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
PORTFOLIO CAPITAL INC., DAVID ROGERSON
and AMY HANNA-ROGERSON

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

Hearing:	February 10, 12, 13 and 14, 2014 June 24 and 25, 2014	
Decision:	February 26, 2015	
Panel:	Christopher Portner	- Commissioner
Appearances:	Gavin Smyth Keir Wilmut	- For Staff of the Commission
	David Rogerson	- For himself
	Amy Hanna-Rogerson	- For herself

No one appeared on behalf of Portfolio Capital Inc.

TABLE OF CONTENTS

REASONS AND DECISION

I. OVERVIEW

A. Background

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether Portfolio Capital Inc. ("**Portfolio Capital**"), David Rogerson ("**Rogerson**") and Amy Hanna-Rogerson ("**Hanna-Rogerson**") (collectively, the "**Respondents**") breached the Act and acted contrary to the public interest.

[2] The proceeding arose from a Notice of Hearing issued by the Commission on March 25, 2013 and a Statement of Allegations filed by Staff of the Commission ("**Staff**") on March 25, 2013, as amended on June 4, 2013 and June 26, 2013 (the "**Statement of Allegations**"). Staff alleges that, during the period from May 2007 to March 2012 (the "**Material Time**"), the Respondents solicited and sold shares of PlusPetro Inc. (Panama) ("**PlusPetro**") to more than 200 investors and potential investors[1], raising approximately US$980,000[2] and $544,000. Staff further alleges that the Respondents engaged in fraudulent conduct by making untrue or misleading statements to investors regarding the business of PlusPetro, the use of investor funds and the future value of PlusPetro shares.

[3] Staff alleges breaches by the Respondents of (i) subsection 25(1)(a) of the Act, as that section existed before September 27, 2009, and subsection 25(1) of the Act, on and after September 28, 2009 (unregistered trading); (ii) subsection 52(1) of the Act (illegal distribution of securities); and (iii) subsection 126.1(b) of the Act (fraud). Staff also alleges that Rogerson breached subsection 38(2) of the Act (prohibited undertakings regarding the future value of securities) and subsection 38(3) of the Act (prohibited representations regarding the future listing of securities). Hanna-Rogerson is also alleged to have authorized, permitted or acquiesced in Portfolio Capital's non-compliance with Ontario securities law and is, therefore, deemed to have not complied with Ontario securities law pursuant to section 129.2 of the Act.

B. History of the Merits Hearing

[4] The hearing on the merits (the "**Merits Hearing**") relating to the Statement of Allegations commenced on February 10, 2014. On the first day of the Merits Hearing, Staff informed me of its efforts to provide notice to the Respondents, who did not appear. I instructed Staff to communicate with the Respondents at the end of the hearing day to indicate that the Merits Hearing was continuing and to invite them to attend at any time during the Merits Hearing. Staff did so in an e-mail message that was sent to the Respondents and their former counsel in the early evening on February 10, 2014. Based on Staff's submissions and the Affidavit of Julia Ho, sworn February 10, 2014 and filed by Staff, I was satisfied that the Respondents had received notice of the Merits Hearing.

[1] See paragraph [99] below for an explanation of the use of the term "potential investors".
[2] Dollars of the United States of America.

[5] The Merits Hearing proceeded as scheduled on February 10, 12, 13 and 14, 2014 in the absence of the Respondents and in accordance with Rule 7.1 of the Commission's *Rules of Procedure* (2014), 37 O.S.C.B. 4168 and section 7 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. Staff filed an Agreed Statement of Facts (the "**Agreed Statement of Facts**") signed by all of the Respondents who were represented by counsel at the time. Although the Agreed Statement of Facts is not signed by Staff and is undated, it was sent by the Respondents' counsel to Staff on January 20, 2014. Staff introduced additional evidence through eight witnesses**.**

[6] On January 28, 2014, counsel for the Respondents provided Staff with Notices of Change in Representation in which each of the Respondents stated that they had discharged their counsel and were electing to represent themselves in connection with this matter. As it is not evident that either Rogerson or Hanna-Rogerson undertook to represent Portfolio Capital, I have had to assume that Portfolio Capital was unrepresented from and after January 20, 2014 except as noted in paragraph [58] below.

[7] Following the close of Staff's evidence on February 14, 2014, I ordered that Staff serve and file written submissions by March 14, 2014, the Respondents serve and file any written submissions by March 28, 2014 and that the date for oral closing submissions would be scheduled in the event that the Respondents filed written submissions.

[8] Following Staff's service of its written closing submissions, the Respondents filed written closing submissions by e-mail on March 28, 2014 and attached several documents on which they wished to rely. Rogerson requested that he be permitted to introduce documentary and oral evidence before the Panel. A motion hearing was held on May 1, 2014 and May 29, 2014, at which Staff attended in person and Rogerson and Hanna-Rogerson attended by telephone, for the purpose of determining whether further evidence would be permitted in this matter, and if so, on what basis. On June 6, 2014, I issued an order in which I granted the request of Rogerson and Hanna-Rogerson (together, the "**Individual Respondents**") to submit additional documentary and oral evidence by video conference and ordered that the Merits Hearing continue for such purpose.

[9] Pursuant to the June 6, 2014 order, the Merits Hearing continued on June 24 and 25, 2014, on which dates the Individual Respondents attended by video conference and led the evidence of three witnesses located in British Columbia. Following the conclusion of the Individual Respondents' evidence, written closing submissions were filed by each of Staff, Rogerson and Hanna-Rogerson.

C. The Respondents and Related Entities

[10] 2137013 Ontario Inc. was incorporated in the Province of Ontario on May 23, 2007, and on July 18, 2008, changed its name to Portfolio Capital Inc. During the Material Time, Portfolio Capital's registered address was 110 Cumberland Street, Suite 317, Toronto, Ontario, which is a United Parcel Services mailbox. Portfolio Capital, the shares of which are solely owned by Hanna-Rogerson, has never been a reporting issuer in Ontario and has never been registered with the Commission in any capacity.

[11] Neither Rogerson nor Hanna-Rogerson has ever been registered with the Commission in any capacity. Throughout the Material Time, Rogerson was the directing mind of Portfolio Capital notwithstanding the fact that Hanna-Rogerson was the sole director. Hanna-Rogerson controlled and was the sole signatory on Portfolio Capital's two bank accounts.

[12] PlusPetro was incorporated by Rogerson in Panama on February 12, 2009. During the Material Time, PlusPetro's address was East 53rd Street, 2nd Floor, Panama City, Panama. Rogerson was the indirect sole shareholder of PlusPetro through his holding company, Janus Capital Inc. Rogerson caused Janus Capital Inc. to transfer approximately 60% of the shares of PlusPetro to PCI Belize (as defined in paragraph [13] below) for nominal consideration and caused additional PlusPetro shares to be issued to PCI Belize from treasury. Rogerson continued to exercise control over PlusPetro and, at the time of the Merits Hearing, Janus Capital Inc. and PCI Belize still had a controlling interest in PlusPetro. PlusPetro has never been a reporting issuer in Ontario and has never been registered with the Commission in any capacity.

[13] Portfolio Capital Inc. (Belize) ("**PCI Belize**") was incorporated in Belize as Windward Securities Ltd. on January 15, 2002, and on August 1, 2008, changed its name to PCI Belize. During the period from July 2008 to March 2012, Rogerson was the sole officer (President), director and shareholder of PCI Belize. PCI Belize, which was established to raise capital for PlusPetro, has never been a reporting issuer in Ontario and has never been registered with the Commission in any capacity.

II. THE ALLEGATIONS

[14] Staff alleges that the Respondents' conduct during the Material Time was contrary to Ontario securities law and contrary to the public interest as follows:

(a) The Respondents traded in and engaged in or held themselves out as engaging in the business of trading in securities without being registered to do so and without an exemption from the dealer registration requirement, contrary to subsection 25(1)(a) of the Act as that section existed at the time the conduct at issue commenced in May 2007, and contrary to subsection 25(1) of the Act, as the section was subsequently amended on September 28, 2009;

(b) The Respondents traded in securities of PlusPetro when a preliminary prospectus and a prospectus had not been filed and receipts had not been issued for them by the Director, contrary to subsection 53(1) of the Act;

(c) The Respondents engaged in or participated in acts, practices or courses of conduct relating to securities of PlusPetro that they knew or ought to have known perpetrated a fraud on persons or companies, contrary to subsection 126.1(b) of the Act;

(d) Rogerson gave an undertaking to investors regarding the future value and price of PlusPetro shares with the intention of effecting a trade in those shares, contrary to subsection 38(2) of the Act;

(e) Rogerson made misleading representations to investors regarding the future listing of PlusPetro shares with the intention of effecting a trade in those shares, contrary to subsection 38(3) of the Act;

(f) Hanna-Rogerson authorized, permitted or acquiesced in Portfolio Capital's non-compliance with Ontario securities law and accordingly failed to comply with Ontario securities law, contrary to section 129.2 of the Act; and

(g) The Respondents' conduct was contrary to the public interest and harmful to the integrity of the capital markets in Ontario.

