



COR#97/184

IN THE MATTER OF THE SECURITIES ACT
R.S.B.C. 1996, c. 418

AND

IN THE MATTER OF JAN H. VAN DER WEIJ AND JOHN W. FISHER

HEARING

PANEL:	JOYCE C. MAYKUT, Q.C. PETER A. MANSON, Q.C. DIANE K. WOLCH	VICE CHAIR MEMBER MEMBER
DATES:	JANUARY 13 to 17, 1997 and MARCH 6, 1997	
APPEARING:	CATHERINE M. ESSON TODD L. CHERNIAK PAUL A. HILDEBRAND	FOR COMMISSION STAFF FOR JOHN W. FISHER

DECISION OF THE COMMISSION

1. INTRODUCTION

This was a hearing under sections 161 and 162 of the *Securities Act* R.S.B.C. 1996, c. 418. A notice of hearing was issued on June 5, 1995, setting out allegations against Peter E. Fox, Jan H. van der Weij and John W. Fisher relating to their conduct as directors and officers of Silverspar Minerals Inc., a reporting issuer under the Act.

During the course of the hearing, Fox signed a settlement agreement with the Executive Director and was removed as a respondent in these proceedings. The settlement agreement was published in [1997] 3 BCSC Weekly Summary 52.

Following the Fox settlement, Commission staff amended the notice of hearing on January 16, 1997, and made the following general allegations against the remaining respondents. Between February, 1993 and May 31, 1995, the relevant period:

- van der Weij failed, as a director and officer of Silverspar, to ensure that Silverspar fulfilled its disclosure obligations under the Act, both in a prospectus and in continuous disclosure documents;
- van der Weij and Fisher, as directors of Silverspar, improperly used their powers to confer unauthorized personal benefits upon themselves; and
- Fisher failed, as a director of Silverspar, to manage or to supervise the management of its affairs and business generally, including failing to ensure that Silverspar met its disclosure obligations under the Act.

On the basis of Commission staff's allegations we are asked to determine whether it is in the public interest to make orders under section 161 of the Act removing the statutory exemptions of van der Weij and Fisher and prohibiting them from acting as directors or officers of any issuer. The Commission is also asked to make orders under section 162 of the Act that van der Weij and Fisher pay administrative penalties and under section 174 of the Act that van der Weij and Fisher pay prescribed fees and charges for the costs of or related to the hearing.

Van der Weij did not appear at the hearing nor was he represented by counsel. On the basis of the affidavits of service of Commission staff member Martin Eady, sworn January 13 and February 19, 1997, we find that van der Weij received the notice of hearing in accordance with section 180 of the Act.

2. BACKGROUND

2.1 Silverspar and its Officers and Directors

Silverspar was incorporated in British Columbia in 1979 and was a reporting issuer under the Act. It was a junior resource issuer and its shares were listed for trading on the Vancouver Stock Exchange. Silverspar was in the business of acquiring, exploring and developing industrial mineral properties. In 1993 it began to focus specifically on acquiring and developing fluorite deposits to obtain fluorspar, the commercial term for the mineral fluorite. At this time, Silverspar's day to day business and affairs were managed by Fox and van der Weij, with Fisher being the only outside director for the 5 months between June 22, 1993 and November 23, 1993. Fox was primarily responsible for the operating side of Silverspar's affairs while van der Weij was primarily responsible for its financial and administrative side. In the preparation of Silverspar's

news releases and quarterly reports, Fox generally drafted the operational aspects and van der Weij drafted the financial and administrative aspects.

Fox, a consulting geologist, was the president and chief executive officer of Silverspar, for most of the relevant period. He resigned as president on February 3, 1995. Fox was a director of Silverspar until May 16, 1995.

Van der Weij, a businessman, was a director during the relevant period. He was vice president of finance and chief financial officer until he succeeded Fox as president on February 3, 1995. He remained as president until May 31, 1995.

During the relevant period, van der Weij had an employment contract with Silverspar to provide public and investor relations services. This contract was to expire August 1, 1995. If this contract was terminated by Silverspar, van der Weij was entitled to an amount equal to the total salary payable to him for the remainder of the contract together with an automobile allowance.

Fisher, a metallurgical engineer, was a director of Silverspar during the relevant period. Fisher was a member of Silverspar's 1993 and 1994 audit committees. Fisher was a director of at least two other Exchange-listed companies.

