

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

- and -

IN THE MATTER OF BRIAN K. COSTELLO

**STATEMENT OF ALLEGATIONS OF STAFF OF THE
ONTARIO SECURITIES COMMISSION**

Staff of the Ontario Securities Commission (the “Commission”) makes the following allegations:

I THE RESPONDENT

1. Brian K. Costello (“Costello”) is a well known author and seminar speaker on personal finance matters. Costello publishes a monthly newsletter entitled “Brian Costello Money Matters” (the “Newsletter”), writes articles published in Canadian newspapers, records segments played on radio stations across Canada, and recently started up a web site in his name.
2. Costello is not registered. He was previously registered as a salesperson between May 1971 and November 1976. Costello has never been registered as an adviser.

II OVERVIEW OF STAFF'S ALLEGATIONS

3. Costello engaged in the conduct described below, contrary to Ontario securities law and the public interest.

4. Costello acted as an “adviser” without being registered in accordance with section 25(1)(c) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”), by engaging in conduct which amounted to recommending the purchase of specific securities to attendees at his seminars, readers of the Newsletter, and listeners of his radio segments, and by offering his opinion to them on the investment merits of those specific securities.
5. Costello engaged in this conduct without disclosing that he held an interest in a company that would benefit financially from the sale of those specific securities or that he received fees for publishing articles in the Newsletter which recommended those specific securities, contrary to section 40 of the Act and the public interest.
6. Costello engaged in conduct which constituted “trading” in securities without being registered in accordance with subsection 25(1)(a) of the Act, by carrying out acts directly or indirectly in furtherance of trades of specific securities by way of his seminars, radio segments, and the articles published in the Newsletter.

III THE FINANCIAL PLANNING GROUP

A. *The Financial Planning Group*

7. The Height of Excellence Financial Planning Group Inc. (“FPG FundsCo”) was registered and operated in Ontario as a mutual fund dealer and a limited market dealer.
8. DPM Securities Inc. (“FPG SecuritiesCo”) was registered and operated in Ontario as a securities dealer.
9. “*The Financial Planning Group*” was a business name used by the group of related companies identified in Appendix “A” to market the investment services provided to the public by FPG FundsCo and FPG SecuritiesCo (hereinafter referred to jointly as the “FPG Registrants”). Together, the FPG Registrants served as the mutual fund, limited market and securities dealer

for clients of *The Financial Planning Group*.

10. The registered salespersons of the FPG Registrants are hereinafter referred to as the “FPG Sales Reps”. The FPG Sales Reps were located in Ontario and elsewhere across Canada.

B. Costello's Interest In *The Financial Planning Group*

11. During the period December 1992 to July 1997, Costello had an interest in the activities of *The Financial Planning Group* through his ownership stake in The Height of Excellence Financial Group Inc. (“FPG ServiceCo”), one of the companies comprising *The Financial Planning Group*. The two principal shareholders of FPG ServiceCo were Costello and DPM Financial Planning Group Inc. (“DPM Financial”), each of whom owned 47.5% of FPG ServiceCo.¹ Costello’s monetary investment in FPG ServiceCo was approximately \$82,000. Costello was the chairman of the board of FPG ServiceCo.
12. FPG ServiceCo did not offer financial services and products for sale to the public but was purportedly created to provide office related, secretarial and other services to the FPG Registrants. FPG ServiceCo was the vehicle through which Costello held his interest in *The Financial Planning Group*.
13. By way of an agreement dated December 1, 1992 (the “Agreement”) between Costello, DPM Financial, and two other parties², the net revenue of the FPG Registrants outside of Quebec, generated primarily from commissions earned on the sale of all securities by the FPG Sales Reps, was to be paid to FPG ServiceCo as fees. Substantially all of the revenue of FPG ServiceCo was derived from the fees paid to it by the FPG Registrants under the Agreement. This arrangement permitted Costello, in consideration for his involvement in the marketing activity of the FPG Registrants and his network of contacts, to share in the profits of the FPG Registrants in the same proportion as his ownership of FPG ServiceCo.