III. OVERVIEW OF THE EVIDENCE

A. Agreed Statement of Facts

[15] Prior to the Merits Hearing, the Respondents and Staff agreed to certain facts at issue in this proceeding which are set out in the Agreed Statement of Facts which was filed by Staff on the first day of the Merits Hearing. Although the version of the Agreed Statement of Facts in evidence was only signed by the Respondents (and not by Staff), Staff submits that the document reflects their agreement with the Respondents regarding certain facts at issue in the proceeding.

[16] In the Agreed Statement of Facts, the Respondents make several factual admissions relating to the sale of PlusPetro shares to investors and the representations that were made to investors. In addition, the Respondents admit that, during the period from July 2008 to March 2012[3], they engaged in conduct contrary to the public interest and contravened Ontario securities law in the following ways:

(a) During the Material Time, Rogerson, Hanna-Rogerson and Portfolio Capital traded and engaged in or held themselves out as engaging in the business of trading in the securities of PlusPetro without being registered to do so and without an exemption from the dealer registration requirement, contrary to section 25(1)(a) of the Act as that section existed at the time the conduct at issue commenced in July 2008, and contrary to subsection 25(1) of the Act, as subsequently amended on September 28, 2009;

(b) During the Material Time, Rogerson, Hanna-Rogerson, and Portfolio Capital traded in securities of PlusPetro when a preliminary prospectus and a prospectus had not been filed and receipts had not been issued for them by the Director, contrary to section 53(1) of the Act;

[3] The period of time for the conduct at issue in the Agreed Statement of Facts, defined as the Material Time, is from July 2008 to March 2012. Staff, however, alleges in the Statement of Allegations that the relevant period of time, also defined as the Material Time, commenced earlier, namely, in May 2007. In its written submissions, Staff notes that the material time "for the purposes of analyzing the source and application of funds is from July 2008 (when investor funds were first received by the Respondents) to March 2012" (Fresh Closing Submissions of Staff at page 1, footnote 1). The term Material Time as used in these reasons has the meaning ascribed to that term in the Statement of Allegations and in paragraph [2] above.

(c) During the Material Time, Rogerson made representations to investors regarding the future price of PlusPetro shares with the intention of effecting a trade in those shares, contrary to section 38(2) of the Act;

(d) During the Material Time, Rogerson made representations to investors regarding the future listing of PlusPetro shares on an exchange with the intention of effecting a trade in those shares, contrary to section 38(3) of the Act;

(e) During the Material Time, Rogerson and Hanna-Rogerson authorized, permitted or acquiesced in Portfolio Capital's non-compliance with Ontario securities law and accordingly failed to comply with Ontario securities law, contrary to section 129.2 of the Act;[4] and

(f) Rogerson, Hanna-Rogerson, and Portfolio Capital's conduct was contrary to the public interest and harmful to the integrity of the capital markets in Ontario.

[17] In his Written Closing Submissions dated August 25, 2014, Rogerson confirms that the Respondents entered into the Agreed Statement of Facts and that he only disputes Staff's allegations of fraud.

B. Witnesses

[18] Staff called the following persons as witnesses at the Merits Hearing:

(a) Stephanie Collins ("**Collins**") is a Senior Forensic Accountant in the Enforcement Branch of the Commission. She testified about Staff's investigation of the Respondents and described her analysis of the source and application of funds received from investors.

(b) Aires Barreto ("**Barreto**") is a chemical engineer with an MBA who worked in the oil industry in Venezuela for 30 years, eventually becoming the Deputy Chairman of Royal Dutch Shell's operations in Venezuela which were nationalized and became known as Petroleos de Venezuela. Since 2004, Barreto has been living in Canada and providing consultancy services to companies in the petroleum industry. Barreto worked as a consultant to PlusPetro in 2009 in exchange for shares of PlusPetro.

(c) Michel Proulx ("**Proulx**") has been an investment banker since 1988 and had worked for the Canadian Imperial Bank of Canada as a bond trader and for HSBC Futures in Singapore trading futures. Proulx testified that he had a fairly broad exposure to the energy markets in his professional career and that he worked for PlusPetro as its Vice President of Trading from the summer of 2009 to early March 2010.

[4] Although Rogerson admits in the Agreed Statement of Facts that he authorized, permitted or acquiesced in Portfolio Capital's non-compliance with Ontario securities law, Staff does not make an allegation against Rogerson in the Statement of Allegations with respect to section 129.2 of the Act.

(d) D.S.P.[5] was a school bus driver and a resident of Ontario who also performed various administrative duties for PlusPetro. She testified that she was also an investor in PlusPetro and had recommended that a number of the members of her family and friends invest in the company. D.S.P. testified about the commissions that were paid in cash and the shares of PlusPetro that she received for referring investors to the Individual Respondents. She also testified about her investment in $10,000 worth of shares of PlusPetro which were issued to her in exchange for work that she and her husband had performed at the Individual Respondents' cottage in Muskoka, Ontario.

(e) V.B. is an automotive technician and a resident of Ontario who was referred to the Individual Respondents by D.S.P. V.B. testified that he invested in PlusPetro, partly in cash and partly in exchange for mechanical work he had performed on Rogerson's car. V.B. also testified about the investments in PlusPetro that were made by his mother and sister of $1,000 and $1,500, respectively. In total, V.B., his mother and his sister acquired 6,000 shares of PlusPetro at prices ranging from $0.25 to $0.50 per share.

(f) C.Y. is a small business owner and a resident of Ontario. He testified about his investments in PlusPetro of approximately $160,000 to $170,000 and his business partner's investments of an additional $165,000 to $170,000.

(g) C.S. is an insurance broker and a resident of Ontario. She testified about her investment in PlusPetro for which she paid in $1,000 in cash and in exchange for a dining set that she sold to Hanna-Rogerson.

(h) D.S. is a Border Services Officer and a resident in Ontario. D.S. testified about his investments in PlusPetro totaling $2,000.

[19] After being permitted to lead additional evidence, the Respondents called the following witnesses who testified by video conference from the offices of the British Columbia Securities Commission in Vancouver:

(a) Rogerson, who testified on his own behalf;

(b) Hanna-Rogerson, who testified on her own behalf; and

(c) Gordon Nicks ("**Nicks**"), a Chartered Professional Accountant and Certified General Accountant, who testified about the work he performed in his capacity as Portfolio Capital's bookkeeper.

[5] In order to protect the privacy of the witnesses who were investors in PlusPetro, their names and personal information have been anonymized and Staff has provided a redacted version of the record in accordance with the Commission's April 24, 2012 *Practice Guideline – Use and Disclosure of Personal Information in Ontario Securities Commission's Adjudicative Proceedings*.

C. Overview of the PlusPetro Investments

Sale of PlusPetro Shares to Investors

[20] During the period from July 2008 to March 2012, PCI Belize offered share purchase agreements ("**SPAs**") to residents of Ontario and residents of other jurisdictions for the purchase of PlusPetro shares.

[21] The Individual Respondents admit that they sold PlusPetro shares to more than 200 investors and potential investors raising US$980,000 and $544,000. The Respondents further admit that Portfolio Capital provided administrative support to facilitate such sales.

[22] Rogerson admits that he met with and told investors that PlusPetro was a start-up company that had the opportunity to purchase the rights to a break-through technology known as Crude Oil Additive Technology Solution ("**COATS**"). Rogerson represented to investors that the COATS technology had the ability to lower the viscosity of crude oil thereby making it easier to transport.

[23] Rogerson told investors that their funds would be used for PlusPetro's start-up operations, including securing financing to acquire and test the COATS technology. Rogerson provided investors with promotional materials that he created or caused to be created regarding the COATS technology and their investment in PlusPetro. These materials included (i) PlusPetro's business plans; (ii) documents entitled "PlusPetro Investment Overview", "PlusPetro Executive Summary" and "PlusPetro Investment Presentation"; (iii) financial models and projections for PlusPetro; (iv) numerous laboratory test reports; and (v) some or all of 19 shareholder update letters which are described in greater detail in paragraphs [72] and [73] below (collectively, the "**Shareholder Update Letters**").