In early September 1993, Fisher departed Canada for an extensive trip and returned to Vancouver at the beginning of September 1994. Before Fisher left on his trip, he made arrangements so anyone who needed to reach him could contact him through his daughter in Vancouver. For the period he was away, Fisher did not resign as a director of Silverspar but appointed Fox his alternate director and his attorney by an instrument entitled "Appointment of Alternate Director and General Power of Attorney", (the "Appointment"). Although the Appointment had been prepared by a lawyer, Fisher testified that there had been no discussion as to its legal effect. Silverspar did not issue a news release announcing the appointment of Fox as Fisher's alternate director. Under the Appointment, Fisher believed that he had delegated to Fox all his duties and powers as a director. Fisher expected Fox to exercise his skill and judgment on every issue on Fisher's behalf and he did not expect to oversee Fox. Fisher testified that he had no reason to believe that Fox would not act in the best interests of Silverspar. Fisher and Fox made no plans for Fox to report to Fisher nor did they put in place any systems whereby Fisher would be informed of Fox's actions under the Appointment or of Silverspar's affairs while Fisher was away. While away, Fisher signed a Consent to Act as A Director form for 1994.

The Articles of Association of Silverspar provided that a director may, by instrument in writing delivered to the company, appoint any person "to be his alternate to act in his

place at meetings of the Directors at which he is not present....” The Articles provided that the alternate is entitled to attend and vote and “if he is a Director, to have a separate vote on behalf of the Director he is representing in addition to his own vote.” The Articles also provided for the directors to act by a unanimous written consent resolution.

Fox signed Silverspar directors’ documents using the Appointment and the unanimous resolution procedure to give effect to Fisher’s concurrence to corporate actions of Silverspar during Fisher’s absence. For example, a unanimous directors’ resolution dated April 28, 1994 was signed by Fox, van der Weij, Fox signing as Fisher under the Appointment, Greenfield and Bates to give the approval of the directors to proceed with the financing and to approve and file a prospectus. Fisher never saw the prospectus before it was filed with and receipted by the Commission. Fox testified that throughout the period of Fisher’s absence the company’s counsel were aware that Fisher was out of the country for an unknown period and that Fox was signing Fisher’s name to directors’ resolutions for Fisher under the Appointment.

Shortly after Fisher returned to Vancouver in September, 1994, he departed on a consulting engagement to Alaska. While there, he participated by telephone in a 1994 audit committee meeting before the release of Silverspar’s 1994 financial statements. In doing so, he testified that he did not make a big contribution to the discussion because he was not familiar with Silverspar’s affairs due to his extended absence. The audit committee members at that time were Fisher, Fox, van der Weij and Greenfield.

Although Fisher visited Silverspar’s offices on his return to Canada in early September 1994, he did not become actively involved in Silverspar’s affairs until late October 1994. In December 1994, Fisher was given operational responsibility for readying certain of Silverspar’s fluorite properties in Kentucky for commercial operations. With this responsibility, Fisher was appointed vice president of mining operations on December 15, 1994. On February 1, 1995, Fisher and Silverspar entered into a one year employment contract under which Fisher was to manage Silverspar’s production operations in Kentucky. In all other aspects the employment contract was the same as van der Weij’s employment contract. Sometime in March 1995, Fisher agreed to move to Kentucky at which time he began overseeing the West Kentucky Property mine operation on a full time basis.

Other Directors

The other directors of Silverspar during the relevant period were:

Phillip J. Rogers - was a director until June 22, 1993;

Charles Greenfield - a financial consultant, was a director from November 23, 1993, to December 15, 1994, and a member of the 1994 audit committee;

Gary Bates - a mining engineer, was a director from November 23, 1993, to May 31, 1995;

Victor Evans - a retired mining consultant, was a director from March 9, 1994 to May 31, 1995;

Barrett E.G. Sleeman - a mining engineer, was a director from December 15, 1994 to May 31, 1995;

John A. Healey - was a director from February 3, 1995 to May 31, 1995. His experience was described as being in the financial and trading sections of the North American resource industries. He was the Chairman of Silverspar from April 10, 1995 until May 31, 1995.

Frank Agar - a geological engineer, was a director from February 3, 1995 to May 31, 1995.