1 The remaining 5% of FPG ServiceCo was owned by an individual whose involvement is not relevant to this proceeding.

2 The two other parties to the Agreement are not relevant to this proceeding.

14. Prior to the Agreement, Costello conducted public seminars across Canada on personal finance and investment related matters. Under the Agreement, Costello agreed to thereafter conduct these seminars, which remained open to the public, exclusively on behalf of the FPG Sales Reps and no other parties. The seminars were arranged by the local FPG Sales Reps, who paid all of the costs of the seminars, including Costello's fee of approximately \$5,000 per seminar.
15. Under the terms of the Agreement, Costello also personally received an annual management fee of \$200,000, plus other fees and expenses from FPG ServiceCo.
16. The Agreement contemplated that Costello would complete the partners, directors and officers qualifying exam (the "PDO Exam") and then become a director and officer of one of the FPG Registrants. Costello agreed to use his best efforts to take and pass the PDO Exam.
17. Costello never took the PDO exam nor did he become a director or officer of either of the FPG Registrants. However, Costello was involved in the following aspects of the business of the FPG Registrants:
 - i. planning and implementing marketing strategy used by the FPG Registrants;
 - ii. recruiting FPG Sales Reps;
 - iii. attending and presiding over branch manager meetings;
 - iv. participating in strategic planning sessions;
 - v. participating in the due diligence review and approval of investment products offered for sale by the FPG Registrants through the FPG Sales Reps.

C. Sales of Synlan and Enervest by FPG Sales Reps

18. Synlan Securities Corporation ("Synlan") was an Ontario company which carried on business promoting real estate limited partnerships located in Florida and Arizona. Units in the Synlan limited partnerships (the "Synlan LP's") were sold by FPG Sales Reps in Ontario and elsewhere

in Canada, as set out in Appendix “B”.

19. The total amount paid for the units of the Synlan LP’s sold by the FPG Sales Reps as set out in Appendix “B” was US \$1,533,900, which generated sales commissions in the amount of approximately Cdn. \$282,000, of which Cdn. \$103,500 was paid to the FPG Registrants and Cdn. \$178,500 was paid to the FPG Sales Reps.
20. Synlan and Richard J. Smith (“Smith”), the principal of Synlan, were the subject of a Commission order in 1998 pursuant to which their respective registrations were terminated and they were ordered to permanently cease trading in all securities. In 1997, Smith pleaded guilty in Ontario to 32 counts of “fraud over \$5,000” under the *Criminal Code* in relation to the misappropriation of proceeds in the limited partnership offering of Track Securities Corporation.
21. The Synlan LP’s were sold pursuant to Offering Memoranda, each of which stated that units in the Synlan LP’s would be sold to investors in Ontario pursuant to the prospectus exemption set out in section 71(1)(d) (now section 72(1)(d)) of the Act. Some or all of the units in the Synlan LP’s sold to investors in Ontario did not properly qualify for this exemption, or for any other prospectus exemption under the Act. No prospectus was filed in respect of any of the Synlan LP’s sold in Ontario. Accordingly, the sale of those Synlan LP’s in Ontario was contrary to section 53(1) of the Act.
22. EnerVest Resource Management Ltd. (“EnerVest”) was an Alberta company which promoted oil and gas limited partnerships. Units in the EnerVest limited partnerships (the “EnerVest LP’s”) were sold by FPG Sales Reps in Ontario, as set out in Appendix “C”.
23. FPG SecuritiesCo was the exclusive sales agent for some or all of the EnerVest LP’s and received syndication fees of approximately \$95,000.
24. The total amount paid for the units of the EnerVest LP’s sold by the FPG Sales Reps in Ontario was (all figures Cdn.) \$9,509,000, which generated sales commissions in the amount of approximately \$697,570, of which \$104,635 was paid to the FPG Registrants and \$592,935 was

paid to the FPG Sales Reps.

D. Financial Benefit to Costello from the Sale of the Synlan and EnerVest LP's

25. The FPG Sales Reps sold the majority of the units in the Synlan and EnerVest LP's. The combined commissions earned by the FPG Registrants from the sales of the Synlan and EnerVest LP's (outside of Quebec) was approximately \$208,135. To the extent that this amount, together with some or all of the aforementioned syndication fees earned by FPG SecuritiesCo, was not applied by the FPG Registrants against daily operations and expenses, or used to maintain minimum amounts of regulatory capital, it was paid to FPG ServiceCo as fees, pursuant to the Agreement.