[24] The Shareholder Update Letters, which were dated from May 1, 2009 to October 15, 2012, stated that PlusPetro was very close to securing financing and would imminently purchase the COATS technology and then commence the marketing and sale of the technology to large oil companies. The Shareholder Update Letters were also used to solicit additional investor funds.

[25] Hanna-Rogerson admits that she also met with and provided information to several investors regarding the purchase of PlusPetro shares, and assisted investors with the completion of the documentation associated with the purchase of PlusPetro shares.

[26] The Respondents admit that, after agreeing to invest, investors executed SPAs with PCI Belize (signed by Rogerson as President of PCI Belize) for the purchase of PlusPetro shares at prices ranging from $0.25 to $0.50 per share[6]. Investments were made by way of cash or by cheque, bank draft or wire transfer made payable to PCI Belize, in the case of international investors, or to Portfolio Capital, in the case of Canadian resident investors. The funds raised from Canadian resident investors were deposited to a Portfolio Capital account at a TD Canada Trust branch located in Orillia, Ontario.

[27] Collins provided evidence that a total of 129 persons provided funds to Portfolio Capital for investment purposes and an additional 92 persons may have done so.

[6] The currency of the share price is not mentioned in the Agreed Statement of Facts.

IV. ISSUES

[28] Staff's allegations raise the following issues for determination:

(a) Did the Respondents act in a manner that was contrary to subsections 25(1)(a), 25(1), 53(1), 38(2), 38(3) and 129.2 of the Act and contrary to the public interest, as admitted by the Respondents in the Agreed Statement of Fact?

(b) Did the Respondents engage or participate in any act, practice or course of conduct relating to the securities of PlusPetro that they knew or reasonably ought to know perpetrated a fraud on any person or company, contrary to subsection 126.1(b) of the Act?

(c) If Portfolio Capital did not comply with Ontario securities law, did Hanna-Rogerson, as the sole officer and director of Portfolio Capital, authorize, permit or acquiesce in Portfolio Capital's non-compliance and is she therefore deemed to also have not complied with Ontario securities law pursuant to section 129.2 of the Act?

(d) Was the conduct of the Respondents contrary to the public interest?

[29] The standard of proof in the Merits Hearing is the civil standard of proof on a balance of probabilities. I need to assess each of the foregoing issues by examining the evidence in this matter and determining whether on a balance of probabilities "…it is more likely than not that the event occurred" (*F.H. v. McDougall*, [2008] 3 S.C.R. 41 at para. 44 ("***McDougall***")). As stated by the Supreme Court of Canada, "…evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall, supra* at para. 46).

V. ANALYSIS – CONDUCT ADMITTED IN THE AGREED STATEMENT OF FACTS

[30] The Respondents expressly admitted in the Agreed Statement of Facts that, as alleged by Staff, their conduct was contrary to Ontario securities law and contrary to the public interest. Following a review of the evidence, including the factual admissions made by the Respondents in the Agreed Statement of Facts, I find that the evidence supports findings of breaches of Ontario securities law, as admitted by the Respondents. My findings in this respect are set out in further detail below.

A. Trading in Securities without Registration

[31] During the Material Time and prior to September 28, 2009, subsection 25(1)(a) of the Act prohibited trading in securities by a person or company without such person or company being registered with the Commission. Subsection 25(1)(a) of the Act provided that:

> No person or company shall,
>
> (a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer, ...

> and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[32] During the Material Time and on and after September 28, 2009, subsection 25(1) of the Act provided that:

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

[33] As noted above, the Respondents admit that none of them has ever been registered with the Commission in any capacity. Further, as described in paragraphs [20] to [26] above, the Respondents expressly admit that their conduct constituted unregistered trading, contrary to section 25(1)(a) and 25(1) of the Act, as in force during the Material Time.

[34] In addition to the foregoing admissions by the Respondents, we also heard evidence from PlusPetro investors D.S.P., V.B., C.Y., D.S., C.S and Proulx, who testified that they were sold securities of PlusPetro by Rogerson. Rogerson created and provided investors with promotional materials and sent investors the Shareholder Update Letters.

[35] I find that the Respondents traded and engaged in or held themselves out as engaging in the business of trading securities of PlusPetro without registration and without an exemption from the dealer registration requirement.

B. Trading in Securities without a Prospectus

[36] Subsection 53(1) of the Act provides that:

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

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

[38] The Respondents admit, and I find, that they traded in securities of PlusPetro when a preliminary prospectus and prospectus had not been filed and receipts had not been issued for them by the Director, contrary to section 53(1) of the Act.

C. Representations and Undertakings

[39] Subsections 38(2) and 38(3) of the Act, as they existed at the Material Time, provided as follows:

> 38(2) No person or company, with the intention of effecting a trade in a security, shall give any undertaking, written or oral, relating to the future value or price of such security.
>
> 38(3) Subject to the regulations, no person or company, with the intention of effecting a trade in a security, shall, except with the written permission of the Director, make any representation, written or oral, that such security will be listed on any stock exchange or quoted on any quotation and trade reporting system, or that application has been or will be made to list such security upon any stock exchange or quote such security on any quotation and trade reporting system, unless,
>
> > (a) application has been made to list or quote the securities being traded, and securities of the same issuer are currently listed on any stock exchange or quoted on any quotation and trade reporting system; or
> >
> > (b) the stock exchange or quotation and trade reporting system has granted approval to the listing or quoting of the securities, conditional or otherwise, or has consented to, or indicated that it does not object to the representation.

[40] Rogerson admitted in the Agreed Statement of Facts that he made representations to investors regarding the future price of PlusPetro shares and the future listing of PlusPetro shares on an exchange.

[41] Rogerson also admitted that he communicated to potential investors that PlusPetro would apply to have its shares listed on the Toronto Stock Exchange ("**TSX**") and told investors that PlusPetro would be listing on the TSX "in the coming months" with the intention of effecting trades in PlusPetro shares. He further admitted that neither he nor PlusPetro ever made an application to have PlusPetro shares listed on the TSX or sought the permission of the Director to make representations to investors regarding the listing of PlusPetro shares on the TSX.

[42] Notwithstanding paragraphs [40] and [41] above, a breach of subsection 38(2) of the Act requires a finding that a respondent provided an undertaking with respect to the future price of a security. As stated by the Commission in previous cases, a simple representation with respect to the future price of a security is not sufficient to constitute a breach of subsection 38(2) of the Act (see, for example, *Re Al-Tar Energy Corp.* (2010), 33 O.S.C.B. 5535 ("***Al-Tar***") at paras. 160-169). The Commission has repeatedly stated that, while an undertaking is more than a mere representation, it may amount to something less than a legally enforceable obligation, and can include representations amounting to promises, guarantees or assurances of future value (*Al-Tar, supra* at paras. 163-164, *Re Global Partners Capital* (2010), 33 O.S.C.B. 7783 at para. 209-215 and *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 1727 at paras. 167 and 170).

[43] Rogerson admitted that he told potential investors that, based on company projections, their shares should substantially increase in value once the PlusPetro shares were listed on the TSX,

and that he made such representations with the intention of effecting trades in PlusPetro shares. Each of C.Y., C.S. and D.S. testified at the Merits Hearing that Rogerson told them that the shares of PlusPetro would be listed on the TSX at a price of $5.00 and each of C.Y. and C.S. further testified that Rogerson told them that the value of the shares would eventually increase in value to a range of $18.00 to $19.00.

[44] Based on the foregoing evidence, I am satisfied, and find, that:

(a) With the intention of effecting a trade in such securities, Rogerson did represent to investors, without the written permission of the Director, that the shares of PlusPetro would be listed on a stock exchange contrary to subsection 38(3) of the Act; and

(b) Rogerson's statements with respect to value were mere representations as to the future value of the PlusPetro shares and were not undertakings within the meaning of subsection 38(2) of the Act. Notwithstanding the fact that Rogerson agreed that such representations constituted a violation of subsection 38(2) of the Act, I am unable to find that his conduct in this respect was a violation of Ontario securities law as it did not rise to the level of providing an undertaking.

D. Authorizing, Permitting or Acquiescing in Portfolio Capital's Non-compliance

[45] Section 129.2 of the Act provides that:

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

[46] Subsection 1(1) of the Act defines "director" as including an individual performing a similar function or occupying a similar position to that of a director of a company. "Officer" is defined as including every individual who performs functions similar to those normally performed by individuals who are designated as officers under a by-law or similar authority of a registrant or issuer.