2.2 The Business and Affairs of Silverspar

Following its announced decision to focus on acquiring fluorite properties, Silverspar agreed in principle in February 1993, to acquire an option to purchase a property containing fluorite and zinc (the "West Kentucky Property") from USX Corporation, a subsidiary of U.S. Steel. The West Kentucky Property was located near Salem, Kentucky and consisted of a 450 ton per day fluorite-zinc concentrator and washing plant and 18 separate mineral and surface rights properties (7,199.54 acres), four of which Silverspar considered to be significant. These included the Babb-Barnes mine, the Robinson-Lasher mine and the Campbell deposits.

To fund the purchase and development of the West Kentucky Property, Silverspar announced on April 8, 1993, its intention to offer by private placement up to \$5.5 million¹, of exchangeable promissory notes (the "special notes"). Silverspar also announced that, following the closing of the private placement it intended to file a prospectus to qualify the distribution of the common shares issuable upon the exchange of the special notes. The financing was designed to permit Silverspar to raise and start spending the funds before the prospectus had been receipted. It was Silverspar's intention to file the prospectus in British Columbia and Ontario.

Under a subscription agreement dated June 22, 1993, between Silverspar and 18 investors, Silverspar issued \$5,672,150 of special notes. Each special note was exchangeable into one unit. Each unit consisted of one Silverspar common share and one Silverspar share purchase warrant. Each special note was exchangeable, at the option of

¹ All amounts are in Canadian dollars unless otherwise indicated.

the note holder of Silverspar at any time after receipts for a prospectus qualifying the common shares were received.

By the end of August 1993, Silverspar had closed a one year option agreement with USX at a cost of US \$25,000. Under the option agreement, which was to expire August 31, 1994, USX granted Silverspar the option to purchase the West Kentucky Property for US \$2 million.

By August 31, 1993, approximately \$2.5 million private placement proceeds had been advanced to Silverspar. Silverspar retained Orcan Mineral Associates, independent consulting engineers, to prepare an independent technical review and report for the prospectus regarding the West Kentucky Property.

By October 26, 1993, Silverspar published its 1993 annual report in which it presented to investors, management's view of the company's progress for 1993. Key achievements highlighted were the acquisition of the option on the West Kentucky Property, including a modern concentrator, and the completion of a strategic financing package to fund Silverspar's future development. Management also stated that it looked forward to start-up operations and "given the minimum amount of work needed at Salem, [expected] to be fully operational in 1994 subject to completion of sales contracts, engineering studies and the anticipated up-turn in demand for quality fluorspar products". There was nothing in the report about the need to exercise the option on the West Kentucky Property.

An update of Silverspar's affairs followed in mid-December with Silverspar's quarterly report for the period ended October 31, 1993. It stated that work was continuing on the West Kentucky Property and that Orcan was preparing its report for Silverspar's prospectus, which was expected to be filed by the end of December.

Silverspar received the Orcan report, dated November 30, 1993, which concluded that a comprehensive exploration program on the West Kentucky Property was warranted. After making specific recommendations, which included drilling 10 holes on the Campbell deposits, the Orcan Report estimated the cost of the exploration program it recommended at US \$570,000.

Although the time is not clear, Silverspar had also retained Boyce Moodie of Moodie Mineral Company to produce a report evaluating the drilling results of the exploration program and the feasibility of bringing the West Kentucky Property into production. According to Fox, Moodie, who was on site in Kentucky, was retained because of his long involvement with, and extensive knowledge of, the West Kentucky Property. Moodie was to receive US \$100,000 if Silverspar exercised the option.

In January 1994, Silverspar submitted its preliminary prospectus to the British Columbia and Ontario securities commissions to qualify the common shares to be issued on the exchange of the special notes.

A news release dated March 9, 1994, and Silverspar's quarterly report for the period ended January 31, 1994, and filed March 18, 1994, announced that work was continuing at the West Kentucky Property and that mill rehabilitation was well underway. The quarterly report said that Silverspar had received the Orcan report which recommended a \$750,000 exploration program. Note 1 to the quarterly financial statements stated that the recoverability of Silverspar's investment in mineral properties, claims and deferred exploration expenses was dependent upon the confirmation of economically recoverable reserves, the ability to obtain necessary financing and future successful operations.