E. FPG ServiceCo's Interest in EnerVest

26. From June 1995 to July 1996, FPG ServiceCo had a 10% equity interest and \$25,000 debenture interest in EnerVest, which was the sole shareholder of the general partner of every EnerVest LP incorporated during that time, except one.³ The general partner of every EnerVest LP received fees for management and other services provided to the limited partnership.

F. Advising Re Synlan and EnerVest

(i) Seminars

27. Between 1994 and 1997, Costello conducted seminars arranged by FPG Sales Reps in Ontario at which he specifically discussed the Synlan and/or EnerVest LP's. Costello went beyond providing simply factual information about the Synlan and EnerVest LP's by offering his opinion on their investment merits and by expressly or impliedly recommending and endorsing them. Costello focused on the benefits and advantages of the Synlan and EnerVest LP's without adequately discussing their related or inherent risks. Costello did not disclose in his seminars that he would benefit financially from the sale of the Synlan and EnerVest LP's by the FPG Sales

³ In the case of the lone exception, FPG ServiceCo held a 10% equity interest directly or indirectly in the general partner, as opposed to through its debt and equity interest in EnerVest.

Reps through his ownership interest in FPG ServiceCo.

28. In his seminars, Costello offered his opinion on the Synlan and/or Enervest LP's variously by stating that they were: "a fabulous tax break", "the best" or "one of the best" investments of this type he had seen, or "the only good one" or "the only one he would consider purchasing".
29. Costello's presentations at these seminars constituted "advising others as to the investing in or the buying of securities" within the meaning of the definition of "adviser" set out in the Act.

(ii) Newsletter

30. During the same period that Costello was giving his seminars, he also published articles in the Newsletter which promoted the Synlan and EnerVest LP's to varying degrees. These articles went beyond providing simply factual information about the Synlan and EnerVest LP's by including opinions on their investment merits and by expressly or impliedly recommending and endorsing them. The articles did not disclose that Costello would benefit financially from the sale of those securities by FPG Sales Reps through his interest in FPG ServiceCo or that he received fees from Synlan and EnerVest for publishing the articles in the Newsletter.
31. The articles published in the Newsletter focussed on the positive features of investing in the Synlan and EnerVest LP's without adequately discussing their related or inherent risks. The articles contained, among other things:
 - i. a statement that Synlan was a good example (and the only example given) of the type of quality investment that readers should look for;
 - ii. statements that the Synlan LP's worked "superbly well at both the 42% and 53% tax brackets" and were "a tax vehicle designed to be a model investment product of the 1990's";
 - iii. a statement that both Synlan and EnerVest were examples of limited partnerships "that offer both tax relief and investment potential";

- iv. statements that EnerVest was a “very interesting opportunity” and that its focus was “to provide investors with a solid opportunity to own a diversified portfolio of producing oil and gas wells at a cost that is substantially below industry averages”; and
 - v. a statement in an article discussing oil and gas income funds that “My preference is one like EnerVest...”, where EnerVest was the only example given.
32. In addition to being sent directly to subscribers, copies of the Newsletter were distributed by FPG Sales Reps to existing or potential clients, made available to attendees at Costello’s seminars, and were also provided to Synlan, which used them for promotional purposes.
33. The nature and content of the articles in the Newsletter concerning the Synlan and EnerVest LP’s constituted “advising others as to the investing in or the buying of securities” within the meaning of the definition of “adviser” set out in the Act. By publishing the articles in the Newsletter, Costello was acting as an adviser.
34. The exemptions from registration in section 34 of the Act and section 148 of Regulation 1015 were not available to Costello so as to exempt him from the registration requirements in section 25(1)(c) of the Act with respect to acting as an “adviser” in connection with the Synlan and EnerVest LP's.