[47] Each of the Individual Respondents admitted that they authorized, permitted or acquiesced in Portfolio Capital's non-compliance with Ontario securities law. The Respondents also admitted that Hanna-Rogerson was the sole director of Portfolio Capital and Rogerson admitted that throughout the time from July 2008 to March 2012, he was the directing mind of Portfolio Capital. Notwithstanding the fact that Rogerson also agreed that he authorized, permitted or acquiesced in Portfolio Capital's non-compliance with Ontario securities law, Staff made no allegation against Rogerson pursuant to section 129.2 of the Act. Even though it was entered as evidence in support of Staff allegations in this matter, I find that I cannot use Rogerson's admissions in the Agreed Statement of Facts as evidence to make a finding against Rogerson in respect of a breach of the Act that Staff has not alleged in the Statement of Allegations.

[48] Hanna-Rogerson's admissions and the evidence of her conduct in connection with the sale of PlusPetro shares during the Material Time, as detailed further in my analysis of the fraud allegations below, lead me to conclude that she authorized, permitted or acquiesced in Portfolio Capital's breaches of subsections 25(1)(a), 25(1) and 53(1) of the Act. I find, therefore, that, pursuant to section 129.2 of the Act, Hanna-Rogerson is deemed to have contravened Ontario securities law.

E. Conclusions

[49] Based on the foregoing analysis, I find that:

(a) The Respondents traded and engaged in or held themselves out as engaging in the business of trading in securities of PlusPetro without being registered to do so and without an exemption from the registration requirement, contrary to subsections 25(1)(a) and 25(1) of the Act, as such sections were in force during the Material Time;

(b) The Respondents traded in securities of PlusPetro when a preliminary prospectus and a prospectus had not been filed and receipts had not been issued for them by the Director, contrary to subsection 53(1) of the Act;

(c) Rogerson made representations to investors regarding the future listing of PlusPetro shares on a stock exchange, without the written permission of the Director, with the intention of effecting a trade in such securities, contrary to subsection 38(3) of the Act; and

(d) Hanna-Rogerson, as the sole director of Portfolio Capital, authorized, permitted or acquiesced in Portfolio Capital's foregoing breaches of subsections 25(1)(a), 25(1), 38(3) and 53(1) of the Act and is therefore deemed under section 129.2 to have contravened Ontario securities law.

[50] I also find that the conduct of the Individual Respondents, as described above and in the Agreed Statement of Facts, was contrary to the public interest and harmful to the integrity of Ontario's capital markets.

VI. ANALYSIS – THE FRAUD ALLEGATIONS

A. Submissions of the Parties

1. Submissions of Staff

[51] Staff submits that, in addition to their breaches of securities laws, the Respondents' investment scheme was fraudulent. Staff contends that the Respondents misrepresented to investors that the proceeds of their investments would be used to fund the start-up operations of PlusPetro when, in fact, investor funds were used to finance personal expenses of the Individual Respondents. Staff also submits that the Respondents further misled investors and prospective investors by failing to state facts and/or concealing facts and that the Respondents made written representations to investors that were untrue or misleading, which resulted in deprivation to investors.

[52] Staff notes in its submissions that, despite facing specific allegations of fraud with respect to the misuse of investor funds and the misleading Shareholder Update Letters and financial projections, the Respondents have failed or not been able to disclose documents that support their defense notwithstanding the unprecedented opportunity to continue the Merits Hearing after Staff had made its closing submissions. With respect to the allegation that the Shareholder Update Letters were misleading, Staff noted in the particulars provided to the Respondents that there was a lack of disclosure by the Respondents of relevant documents. Staff noted that, given the nature of the representations by the Respondents with respect to the size of the companies ostensibly involved in the development of COATS and the complexity of the events described, it strains credibility that no e-mails, contracts, letters or other documents exist to support the claims. Staff takes the position that the events described in the Shareholder Update Letters did not take place and the financial projections were misleading.

[53] Staff also submits that the documentary evidence provides little support for the claim that legitimate business expenses were incurred by the Individual Respondents. Staff submits that the documents provided by the Respondents purporting to demonstrate dealings with oil companies are unauthenticated and reveal very limited and superficial dealings with oil companies, mostly during or after 2010. Staff argues that there is limited evidence of any effort to market or acquire the COATS technology or any basis to legitimately claim a business expense.

[54] Staff notes that the Respondents did not provide documentation to support a claim that investor funds were used for legitimate business expenses or documentation that might support the Individual Respondents' claim that they were entitled to receive US$17,500 per month in management fees which Staff alleges were not paid. Further, Staff submits that the Respondents spent more than was allowed in these agreements in any case. Had the management fees been due during the period from July 2008 to March 2012, as claimed by the Individual Respondents, an amount of $787,500 would have been due. Collins testified that such an amount would have represented approximately 50% of all funds received by the Respondents from investors and deposited in the Canadian bank accounts. Staff submits that, in fact, $1.7 million was spent from the Canadian bank accounts alone.

[55] Staff also submits that the Respondents represented to investors that their investment funds would be used to fund the start-up operations of PlusPetro, but were instead used by the Individual Respondents to pay for personal expenses. In addition, Staff contends that investors funded the operations of an unrelated company, Sleep Holdings.

[56] Staff further submits that the evidence of the Respondents and that of Nicks is not credible and is not reliable. Staff submits that both Rogerson and Hanna-Rogerson sought to downplay the other's role in the scheme and that Rogerson was combative and un-cooperative during the Merits Hearing, refusing to provide documents or admit to basic facts not in dispute and gave every indication that he did not respect the Commission's process or authority. Staff notes that Rogerson demonstrated clear discomfort during cross-examination on the amount of money raised by the sale of PlusPetro shares and submits that he was unable to provide credible answers. He did, however, finally admit that an additional $900,000 was raised above the $1.6 million admitted in the Agreed Statement of Facts.

[57] Staff also challenges the credibility of Nicks, whom Staff describes as a friend of Rogerson who was doing his best to assist the Respondents in this proceeding, at times stepping into the

role of advocate for the Individual Respondents. Staff contends that Nicks attempted to frustrate his cross-examination knowing that I had imposed a limit on the time available to Staff for its cross-examination of Nicks .

2. Submissions of Rogerson

[58] Rogerson filed submissions on behalf of himself, Portfolio Capital and Hanna-Rogerson. Hanna-Rogerson filed submissions on her own behalf. As they made clear during the Merits Hearing, the interests of the Individual Respondents are not identical. As a result, I rely primarily on Hanna-Rogerson's submissions on her own behalf, rather than the submissions of Rogerson on her behalf.

[59] Rogerson only disputes Staff's allegations of fraud and submits that supporting documentation provided to the Commission demonstrate that Staff inaccurately describes the use of the US$17,500 monthly consulting fee.

[60] Rogerson contests Staff's allegation that he did not have an honest and reasonable belief that PlusPetro was "very close" to securing financing for the COATS technology. Rogerson questions the basis of Staff's allegation that PlusPetro did not carry out any legitimate business operations in the context of a start-up operation like PlusPetro that was seeking to secure financing to implement its business plan. Further, Rogerson submits that Staff did not identify evidence to support its allegation that there is no evidence that the COATS technology exists.

[61] With respect to Staff's allegations regarding the use of investor funds to pay for personal purposes, Rogerson submits that there was no misappropriation of funds. Rogerson relies on the evidence provided by Nicks and submits that investors who testified during the Merits Hearing were unaware of the consulting agreements that were in place, which justify the personal expenditures, notwithstanding the fact that business and personal expenses were co-mingled.

[62] Rogerson submits that Hanna-Rogerson acted in an administrative capacity under his direction at all times and that, to the extent that she used certain funds received by Portfolio Capital, she clearly did so at Rogerson's direction.

[63] Rogerson submits that, since the Respondents admitted to their mistakes in the Agreed Statement of Facts, it would be an injustice to find that the Respondents conduct amounted to fraud "based on the overwhelming evidence supporting [their] case."

3. Submissions of Hanna-Rogerson

[64] Hanna-Rogerson submits that she was controlled and put in a situation in which she was out of her depth. She submits that she did what Rogerson told her to do, at times under duress, with the understanding that Rogerson knew what he was doing and was educated about securities. In her Written Submissions, Hanna-Rogerson submitted that:

> [Rogerson] told me what to pay and sign and he used my personal TD bank account, which I never used, again I was told what to do. I trusted he was doing everything by the books. The Company Plus Petro Panama being off shore was always his platform that all was legal, when I would ask is this legal in Canada, which I naively trusted him.

(Written Submissions of Hanna-Rogerson dated August 25, 2014)

[65] Hanna-Rogerson also submits that she began helping Rogerson with the sale of technology in July 2006, and it was not until May 2007 that she was told to incorporate a company to incur the business expenses of selling COATS. She submits that she assisted Rogerson by providing:

(a) $70,000, which was to be used for Rogerson's travel expenses for testing in Edmonton in the Spring of 2007;

(b) $80,000 to maintain the business, funded through a second mortgage Hanna-Rogerson took out on her home and provided at Rogerson's request; and

(c) Money from her personal credit and credit cards.