By April 28, 1994, Silverspar had filed its prospectus with the British Columbia and Ontario securities commissions. On April 28, 1994, the prospectus was certified to contain full, true and plain disclosure of all material facts relating to the offering by Fox, as president and chief executive officer, by van der Weij as vice president and chief financial officer and by Greenfield and Bates on behalf of the board of directors.

The prospectus stated that Silverspar's principal mineral resource properties were the West Kentucky Property in which it held an option to purchase 100% ownership, the Sweetwater Property in Tennessee in which it held a 100% leasehold interest, the Silver District Project in Arizona in which it held 100% ownership and the Hidalgo property in New Mexico in which it held 100% ownership. Each of these properties was described in the prospectus.

With a substantial portion of the private placement proceeds allocated for the West Kentucky Property, the prospectus, quoting from the Orcan Report, described in some detail the property and the proposed exploration program with itemized costs. In addition, the prospectus described Silverspar's proposed development program, in part, as follows:

The Corporation plans to thoroughly analyze and evaluate the potential of those portions of the West Kentucky Property which warrant further exploration and development (as indicated by Orcan). In addition, the Corporation plans to undertake additional drilling on the Campbell deposits to further evaluate its fluorspar producing potential. The Corporation also plans to undertake some minor upgrading to the concentrating plant and the equipment located at the Babb-Barnes Mine in order to bring it up to industry standards for the production of acidspar.

After this upgrading, the Corporation plans to commence a marketing study for fluorspar in the central United States.

In describing the risk factors, the prospectus stated that there was no known commercial body of ore on any of its mineral properties nor any cash flow therefrom. It went on to state that Silverspar's ultimate success would depend on its ability to develop such cash flow and that there was no certainty that the expenditures to be made in the exploration and development program outlined in the prospectus would result in the discovery of commercial bodies of ore.

The prospectus described the use of proceeds realized from the private placement as follows:

Fund purchase of West Kentucky Property	\$2,600,000
Further work on West Kentucky Property, including further exploration, drilling, mining and processing, facility upgrading and maintenance	\$1,000,000
Further work on Silver District Property, including further exploration, drilling, geological data analysis and designing of mineral processing techniques	\$300,000
Finalize the purchase of the Hildago Property and the lease of the Sweetwater Property, including further exploration and drilling on these properties.	\$150,000
Expenses related to this transaction, including a finder's fee of \$283,608 payable to the Finder (John J, Plourde) and additional Note Agent Fees	\$500,000
General working capital, interest charges and possible future industrial mineral property acquisitions	\$1,122,150
TOTAL	\$5,672,150

In stating the use of proceeds, there was no statement as to what proceeds had been already spent.

However, elsewhere in the prospectus there was some disclosure of the proceeds already spent. Based on management's discussion of operations as at January 31, 1994, it appeared an aggregate of \$383,000 had been spent. Based on the consolidated financial statements in the prospectus for the same period, \$1 million had been spent and for the year ended July 31, 1993, in excess of \$200,000 had been spent. The quarterly report for the period ended April 30, 1994, and filed June 24, 1994, showed that a further \$400,000 had been spent. Consequently, one can conclude from the prospectus and subsequent disclosure that by the date of the prospectus, approximately \$1.6 million of the proceeds had been spent. Not only was there little description of how these proceeds had been spent, but further, after deducting from the proceeds the \$2.6 million allocated for the purchase of the West Kentucky Property, these already spent items represented over 50% of the approximately \$3.1 million remaining proceeds.

The quarterly report for the period ended April 30, 1994, and filed June 24, 1994, disclosed that Silverspar's only income from August 1, 1993 to April 30, 1994, was about \$60,000 in interest. Apart from this amount, money spent by Silverspar during this period must have come from the proceeds of the special notes.

On the cover page of the prospectus, after disclosing commissions and finder's fees payable to named others, the following statement was made "No additional fee will be paid to the note agent, the finder or any other person in connection with the notes." The prospectus did disclose in management's discussion of operations that van der Weij was paid \$20,000 in fees for his assistance in completing the prospectus and investigating the new properties. The prospectus did not disclose that Silverspar was also obliged to pay a finder's fee of \$71,000 to van der Weij for services related to the special note private placement. The payment of van der Weij's \$71,000 finder's fee was not referred to in the "Interests of Management in Material Transactions" section of the prospectus and was first publicly disclosed in a note disclosure in the 1994 annual report. Fox testified that van der Weij submitted the invoices for his finder's fee late in 1993. Fox says he informed the company's special legal counsel of van der Weij's invoices during the preparation of the prospectus. Fox described the omission of the \$71,000 van der Weij finder's fee from the prospectus as an "oversight".