G. Trading Re Synlan and EnerVest

(i) Acts In Furtherance of Trades

35. The manner in which Costello portrayed the Synlan and EnerVest LP’s during his seminars had the effect of creating interest in and demand for these securities. In the case of the Synlan LP’s, Costello effectively created markets for these securities where none existed before. Prior to Costello’s seminars, the local FPG Sales Reps were not aware of any significant interest in the Synlan LP’s. After his seminars, there was considerable interest in the Synlan LP’s shown by clients of the FPG Sales Reps. This conduct by Costello amounted to “acts in furtherance of

trades” and therefore constituted “trading” as defined in the Act.

(ii) Solicitation In Furtherance of Trades

36. Costello’s seminars were also used in part to solicit investors interested in purchasing products approved for sale by the FPG Registrants, including the Synlan and EnerVest LP’s. Costello’s participation in this activity, described below, amounted to “solicitation in furtherance of a trade” and therefore constituted “trading” as defined in the Act.
37. Attendees at Costello’s seminars were provided with “inquiry cards” upon arrival. After Costello discussed a specific product, such as the Synlan or EnerVest LP’s, he advised attendees to identify that product on their inquiry cards if they were interested in obtaining further information about it. Door prizes, including Costello merchandise, were given out to induce attendees to return their inquiry cards.
38. After each seminar, the FPG Sales Reps who had arranged and paid for the seminar divided the inquiry cards amongst themselves. The FPG Sales Reps used the inquiry cards to identify and contact potential investors for the purpose of offering to meet with them to provide further information on the products and services in which they had expressed interest, including the Synlan and EnerVest LP’s, and in some cases to effect sales of these products.
39. Attendees who expressed an interest in the Synlan LP’s were invited by the FPG Sales Reps to attend a follow-up seminar presented by the principal of Synlan, Smith, which in some cases was then followed by direct one-on-one sales pitches by Smith.

(iii) Advertisements In Furtherance of Trades

40. Several of the articles published in the Newsletter focussing on the Synlan LP’s were in the nature of advertisements designed to create interest in and demand for the Synlan LP’s. As such, these articles constituted “advertisements in furtherance of a trade” and their publication in the Newsletter therefore constituted “trading” as defined in the Act.

41. The exemptions in section 35 of the Act and section 151 of Regulation 1015 were not available to Costello so as to exempt the trading activity in the Synlan or EnerVest LP's described in the paragraphs above from the registration requirements in section 25(1)(a) of the Act.

H. Failure by Costello to Disclose Financial Interest and Benefit

42. Costello was required to be registered under the Act as an adviser prior to providing advice in relation to the Synlan and EnerVest LP's. Section 40 of the Act requires registered advisers to disclose, in any published material in which the adviser provides advice on specific securities, any financial or other interest in, or benefit derived from the sale or purchase of, the specific securities, whether direct or indirect, including any commission or other remuneration the registered adviser may expect to receive, or any financial arrangement relating to the securities.

43. Costello failed to disclose in the Newsletter that he had an interest in FPG ServiceCo through which he would benefit financially from the sale of the Synlan and EnerVest LP's by the FPG Sales Reps or that he received fees for publishing the articles in the Newsletter concerning these specific securities, contrary to section 40 of the Act and the public interest.

44. Costello also provided advice orally in his seminars in relation to the Synlan and EnerVest LP's. In the course of doing so, Costello failed to disclose that he had an interest in FPG ServiceCo through which he would benefit financially from the sale of those securities by the FPG Sales Reps, contrary to the public interest.

IV RETROCOM GROWTH FUND

45. Retrocom Growth Fund Inc. ("Retrocom") is a labour sponsored investment fund sold in Ontario and elsewhere in Canada pursuant to a prospectus dated January 15, 2001.

46. In February 2001, Retrocom aired advertisements for its fund on radio stations in Toronto and

Ottawa (the “Radio Spot”) in which Costello described positive features and benefits of investing in Retrocom, without discussing any of the related or inherent risks. Costello directed listeners who wanted more information on Retrocom to contact a particular Dundee Securities Corporation sales representative in Ottawa (the “Dundee Sales Rep”) and provided the Dundee Sales Rep’s name and telephone number. The full text of the Radio Spot is set out below:

If low volatility is what you are looking for in your RRSP this year, I recommend you look at Retrocom Growth Fund. I’m Brian Costello. Retrocom is the only labour sponsored fund investing in Canada’s booming construction market. It comes with a lower volatility rating than most bond funds. With Retrocom you’ll get your RRSP deduction, save an additional \$1,500 in taxes and boost your foreign content. For more information on Retrocom, call [Dundee Sales Rep], Dundee Securities at [phone number deleted]. Obtain a copy of the prospectus and read it carefully before investing. Dundee Securities is a member of CIPF.