According to Hanna-Rogerson, she accounted for all receipts and provided them to Nicks.

[66] Hanna-Rogerson submits that Rogerson asked her how much she wanted in monthly fees, in response to which Hanna-Rogerson suggested $10,000 per month, which she claims was the minimum income that she used to make per month.

[67] Hanna-Rogerson contends that she thought she was involved in "[bringing] a useful product to the oil industry and helping people get ahead." She submits that, at times, she had to borrow money from friends and family to cover bills for business and personal expenses and that her involvement in this matter has ruined her reputation with banks, friends and family.

B. The Applicable Law - Fraud

[68] Subsection 126.1(b) of the Act provides that:

> A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives[7] of securities that the person or company knows or reasonably ought to know,
>
> …
>
> (b) perpetrates a fraud on any person or company.

[69] The Commission first considered subsection 126.1(b) of the Act in *Al-Tar, supra*, in which the Commission describes the law with respect to fraud in the administrative context. Given the importance of the issue and the relevance of the decision in *Al-Tar*, the Commission's description is set out at some length as follows:

> Fraud is "one of the most egregious securities regulatory violations" and is both "an affront to the individual investors directly targeted" and something that "decreases confidence in the fairness and efficiency of the entire capital market system" (*Re Capital Alternatives Inc.* (2007), A.B.A.S.C. 79 at para. 308 citing D.

[7] The version of paragraph (b) of section 126.1 in force prior to 2010 did not include any reference to derivatives. The 2010 amendment adding derivatives to the section does not affect the allegations in this matter.

Johnston & K. D. Rockwell, *Canadian Securities Regulation,* 4th ed., Markham: LexisNexis, 2007 at 420).

The term fraud is not defined in the Act. Due to the recent introduction of the fraud provision in the Act, there are no decisions from the Commission interpreting this provision. However, we can draw out guidance and principles from criminal and administrative law jurisprudence and decisions from other securities commissions.

The British Columbia Court of Appeal addressed the application of the substantially identical fraud provision in the British Columbia *Securities Act,* R.S.B.C. 1996, c. 418, as amended (the "BC Act") in *Anderson v. British Columbia (Securities Commission),* 2004 BCCA 7 ("*Anderson*"). The Supreme Court of Canada denied leave to appeal the Anderson decision ([2004] S.C.C.A. No. 81).

In *Anderson,* the British Columbia Court of Appeal reviewed the legal test for fraud and relied on *R. v. Théroux,* [1993] 2 S.C.R. 5 ("*Théroux*"). In Théroux, Justice McLachlin (as she then was) summarized the elements of fraud as follows at paragraph 27:

> . . . the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk)

Section 126.1 of the Act has the identical operative language as the fraud provision in the British Columbia Act. In interpreting the fraud provision in the British Columbia Act and with respect to the mental element, the British Columbia Court of Appeal in Anderson stated at paragraph 26 that:

> ...[the fraud provision of the BC Act] does not dispense with proof of fraud, including proof of a guilty mind. . . . Section 57(b) [the fraud provision of the BC Act] simply widens the prohibition against participation in transactions to include participants who know or ought to know that a fraud is being perpetrated *by others,* as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud,

> including proof of subjective knowledge of the facts constituting the dishonest act, by someone involved in the transactions. (emphasis in original)

The British Columbia Court of Appeal in Anderson further explained at paragraph 29 that:

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

The British Columbia Court of Appeal approach to the legal test in the context of securities fraud as set out in Anderson was adopted in *Re Capital Alternatives Inc.*, 2007 ABASC 79, which was affirmed in *Alberta (Securities Commission) v. Brost*, [2008] A.J. No. 1071 (C.A.).

> For a corporation, it is sufficient to show that its directing minds knew or reasonably ought to have known that the corporation perpetrated a fraud to prove a breach of section 126.1(b) of the Act. [Emphasis added]

(*Al-Tar, supra* at paras. 214-221)

[70] The Commission has adopted substantially the same analysis in a number of subsequent decisions which were provided by Staff, including *Re Lehman Cohort* (2010), 33 O.S.C.B. 7041 at paragraphs 86-100; *Re Global Partners* (2010), 33 O.S.C.B. 7783 at paragraphs 238-245; *Re Borealis International Inc.* (2011), 34 O.S.C.B. 777, at paragraphs 65-67; and *Re Richvale*, supra, at paragraphs 102-105.

[71] As noted in prior Commission decisions, in *R. v. Théroux*, [1993] 2 S.C.R. 5, the Supreme Court of Canada noted that courts have defined the sort of conduct which may fall under the category of other fraudulent means to include "the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property" (at para. 15).

C. Analysis and Conclusions – Fraud

1. Promotional Materials

[72] In the Agreed Statement of Facts, the Respondents admitted that Rogerson created, or caused to be created, and provided investors with promotional materials regarding the COATS technology and the PlusPetro investment. These materials included, but were not limited to:

(a) Several versions of a PlusPetro business plan;

(b) Several versions of a document entitled "PlusPetro Investment Overview";

(c) Several versions of a document entitled "PlusPetro Inc. Executive Summary";

(d) Several versions of a document entitled "PlusPetro Inc. Investment Presentation";

(e) Several financial models and projections for PlusPetro;

(f) A document entitled "Crude Oil Additive Technology Solution (COATS) Technical Executive Summary";

(g) Numerous laboratory test reports;

(h) A letter to "Investment Syndication Investors" dated April 29, 2009; and

(i) Shareholder Update Letters dated May 1, August 1 and October 19, 2009, January 23, June 13 and October 2010, January, February 16, March 14, April, June, July, July 11, August 3, September 12, November 3 and December 22, 2011 and May 12 and October 15, 2012.

[73] The Shareholder Update Letters were sent by Rogerson to investors during the Material Time. As admitted by the Respondents, the letters stated that PlusPetro was very close to securing financing, would imminently purchase the COATS technology and would then commence the marketing and sale of the technology to large oil companies. The Shareholder Update Letters were also used to solicit further funds from existing investors.

[74] In the Shareholder Update Letter dated May 21, 2009, Rogerson stated:

> Well it's been a long wait but we finally have two offers waiting for us in Europe. I have to fly there next week to meet with the consortium contact and go through the offers. The reason for the long wait was our proposal had to pass through many departments to finally reach the management heads and who have now signed off on the opportunity [*sic*]. I have no details yet as they will only talk face, to face, so I will know more next week.
>
> …
>
> Approximately one month ago we posed a refinery pilot to our contact to pass onto the consortium as this would satisfy any and all the issues with regard to any doubts about what the COATS technology can do. We had positive feed back [*sic*] from the group and were advised that they will consider the refinery pilot. We then drafted some very attractive terms around the refinery pilot with a 25% deposit and an earn out program on the balance after the successful completion of the refinery pilot. I believe that these attractive terms are the reason they now have the two proposals so we are hopeful that we all have an understanding of the parameters of the deal and can move ahead with everyone feeling comfortable.

Shareholders were then asked to provide assistance to "get us to the finish line" and Portfolio Capital offered PlusPetro shares at $0.25 per share for such purpose.

[75] Barreto testified that he had worked in research and development and engineering for Royal Dutch Shell ("**Shell**") for 30 years and had been involved in Shell's efforts to develop technologies for upgrading heavy crude oil. Barreto testified that he had been contacted by Rogerson and agreed to work as a consultant to PlusPetro in exchange for shares of the company.

[76] Barreto also testified that he was a consultant to PlusPetro at the time of the Shareholder Update Letter dated May 21, 2009 and that the contents of the letter were "totally incorrect" (Hearing Transcript, February 12, 2014 at page 149). Barreto testified that, if anybody had been interested in the technology, he would have been involved and that if there had been two offers in Europe in May 2009, he would definitely have known about it.

[77] Barreto further testified that he was never aware of any proposed refinery pilots, but that he would have been aware if any had been proposed. Barreto testified that PlusPetro was never in a position to do a refinery pilot, which required a lot of expense and time and large facilities. He testified that this step would not have been taken until after the technology had been tested by research and development people at the oil company.

[78] In the Shareholder Update Letter dated August 1, 2009, which was also entered into evidence, Rogerson communicated that a Shell petrochemical engineer said PlusPetro had "created magic" and was very impressed with the management team. Barreto testified that Rogerson told him that a representative of Shell had come to watch an experiment at a local laboratory. Barreto never saw any correspondence to or from Shell and that he would have definitely known if Shell was interested in acquiring a license, as was communicated in the Shareholder Update Letter.

