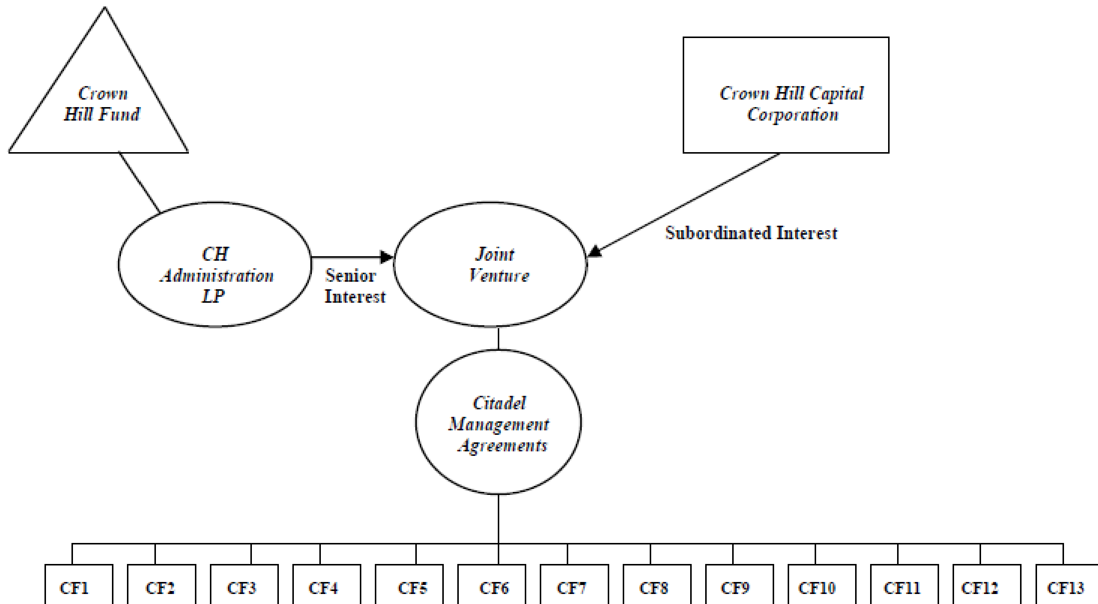
SCHEDULE "C"

Ownership Structure after the Citadel Acquisition but before the proposed Reorganization



Note: "CF1" - "CF13" refer to the 13 funds in the Citadel Group of Funds.

Ownership Structure giving Effect to the proposed Reorganization



Note: "CF1" - "CF13" refer to the 13 funds in the Citadel Group of Funds.