47. In February 2001, Costello also participated as the featured guest in a telephone interview set up by Retrocom (the “Interview”) which was accessible to the public by means of a toll free telephone number and later made available on Retrocom’s website. During the Interview, Costello was asked by the interviewer to comment on a number of the benefits and advantages of Retrocom as an investment. Costello commented favorably on labour sponsored funds generally, and Retrocom in particular, without adequately discussing any of the related or inherent risks of the investment.
48. In the Radio Spot and Interview, Costello went beyond providing simply factual information about Retrocom by offering his opinion on its investment merits and by expressly or impliedly recommending or endorsing Retrocom. The nature, conduct and manner of Costello’s participation in the Radio Spot and the Interview constituted “advising others as to the investing in or the buying of securities” within the meaning of the definition of “adviser” set out in the Act.
49. The exemptions from registration in section 34 of the Act and section 148 of Regulation 1015 were not available to Costello so as to exempt his acting as an “adviser” in relation to Retrocom from the registration requirements in section 25(1)(c) of the Act.
50. Costello’s participation in the Radio Spot and Interview also constituted “acts in furtherance of

a trade” within the meaning of the definition of “trading” set out in the Act.

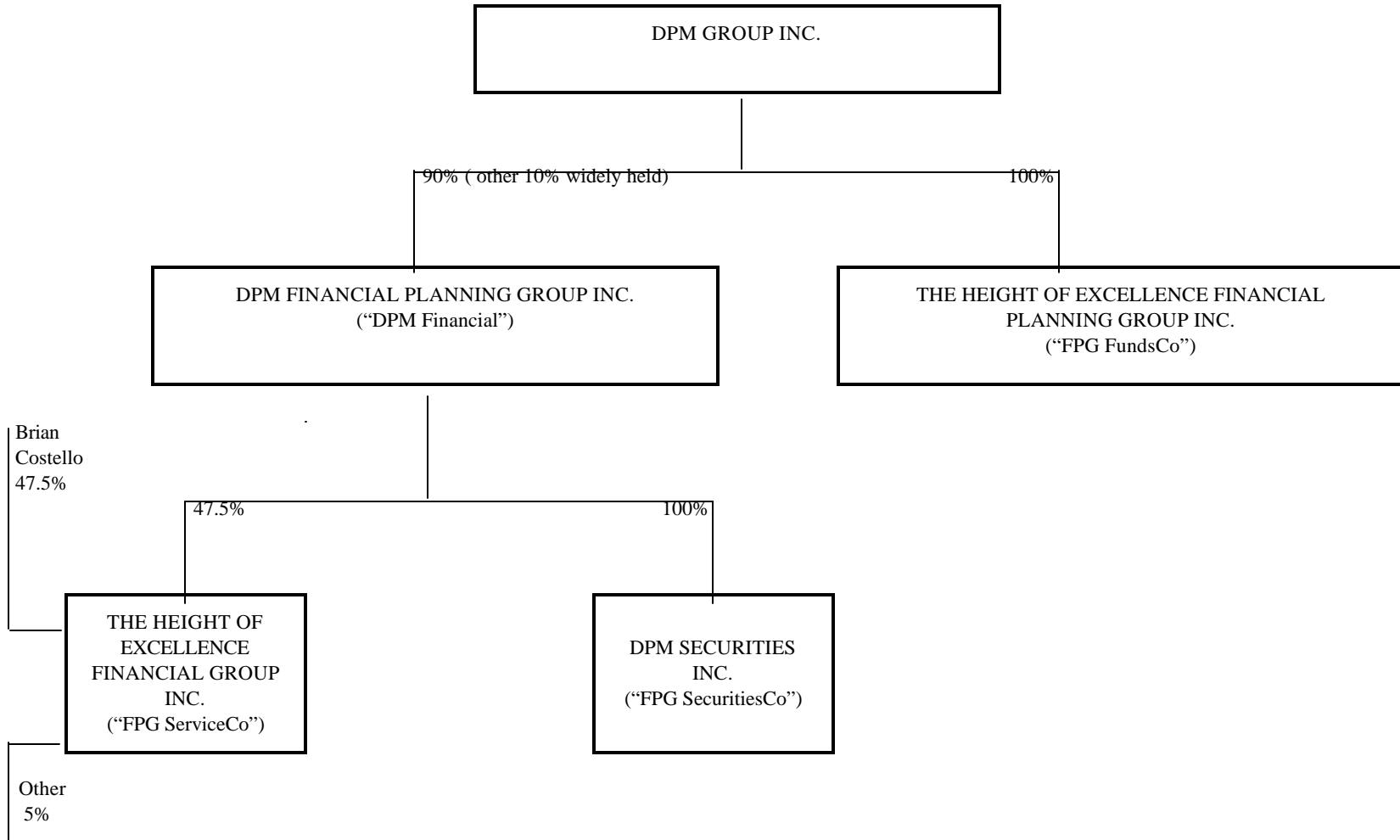
51. The exemptions in section 35 of the Act and section 151 of Regulation 1015 were not available to Costello so as to exempt this trading activity in Retrocom from the registration requirements in section 25(1)(a) of the Act.