[79] Proulx testified that, in June 2009, he met Rogerson in a bar in Toronto and that, subsequent to further meetings over the course of the following week, Rogerson employed him as a member of the PlusPetro team on the basis that he would not be paid a salary but would earn equity in PlusPetro. Later in 2009, when Proulx invested $5,000 in PlusPetro, he was given the title of Vice President, Trading of PlusPetro. Proulx testified that, at the time he made his investment, Rogerson advised him that the proceeds of the investment would be used to pay the operating expenses of PlusPetro.

[80] Proulx testified that Rogerson told him about his conversations with large oil companies, including Shell and British Petroleum ("**BP**"), that were interested in the COATS technology. However, Proulx never participated in conversations with these companies or saw any documents relating to such conversations during his employment by PlusPetro.

[81] In a further Shareholder Update Letter sent in June 2010, Rogerson told investors that "We are in constant discussions with [Shell] and should have an outline of their proposed testing details next week". In the same letter, Rogerson communicated that another major oil company had done "extensive lab and pipeline testing with successful results". However, Barreto testified that, as of January 2010 when he terminated his consultancy with PlusPetro, the company was definitely not engaged in any lab or pipeline testing and would not have been in a position to do so. Rogerson himself admitted during the Merits Hearing that the COATS technology was developed, but not patented or proven in the field. Rogerson testified that the reference in the Shareholder Update Letter to "extensive lab and pipeline testing" was a reference to a pipeline

simulation done by BP. Rogerson did not, however, provide any documentary or other evidence of such a simulation.

[82] Through the Shareholder Update Letters sent by Portfolio Capital, Rogerson continued to provide investors with information that indicated that PlusPetro was in advanced discussions with major oil companies and that acquisition of the COATS technology was essentially imminent. Notwithstanding the fact that the evidence, and in particular, the testimony of Barreto and Proulx, demonstrates that the acquisition of the COATS technology was not imminent, the Respondents provided such information to investors and prospective investors for the purpose of soliciting funds.

[83] Staff introduced a printed copy of the website for Portfolio Capital as an exhibit which described the company as "an investment banking firm that focuses on providing capital raising and advisory services to growth oriented companies", and stated that "we provide a complete range of investment banking services, in targeted industries including: Energy, Technology, Healthcare and Biotechnology". All evidence indicates that Portfolio Capital's only purpose was to solicit investments in PlusPetro.

2. Portfolio Capital and the COATS Technology

[84] Proulx testified that TDF Consulting ("**TDF**") was the company that represented the COATS technology. He explained that Portfolio Capital had an arrangement with TDF to be the exclusive marketer of the COATS technology. Proulx testified that his understanding was that Portfolio Capital was the 100 per cent owner of PlusPetro and had agreed to let PlusPetro do the marketing for the technology.

[85] During cross-examination, Rogerson testified that (i) he incorporated PlusPetro; (ii) his company, Janus Capital Inc., was the original sole shareholder of PlusPetro; (iii) he caused shares of PlusPetro to be transferred to his company PCI Belize for nominal value; (iv) he sold PlusPetro shares to the public; and (v) he still indirectly controls PlusPetro.

[86] Proulx testified that Rogerson's original plan for PlusPetro was to have a master licence for the COATS intellectual property and then licence the intellectual property to end users of the product including producers of heavy oil from the Alberta Tar Sands. Proulx also testified that Rogerson's business plan was initially built around the ownership of a licence, without the ownership of any assets.

[87] Staff introduced into evidence a copy of a slide deck that the Respondents had provided to Staff prior to the Merits Hearing, which was dated February 5, 2008 and entitled "Crude Oil Additive – Innovation ref 1299". The slide deck, which relates to a proposal similar to the COATS technology, appears to have been prepared on a BP template. The slide deck presentation begins as follows:

> This proposal relates to a crude oil additive, developed by a small Canadian scientific company over the past 25 years. Their product is very mature in terms of having undergone extensive laboratory testing, to recognised standards over an extended period of time and they feel that a number of market indicators make it the right time to offer their produce to the oil industry. They are offering BP the

> opportunity to witness testing of their product under controlled conditions, with a view to owning the exclusive worldwide rights.
>
> …
>
> The product is added to crude oil at source as a cold process and becomes homogenous to the oil, enhancing the product and therefore does not require subsequent removal or separations prior to refining.
>
> …

[88] The slide deck also provides a summary of the purported benefits of the proposed technology and reports on sample test results for Alberta crude, Texas crude and Heavy Oil from Eastern Europe. The slide deck requests that the BP Innovations Board provide (i) a senior level BP sponsor for the study; (ii) appropriate BP scientists to take part in an exploratory conference call and a laboratory test; and (iii) assistance to build a BP business case.

[89] Barreto testified that his understanding from Rogerson was that BP was the only company that Rogerson had been in any discussions with before Barreto began providing consultancy services to PlusPetro in January 2009. Barreto did not see any correspondence from BP during his time as a consultant, but he testified that Rogerson produced data that he said was from BP's analysis of the COATS technology and told Barreto that BP would then determine whether it wanted to become involved with PlusPetro. There was no further response from BP during Barreto's time as a consultant. When he approached contacts at BP, Barreto was told that BP would not accept any technology unless the tests were undertaken in BP laboratories. Barreto testified that the owners of the COATS technology were never prepared to take such steps.

[90] Staff also introduced a number of other documents provided by the Respondents prior to the Merits Hearing that purportedly demonstrated interest by Enbridge Inc. ("**Enbridge**") in the COATS technology, including an e-mail communication involving Rogerson, a Confidentiality Agreement and a proposal by PlusPetro for a 25-year strategic partnership with Enbridge for an investment in PlusPetro and the exclusive North American Manufacturing License to supply the COATS product. Additional evidence of Rogerson's solicitation of possible strategic partners for the COATS technology was provided in the form of e-mail responses to an unsolicited offer to ExxonMobil Corporation and e-mail communications with Kuwait Petroleum Corporation (KPC).

[91] Proulx testified that Rogerson did spend some time in Kuwait "flying around, running up expenses, and not really coming back with anything significant" (Hearing Transcript, February 13, 2014 at page 49).

[92] Barreto testified that he told Rogerson that the COATS technology would first have to be tested by a reputable company before interest in the product could be developed. Arrangements were made to have COATS tested at a laboratory, however, the owner of the technology never permitted a sample to be used for testing and Barreto concluded that he was wasting his time and resigned as a consultant to PlusPetro in January 2010.

[93] Proulx explained that he was hired with the expectation that, once PlusPetro was up and running, it would be participating in various energy and commodity markets across the world, at which time Proulx's experience would be useful. However, he testified that, from the beginning, he had concerns about the ownership structure between Portfolio Capital and PlusPetro, which he described as "convoluted". Proulx noted that he did not believe that Portfolio Capital's business plan was viable in the long run because of concerns arising from the ownership of the intellectual property. He testified that he spoke with former colleagues in the investment banking business who confirmed his suspicions that the corporate structure was too opaque to generate significant investor interest. Proulx suggested to Rogerson that changes be made to the corporate structure and put together an acquisition proposal to obtain the intellectual property right for the COATS technology from TDF. Proulx's suggestions to improve corporate structure and governance were not instituted.

[94] Proulx's efforts to make a presentation on behalf of PlusPetro at a venture capital conference in New York in mid-2010 were unsuccessful as he was told by Rogerson that the company could not afford the $3,000 that it would be required to spend. He further testified that he became increasingly concerned with the way in which PlusPetro was being run, citing the absence of a bank account and the lack of oversight. Proulx resigned shortly after Rogerson expressed unhappiness about statements Proulx made at a March 2010 investor conference call about some of his concerns, including a suggestion that PlusPetro establish a board of directors to provide oversight. In addition to his concerns with respect to the lack of proper corporate governance at PlusPetro, Proulx also testified about his concerns with respect to the use of investor funds.

[95] I found both Barreto and Proulx to be forthright and credible witnesses and their testimony was entirely consistent. Conversely, Rogerson's testimony with respect to the breadth and scope of his purported activities relating to the marketing and development of the COATS technology was not credible and the contents of the Shareholder Update Letters and the other representations he made to investors and prospective investors, which were unsubstantiated, were grossly inaccurate and misleading.

[96] Although Hanna-Rogerson may not have been involved in the day-to-day activities of PlusPetro, she was directly engaged in making representations to investors and prospective investors and her denials of having any knowledge as to the misleading nature of those representations demonstrates wilful ignorance of the actual status of the marketing and development of the COATS technology and are simply not credible.