Although only four months were left before the option expired when Silverspar filed its prospectus, there was no discussion in the prospectus as to what Silverspar would do when the option expired or in the event it did not exercise the option before its expiry.

On May 2, 1994, a receipt for Silverspar's prospectus was issued by the British Columbia Securities Commission.

On May 26, 1994, Silverspar issued a news release stating that its prospectus had been received by the British Columbia and Ontario securities commissions on May 2 and 3, 1994, respectively, and that it had received approximately \$3.1 million of the private placement offering proceeds previously held back pending receipt of its prospectus. Silverspar also announced that drilling on the West Kentucky Property was continuing. The news release stated that, for the immediate future, Silverspar intended to follow the Orcan Report program, in which up to 10,000 feet of drilling was recommended to test the Campbell deposits. In this release Silverspar also announced that discussions were underway with an independent agent to market fluorspar concentrate and establish potential customers. The intention to market fluorspar concentrate and establish customers while continuing to develop the Campbell deposits, was also stated in Silverspar's quarterly report for the period ended April 30, 1994, and filed June 24, 1994. The quarterly report also noted that the drilling recommended for the Campbell deposits began March 23, 1994. Fox testified that he did not consider the purchase of the fluorspar stockpiles to be a change in direction from what was disclosed in the prospectus, because "it was still fluorspar and we were still going to process it, but the only thing we were not doing was mining it."

In July 1994, Fox initiated discussions with USX to negotiate an extension of the option. By August 1, 1994, Fox had negotiated a verbal agreement with USX to extend the option for one year. Fox testified that with fluorspar tonnage prices low he was also looking to renegotiate the price of the option. USX had informally agreed to a reduced option price of \$US 1.8 million, but Fox believed further negotiations could bring the price down to \$US 1.5 million perhaps even \$US 1.3 million. According to Fox, the parties agreed to resume discussions in November, 1994.

On September 9, 1994, Silverspar and USX signed an amendment to the option agreement extending the option period to August 31, 1995, at a cost of US \$25,000. The purchase price of the option remained the same. On the same day Silverspar announced that the option had been extended and that negotiations were in progress whereby an early exercise of the option would significantly reduce the purchase price. Silverspar also announced its intention to reduce the exercise price of the warrants to obtain financing to bid on U.S. government fluorspar stockpiles, to commence concentrate production earlier and to obtain long term supply contracts. Silverspar stated that these contracts, together with the proceeds from the exercise of warrants, would enable it to proceed with development of the Campbell deposits. The news release also stated that the first phase of the Campbell drilling program (6 drill holes) had been completed. With results from the first two holes having been previously announced, Silverspar announced results from two additional holes and indicated further assays were pending.

On October 20, 1994 Silverspar announced, along with the assays from the last three drill holes from the Campbell deposits, that the period for exercising the warrants had been extended a further two weeks to October 28, 1994. On November 1, 1994 Silverspar issued a news release stating that with share prices down, the warrant financing did not proceed. Silverspar also announced that it had submitted a proposal to purchase fluorspar stockpiles from the U.S. government and that it expected to complete long term contracts with the U.S. government that would supply several years of low cost feed to its Salem plant prior to developing the Campbell deposits.

Fox testified that Silverspar had expected to drill approximately 20 holes on the Campbell deposits in the summer of 1994 to be able to assess the ore reserves with confidence. However, only 6 drill holes had been completed by the end of the summer and Fox testified that the results from the last three drill holes were not as positive as he had hoped for. Fox said that although he, personally, had concerns about the viability of mining the West Kentucky Property, he felt it was inappropriate to issue a press release to that effect or even to pass on his personal views to Silverspar's board as Moodie had been retained professionally to assess the results and viability of the project. Fox concluded that without further drilling results and Moodie's report, it would have been premature for Silverspar then to decide whether or not to exercise the option.