52. Staff reserves the right to make such further and other allegations as the Commission may permit.

DATED AT TORONTO this 9th day of January, 2002.

APPENDIX "A"

CORPORATE STRUCTURE
THE FINANCIAL PLANNING GROUP
Dec 1/92 - July 30/97



APPENDIX "B"

Sales of Synlan LP's by FPG Sales Reps

I. Ontario

1. The Fairways Limited Partnership - 1 Unit Sold
Total cost to investor - US\$29,900 (Face value of unit - US\$129,900)
2. The Fairways I Limited Partnership - 5 Units Sold
Total cost to investors - US\$160,000 (Face value of units - US\$675,000)
3. The Valley of the Sun Limited Partnership - 1 Unit Sold
Total cost to investor - US\$32,000 (Face value - US\$134,000)

II. British Columbia

4. The Fairways I Limited Partnership - 5 Units Sold
Total cost to investors - US\$160,000 (Face value - US\$675,000)
5. The Valley of the Sun Limited Partnership - 6 Units Sold
Total cost to investors - US\$192,000 (Face value - US\$789,000)
6. The West Valley of the Sun Limited Partnership - 3 Units Sold
Total cost to investors - US\$96,000 (Face value - US\$351,000)

III. Saskatchewan

7. The Valley of the Sun Limited Partnership - 3 Units Sold
Total cost to investors - US\$96,000 (Face value Value - US\$397,000)
8. The West Valley of the Sun Limited Partnership - 21 Units Sold
Total cost to investors - US\$672,000 (Face value - US\$2,457,000)
9. The Westshire Limited Partnership - 3 Units Sold
Total cost to investors - US\$96,000 (Face value - US\$432,000)

TOTALS

Total Sales - US\$1,533,900 paid by investors (Face value - US\$6,039,900)
Total Commission = Cdn.\$282,000

FPG Registrant's share of Total Commission = Cdn.\$103,500

APPENDIX "C"

Sales of EnerVest LP's by FPG Sales Reps in Ontario

1. The EnerVest Energy Fund 1995-1
37 Sales - \$1,056,000
2. EnerVest Oil & Gas Income Fund 1995-2
20 Sales - \$548,000
3. The EnerVest Private Partnership 1995
43 Sales - \$627,500
4. The EnerVest Energy Fund 1996-1
32 Sales - \$962,500
5. EnerVest Resource Fund 1996
348 Sales - \$4,452,500
6. EnerVest FTS Limited Partnership 1997
30 Sales - \$802,500
7. EnerVest FTS 1997-1 Limited Partnership
34 Sales - \$1,060,000

TOTALS

Total Sales - \$9,509,000

Total Commission = \$697,570

FPG Registrant's share of Total Commission = \$104,635