3. Source and Application of Funds in the PlusPetro Investment Scheme

[97] The Respondents admitted in the Agreed Statement of Facts that investors paid for their investments in cash or by way of cheque, bank draft or wire transfer made payable to PCI Belize (for international investors) and Portfolio Capital (for Canadian resident investors).

[98] As noted previously, the Respondents admitted in the Agreed Statement of Facts that Rogerson and Hanna-Rogerson sold PlusPetro shares to more than 200 investors and potential investors, raising US$980,000 and $544,000. When cross-examined by Staff with respect to the balance sheet of PCI Belize which showed that that more than $3.1 million had been raised from the sale of PlusPetro shares, Rogerson would only admit that, as noted in paragraph [56] above,

an amount of $900,000 had been raised in addition to the $1.6 million admitted in the Statement of Facts. For the purposes of my analysis, I have considered the approximately $1.7 million amount employed by Staff in the Statement of Allegations.

[99] With respect to the source of funds, Collins testified that US$805,520.28 of the funds in Portfolio Capital's U.S. dollar account was received from investors. She further testified that "potential investors" contributed an additional US$175,704.91. During her testimony, Collins explained that, based on documents that Staff had received and interviews that Staff had conducted, she knew that certain people were investors in PlusPetro. For another group of people, Collins was unable to confirm why they transferred funds to Portfolio Capital, but thought that, for the most part, they were probably investors and categorized them as "potential investors".[8] Collins testified that a total amount of $960,977.07 was transferred to Portfolio Capital's Canadian dollar account from the company's U.S. dollar account, and stated that all of the funds credited to the U.S. dollar account were received from investors.

[100] With respect to Portfolio Capital's Canadian dollar account, Collins testified that investors directly deposited a total of $417,680, and that the amount of funds that were directly sourced from potential investors and deposited in the Respondents' Canadian dollar accounts was $151,740.28. Neither Staff nor the Individual Respondents provided an explanation for the fact that the Canadian and U.S. dollar amounts referred to in this paragraph and the previous paragraph do not match the amounts admitted by the Respondents in the Agreed Statement of Facts.

[101] Collins testified that it also appeared that PCI Belize held a bank account in Belize, but that Staff had been unable to obtain bank records for this account. However, Collins testified that the majority of investor and potential investor funds were deposited to Portfolio Capital's Canadian and U.S. dollar bank accounts and that some investor funds were deposited directly to Hanna-Rogerson's personal accounts.

[102] Collins analyzed a number of bank accounts and credit cards connected to the funds deposited by PlusPetro investors. Portfolio Capital had a U.S. dollar account and a Canadian dollar account at TD Canada Trust, for which Hanna-Rogerson had signing authority. In addition, investor funds were deposited or transferred to three accounts in the name of Hanna-Rogerson at the Royal Bank of Canada ("**RBC**") and TD Canada Trust and an account at RBC in the name of I-Imagery Ent. I-Imagery Ent. is a sole proprietorship that was registered in British Columbia in 1999 to Hanna-Rogerson under her maiden name, Amy May Hanna. Collins also examined expenditures charged by Hanna-Rogerson to a Holt Renfrew American Express card and an RBC Visa card and testified that the outstanding balances of both cards were paid using investor funds.

[8] The use of the term "potential investors" by Collins in the foregoing context and its use in the Agreed Statement of Facts creates confusion as the term would ordinarily be used to refer to persons who might invest but have not yet done so. It is most unlikely that a person who intended to be an investor in PlusPetro would have paid money to the Individual Respondents or to Portfolio Capital without having received shares or a promise that shares would be issued to them. The absence of proper corporate records made an accurate assessment by Collins in this regard impossible. Accordingly, when used in these reasons in reference to the Agreed Statement of Facts, the testimony of the Individual Respondents and the documentary evidence, the term "potential investors" should be construed to mean persons who were likely already investors as well as persons who were being solicited to become investors.

[103] During her investigation, Collins did not see any evidence that, during the Material Time, the Respondents earned any income or revenue of any significance. Proulx testified that he had no reason to believe that Rogerson was drawing a salary or received management fees from PlusPetro and believed that Rogerson was "working [for] sweat equity" (Hearing Transcript, February 13, 2014 at page 26).

[104] With respect to the allocation of investor funds, the Respondents admit that Rogerson and Hanna-Rogerson paid cash or transferred PlusPetro shares to various persons who referred investors to them. Collins explained that a total of $40,790.64 and US$10,000 was paid to other related parties, including relatives of Rogerson and Hanna-Rogerson, during the Material Time. Collins provided testimony and documentary evidence of her analysis of the source and application of funds that demonstrated that the following payments were made from the accounts to which PlusPetro investor funds were deposited:

- Cash withdrawals - $250,898.81
- Wages or salaries - $127,538.72
- Technical expenses including consultants - $120.143.84 and USD $34,050.78
- Visa payments - $265,785
- American Express payments - $34,455.01
- Rent and mortgages - $260,118.90
- Utilities - $33,635.70
- Travel - $47,226.41
- Food and alcohol - $52,372.67
- Muskoka property taxes - $21,708.42
- Department or big box stores - $34,387.15
- Pet care expenses - $15,556.37
- Other - $39,242.63

The "Other" category included payments for landscaping, boating, piano tuning, theatre tickets and golf clubs.

[105] Collins testified that she had not been asked to analyze the credit card expenses incurred by the Individual Respondents to determine whether the expenses incurred were for business or personal purposes. She did, however, testify that a total of $137,534.94 was charged to Visa for travel expenses including airline tickets, travel insurance, hotels, travel companies, car rentals, ferries, rail travel, taxis, parking, gasoline and car repairs.

[106] In addition to the foregoing amounts, Collins determined that $11,374.03 of health and beauty expenses were paid from the Canadian dollar accounts to which investor funds had been deposited and that her analysis of Visa charges revealed that, during the Material Time, $29,292.62 was spent on health and beauty expenses including reproductive medicine services, spas, salons and beauty products, drug stores and health and vitamin shops as well as the expenses incurred for a weight loss system and for the services of a dentist and a doctor.

[107] Collins provided further evidence that $61,146.17 was used to pay charges made on an RBC Visa card for utilities expenses, department or big box stores including Winners, Wal-Mart and Canadian Tire, pet care, home renovations and decoration, insurance payments and for

personal and entertainment expenses. As noted in paragraph [102] above, Visa payments were made from accounts to which PlusPetro investor funds had been deposited.

[108] It appears that some of the travel expenses may have been incurred in connection with the Respondents' efforts to develop the COATS technology including the trip to Kuwait to which reference is made in paragraph [91] above. Proulx also testified that PlusPetro covered expenses for trips he took with Rogerson to a conference in Edmonton in September 2009 and that he took with Barreto and another person to the Canadian embassy in Washington.

[109] However, the evidence overwhelmingly demonstrates that the Respondents treated investor funds as their own and used the majority of funds received from PlusPetro's investors to pay their personal expenses.

[110] With respect to the status of the various bank accounts, Collins testified that, as of March 15, 2012, the Respondents' bank accounts had an aggregate overdraft of $5,883.81.

[111] Rogerson testified that the Respondents' conduct was not fraudulent, but was merely the result of what could be described as poor accounting practices. The position of the Individual Respondents is that they were entitled to monthly payments of $17,500 in management fees as a result of the following two agreements:

(a) An Agreement for Business Development Service between PlusPetro and Portfolio Capital, dated February 1, 2009 (the "**Business Development Agreement**"). Pursuant to the Business Development Agreement, PlusPetro was to pay Portfolio Capital US$17,500 per month as compensation for business development services which included raising investment capital, investor relations, securities transactions, banking, sourcing business contacts, accounting, administration and recruitment. Although the Business Development Agreement purports to be between PlusPetro and Portfolio Capital, no one signed the Agreement on behalf of Portfolio Capital and Rogerson signed the Agreement on behalf of PCI Belize which was not a party.

(b) An Agreement for Service between PCI Belize and Portfolio Capital dated May 1, 2007 (the "**Service Agreement**"). Pursuant to the Service Agreement, PCI Belize was to pay Portfolio Capital US$10,000 per month for executive support and corporate development services, which included banking, corporate development and branding, web design, office support, travel arrangements, appointment scheduling, transportation, liaison with consultants, accounting, administration and mobile phone service contracts. The Service Agreement was signed by Rogerson on behalf of PCI Belize and Hanna-Rogerson on behalf of Portfolio Capital.

[112] Hanna-Rogerson testified that the US$10,000 fee payable under the terms of the Service Agreement was to be paid by PCI Belize from the US$17,000 it was to receive monthly from PlusPetro.