Although share prices were down, Silverspar's 1994 annual report and letter to shareholders, dated November 15, 1994, was optimistic about the future based on its 1994 progress in acquiring the West Kentucky Property and completing a strategic financing package. Management stated that with the upgrading of the concentrator complete and with the government stockpile proposal accepted, it looked forward to the start-up of operations and cash flow developing in the near future. Management also stated that Silverspar intended to seek a listing on a major American stock exchange early in 1995. The audited financial statements for the year ended July 31, 1994, stated that Silverspar's working capital of \$3,149,049 was committed to the exercise of the US \$2 million (Cdn. \$2,583,200) West Kentucky Property option and to sustain company operations.

Despite management's optimistic outlook, share prices continued to fall in late 1994, and a group of dissident Silverspar shareholders began voicing their disapproval with how Silverspar was being managed. The dissidents were persons who had subscribed for the special notes and, with the exchange of the special notes, were now significant shareholders of Silverspar. They began aggressively asserting that Silverspar should have exercised the option on the West Kentucky Property as soon as it had received its prospectus receipt on May 2, 1994. They said management's failure to exercise the option was inconsistent with the disclosure Silverspar had made in the prospectus. They said that they had invested in the private placement on the representation that Silverspar

was going to purchase the West Kentucky Property and in particular the mill, as soon as the prospectus had been received. Although Silverspar had not come to any conclusions regarding the results of the exploration program, the dissidents were of the view that Silverspar should have exercised the option in any event so as to acquire the mill, which they said had considerable value in its own right. They asserted that once the mill had been acquired, exploration would follow. One of the dissidents who testified stated, in response to a question from the panel, that he could not say how Silverspar would be better off exercising the option before determining whether the reserves were economically viable. However, he was adamant that this was what the prospectus represented and that this was the basis upon which he had invested. Wanting to remove Silverspar's existing management, the dissidents mounted a proxy fight for control of Silverspar's board at its 1994 annual general meeting to be held December 15, 1994.

Silverspar filed its quarterly report for the period ended July 31, 1994 and its quarterly report for the period ended October 31, 1994, on December 7 and 12, 1994, respectively. Both quarterly reports stated that while the West Kentucky Property "is close to becoming a producing mine and generating cash flow, additional capital is required to be able to commence production...The recoverability of the company's investment in mineral properties, claims and deferred exploration expenditures is dependent upon .. the ability of the company to obtain additional financing to commence production..." The October 31 quarterly report noted that at the end of the quarter, Silverspar's working capital of \$2,667,138 was committed to the exercise of the US \$2 million (then Cdn \$2,706,600²) option to purchase the West Kentucky Property and to sustain company operations.

On January 30, 1995, Silverspar issued a news release announcing various developments including that the recommissioning work at the West Kentucky Property was on hold pending the outcome of Silverspar's bid to acquire fluorspar from U.S. government stockpiles, that the company had initiated an application to list on NASDAQ, and that Fox's employment contract had been placed on hold pending further development of the US properties. The release also stated that if Silverspar's bid was successful, it expected the Kentucky operation to be "in production by mid-year and should be sufficient to generate the cash flow needed to sustain on-going operations..."

The dissidents, being unsuccessful at removing Silverspar's existing board at the December annual meeting, requisitioned an extraordinary general meeting for May 16, 1995 in another attempt to remove the board. At the same time the dissidents were exerting increasing pressure on management to resign so that they could control the direction of Silverspar's affairs. Both Fox and Fisher testified that although it was

² The increase in the Canadian cost of the US priced option hereafter reflects the fluctuation in foreign exchange rates

abundantly clear the dissidents wanted to take over the control of Silverspar, the dissidents did not say what they planned to do differently once they were in control.

On February 3, 1995, Fox resigned as president of Silverspar. At Silverspar's request he remained as a director until May 31, 1995, in order to manage Silverspar's silver properties. On February 3, 1995, van der Weij became interim president, Healey and Agar joined the board, and Healey became Chairman. On February 7, 1995, Silverspar announced the changes in the board and stated that it was looking for a president "with the necessary management and operating experience to oversee the transition of Silverspar to a production stage."

On February 20, 1995, Silverspar announced that it had succeeded in its bid to acquire a quantity of fluorspar from U.S. government stockpiles and that it planned to ship the stockpile to its mill and concentrator in Kentucky for processing. Mill production was expected in three to six months with the stockpile supplying feed for the mill for approximately one to two years "during which time the Company plans to expand its production through further acquisitions and possible developments of reserves located within its holdings in Kentucky."

On March 20, 1995, Silverspar announced that it had sold some of its metallurgical grade fluorspar and that it had received a letter of intent "for the supply of substantial quantities of metallurgical grade and acid grade fluorspar products on a regular, to be determined, basis, at market prices throughout 1995 and continuing into 1996." At the same time Silverspar announced that its mill facility was in the final stages of recommissioning and that it had entered into a one year employment contract with Fisher, who was to act as vice-president of operations for the Kentucky project. At Silverspar's request, Fisher moved to Kentucky and purchased a house that could be used as a combined home, a mine office for the company and accommodation for visiting company officers.

On March 28, 1995, three dissident shareholders filed a petition in the Supreme Court seeking, among other things, a declaration that Silverspar and its directors acted in an oppressive manner to shareholders and that they be prohibited from voting at the May 16, 1995 meeting.

On March 31, 1995, Silverspar filed its quarterly report for the period ended January 31, 1995, in which it noted that it had working capital of \$2,009,581 committed to the exercise of the \$2,814,400 option and to company operations. It stated that although it was close to generating a cash flow by producing fluorspar at its mill, additional capital was required to be able to exercise the option to purchase the West Kentucky Property.

At a board meeting on April 10, 1995, Silverspar's directors ratified van der Weij's appointment as president and passed a resolution that approved "a change of the business emphasis from production of minerals to the processing of ore bodies and that the Company and its subsidiary not engage in any mineral exploration except as part of a joint venture, or until such time as Board approval has been obtained in writing for this activity."

At the same meeting, the directors approved a resolution that Silverspar open a US operating bank account to carry working capital sufficient for day to day operations. The resolution stipulated that any cheque drawn on the US bank would require the signature of any two officers or directors... "and any cheque in excess of \$15,000 would need the signature of a third director, excluding van der Weij and Fisher". In addition no cheques aggregating over \$50,000 per calendar month were to be issued without the signature of a third director.

By May 15, 1995 it was clear that the dissidents were going to be successful in their bid to remove the existing board and the extraordinary general meeting was adjourned to May 31, 1995. Fisher testified that on May 15, 1995, in anticipation that they would be removed as directors and employees at the May 16, 1995 extraordinary general meeting by the dissidents, van der Weij instructed Fisher to prepare three Silverspar cheques in favour of Fisher totaling US \$91,650. Fisher testified that the US \$91,650 related to money van der Weij calculated would be due to Fisher and van der Weij if their employment contracts were terminated. Fisher did not have any documents to support the cheques. He testified that the first two cheques for US \$53,500 and US \$32,750 respectively represented Fisher's and van der Weij's anticipated employment contract losses and auto expenses. The third cheque represented Fisher's house and living expenses for the next three months. When Fisher relocated and bought the house in Kentucky he personally incurred expenses. Fisher believed he was entitled to be reimbursed for these expenses. On May 15, Fisher deposited the Silverspar cheques into a US account in his name. The cheques cleared the bank the following day.

Fisher testified that on May 31, 1995, the existing board of Silverspar signed a settlement agreement with the dissidents under which they agreed to resign in order to give control of the board to the dissidents. In the first few days of June certain members of the new board went to the West Kentucky Property to assess the situation and to secure the assets of Silverspar. At that time Fisher was still heading up operations at the Kentucky mill site and although he felt somewhat uncertain about the situation he believed his position was safe based on earlier discussions he had with Silverspar's new president. However, on June 5, 1995, when Fisher attended his operations office at the mill site, he found that his personal effects had been removed from it and that Moodie was now occupying the

office as Silverspar's operations manager. As a result, Fisher concluded that he had been terminated as an employee of Silverspar effective June 5, 1995.

Also on June 5, 1995, the new president of Silverspar sent a letter to van der Weij advising him that, effective immediately, his services were no longer required.

On June 6, 1995, Fisher issued cheques totaling US \$91,650 on his US account to himself and van der Weij. Fisher testified that he understood the purpose of this action was to secure their financial positions. Fisher testified that:

It was my intention to hold that money to see what was going to happen, the outcome of the fight between the dissidents and the existing management. I just took the instruction that -- I didn't question Mr. Van der Weij. He just said "Here's what we do" and I just did it. Rightly or wrongly I did it."