[113] The evidence demonstrates that PCI Belize did not receive US$17,500 monthly payments from PlusPetro. Rather, investor money was freely used by the Individual Respondents to cover any and all personal expenses as described in paragraphs [102] and following above.

[114] Rogerson testified that the Respondents did not inform all investors about the Business Development Agreement and the Service Agreement. He claimed during his testimony that he told some of the investors about the agreements, but was not able to provide sufficient detail about which investors would have known about the agreements.

[115] Both Rogerson and Hanna-Rogerson testified that Hanna-Rogerson's role was merely administrative and that she was working for Rogerson pursuant to the Service Agreement. In her written submissions, Hanna-Rogerson states that she opened accounts, incorporated a company and did whatever Rogerson asked her to do, at times under duress. She also submitted that she had employed her own funds and had "been controlled and put in a situation [in which she was] way out of my depth of knowledge only ever being told what to do, as I thought [Rogerson] knew what he was doing and as he was educated in securities."

[116] Although Rogerson was the directing mind of the PlusPetro investment scheme, he did not provide any further or meaningful information to support his submissions with respect to the use of investor funds, but instead deferred to Nicks on financial and accounting issues. I found Rogerson's testimony with respect to the use of investor funds to be argumentative and evasive and simply not credible. Hanna-Rogerson's submissions that she had no idea that investor funds were being misused and misapplied are simply not credible given the fact that she controlled the flow of funds to and from the bank accounts maintained by Portfolio Capital and was responsible for expending a significant portion of such funds on expenses that were obviously personal in nature.

[117] Nicks testified on behalf of the Respondents and was critical of the analysis of the source and application of PlusPetro investor funds undertaken by Collins which he retracted later in his testimony. His testimony provided no further support for the Respondents' submissions that their business practices were legitimate and it was quite obvious that Nicks's role was that of a bookkeeper and that he merely recorded in Portfolio Capital's accounting records the financial information that was provided, usually without support, by the Individual Respondents. No further documentary evidence was provided to support the claim of the Individual Respondents that investor funds were used for legitimate business purposes rather than to pay personal expenses.

[118] During cross-examination, Staff questioned Nicks about $128,000 that Nicks described in his analysis of the Portfolio Capital funds as being "excess funds received during the period" that were "used for subsequent expenditures or refund". In respect of these funds, Nicks testified that "You're right, that note does not adequately describe it" and admitted that he did not know where that $128,000 went (Hearing Transcript, June 25, 2014, at pages 105 to 106).

[119] Nicks also testified with respect to two versions of his analysis of the Portfolio Capital funds. In an earlier version, he noted cash expenses of $122,949 in the category of "Travel" and $182,345 in the category of "David's Expenses". In a later version of the analysis, these categories were combined and categorized as "Travel and Promotion" in the amount of $311,050.

[120] Nicks did provide bookkeeping records relating to the use of funds. However, in addition to being essentially led by Rogerson at many points during his examination-in-chief, Nicks's evidence raised a number of serious concerns with respect to the manner in which

expenses were recorded, the absence of documentary evidence for many expenses and the fact that the general ledger may have been altered in 2013 or 2014.

[121] Aside from the foregoing concerns, Nicks's testimony was evasive and imprecise and did not provide any assistance with respect to the use of investor funds nor did it shed any light on the legitimacy of the Respondents' efforts with respect to the marketing and development of the COATS technology or the business expenses that Rogerson allegedly incurred in connection with such marketing and development.

4. Conclusion

[122] Although I was presented with some evidence that limited efforts were made by Rogerson to market the COATS technology, I find that the status of his purported discussions with prospective users of the technology and the testing of the technology, which were communicated to investors and prospective investors both orally and through the use of the Shareholder Update Letters, was grossly exaggerated and intentionally designed to mislead to such an extent that his conduct and that of Hanna-Rogerson constituted a fraud on investors.

[123] Further, and importantly, substantial amounts of the investor funds that were received by Portfolio Capital were not used for the purposes represented to investors. Rather, the Individual Respondents used investor funds to pay for personal expenses totally unrelated to the operation of PlusPetro or Portfolio Capital and that did nothing to advance the marketing or development of the COATS technology. As a result of such conduct, I find that the Individual Respondents engaged in repeated and prolonged acts of deceit, falsehood and other fraudulent means that deprived investors of the amounts that they invested.

[124] I do not accept the Individual Respondents' assertions that they were entitled to a monthly management fee of US$17,500 and have seen no evidence that would confirm that the Business Development Agreement and the Service Agreement were actually executed on the dates which they bear. Moreover, even if the two Agreements had been executed when alleged, neither of the Individual Respondents can demonstrate that investors or prospective investors were ever apprised of such fees.

[125] I agree with Staff's submission that the economic interests of investors were imperilled by the Individual Respondents' fraudulent conduct and the investors also experienced actual loss of funds as the evidence disclosed that only Proulx was reimbursed for his investment and the bank accounts maintained by Portfolio Capital had an aggregate overdraft at the time of Staff's investigation. The Individual Respondents used investor funds to pay for their personal expenses in a manner that was dishonest and unscrupulous.

[126] It is clear that Rogerson was the directing mind of PlusPetro, PCI Belize and Portfolio Capital. Rogerson knowingly made direct misrepresentations to investors and prospective investors about the status of Portfolio Capital's work to utilize the COATS technology and about the manner in which investor funds would be used. Through Portfolio Capital, Rogerson was directly engaged in the marketing and sale of PlusPetro securities to investors.

[127] Hanna-Rogerson was President of Portfolio Capital and had control over the bank accounts through which investor funds were funnelled. Hanna-Rogerson was aware of how the funds that flowed through these accounts were sourced and used. I find that she knew, and at the

very least, ought to have known, that her actions with respect to the management and use of investor funds resulted in deprivation to investors.

[128] Based on the evidence summarized above, I find that the Respondents engaged in conduct that they knew or reasonably ought to have known perpetrated a fraud on investors in Portfolio Capital, contrary to subsection 126.1(b) of the Act. I further find that such breaches were contrary to the public interest.

[129] Further, and in any event, I find that Hanna-Rogerson as the director of Portfolio Capital, authorized, permitted and acquiesced in Portfolio Capital's breach of subsection 126.1(b) of the Act and accordingly failed to comply with Ontario securities law pursuant to section 129.2 of the Act.

VII. CONCLUSION

[130] For the reasons stated above, I find that, during the Material Time:

(a) Rogerson, Hanna-Rogerson and Portfolio Capital engaged in or held themselves out as engaging in the business of trading in securities of PlusPetro without being registered to do so, contrary to subsection 25(1)(a) of the Act, as that section existed prior to September 28, 2009, and contrary to subsection 25(1) of the Act, on or after September 28, 2009, and contrary to the public interest;

(b) Rogerson made prohibited representations that the securities of PlusPetro would be listed on an exchange with the intention of effecting a trade in such securities, contrary to subsection 38(3) of the Act and contrary to the public interest;

(c) Rogerson, Hanna-Rogerson and Portfolio Capital illegally distributed securities of PlusPetro, contrary to subsection 53(1) of the Act and contrary to the public interest;

(d) Rogerson, Hanna-Rogerson and Portfolio Capital engaged or participated in acts, practices or courses of conduct relating to securities of PlusPetro that they knew or reasonably ought to have known perpetrated a fraud, contrary to subsection 126.1(b) of the Act and contrary to the public interest;

(e) Hanna-Rogerson, as the director of Portfolio Capital, authorized, permitted or acquiesced in Portfolio Capital's non-compliance of Ontario securities law, and is therefore deemed to have contravened Ontario securities law pursuant to section 129.2 of the Act; and

(f) The conduct of Rogerson, Hanna-Rogerson and Portfolio Capital as described above was contrary to the public interest.

[131] An order will be issued as follows:

(a) Staff shall serve and file its written submissions on sanctions and costs by 4:00 p.m. on Friday, March 20, 2015;

(b) The Respondents shall serve and file their written submissions on sanctions and costs by 4:00 p.m. on Friday, April 10, 2015;

(c) Staff shall serve and file any reply submissions on sanctions and costs by 4:00 p.m. on Wednesday, April 15, 2015;

(d) The hearing to determine sanctions and costs against the Respondents will be held at the offices of the Commission at 20 Queen Street West, Toronto, Ontario on Monday, April 20, 2015 at 10:00 a.m., or on such further or other dates as agreed by the parties and set by the Office of the Secretary; and

(e) In the event of the failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party, and such party is not entitled to any further notice of the proceeding.

DATED at Toronto this 26th day of February, 2015.

"Christopher Portner"

_____

Christopher Portner