Fisher subsequently sold the house in Kentucky and returned to Vancouver.

With new management in place, Silverspar continued to acquire and process fluorspar stockpiles while attempting to extend and renegotiate the price of the option. By all accounts attempts to renegotiate the option price were ultimately unsuccessful.

3. ANALYSIS AND FINDINGS

Our analysis and findings are focused on the following issues:

1. whether van der Weij failed, as a director and officer of Silverspar, to ensure that Silverspar fulfilled its disclosure obligations:
 - a) to provide full, true and plain disclosure in its prospectus of all material facts relating to the securities in the offering; and
 - b) to ensure its continuous disclosure documents were accurate and timely?
2. whether van der Weij and Fisher improperly used their powers as directors of Silverspar to confer unauthorized personal benefits upon themselves?
3. whether Fisher failed, as a director of Silverspar, to manage or supervise the management of its affairs and business generally, including failing to ensure that Silverspar met its disclosure obligations under the Act ?

3.1.a Did the Prospectus fail to make full, true and plain disclosure of all material facts?

Commission staff allege that van der Weij failed to ensure that Silverspar's prospectus disclosed the following material facts:

1. that Silverstar had an obligation to pay \$71,000 to van der Weij in connection with the offering;
2. that funds raised by the offering and allocated in the use of proceeds to expenditures on properties and working capital had been spent as of the day the prospectus was received;
3. that the option on the West Kentucky Property would not be exercised immediately but rather would only be exercised if the results of an exploration program to be carried out were satisfactory; and
4. that the amounts specified in the use of proceeds for further work on the West Kentucky Property would be spent only on exploration, facility upgrade and maintenance and not on drilling, mining and processing except as those activities incidentally occurred in the process of exploration.

The relevant provisions of the Act are as follows:

Section 61 of the Act requires that before a security can be distributed, a prospectus in the required form must be filed with, and a receipt obtained from, the Executive Director.

Section 63 of the Act, requires an issuer to provide in its prospectus "full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed".

Section 1 of the Act defines "material fact" to mean "a fact that significantly affects or could reasonably be expected to affect, the market price or value of securities".

The required form for a prospectus of a natural resource issuer such as Silverspar was Form 14. At the time of Silverspar's prospectus, Form 14 required under "Interests of Management and Others in Material Transactions" that Silverspar disclose the interests of its officers in the issue of the special notes. Also Silverspar was required to state in the "Use of Proceeds" section, the estimated net proceeds of the offering, the principal purposes for which the net proceeds are intended to be used and the approximate amount to be used for each purpose. Other instructions in the Form directed issuers to be reasonably specific in their descriptions, indicating for example that reasons must be given for adding unallocated funds to working capital.

Form 14 has been amended since the date of Silverspar's prospectus so as to require in describing the "Use of Proceeds", a specific breakdown of funds available, including a direction that where all or a portion of the funds have been spent the issuer must explain how the funds were spent. Also any amounts referred to must be updated to the most recent month end. Although this specific direction was not particularized in the prospectus form at the time of Silverspar's prospectus, issuers were nonetheless required to disclose particulars of all material facts relating to the securities proposed to be offered as at the date of the prospectus.

We agree with Commission staff's submission that the obligation to make full, true and plain disclosure in a prospectus is not diminished where the prospectus is to qualify an issuance of securities for which the money has already been put up by the investors, as in this case. In short, Silverspar's obligation was simply to issue a prospectus that made full, true and plain disclosure of all material facts relating to the securities of the offering at the date the prospectus was filed.

At the time the prospectus was approved by the board of Silverspar and filed with the Commission, Fox, van der Weij, Fisher and three others, were directors. The certificate attesting that the prospectus constituted full, true and plain disclosure of all material facts was signed by Fox as the president and chief executive officer, van der Weij as the vice president and chief financial officer and Greenfield and Bates on behalf of the board of directors.

Our findings with respect to Commission staff's allegations are as follows:

1. the failure to disclose van der Weij's \$71,000 fee

Silverspar had an obligation to pay a fee of \$71,000 to van der Weij in connection with the issue of the special notes. This was not disclosed in the prospectus. There was a requirement in Form 14 to disclose fees paid to officers in connection with the issue of the special notes. The fees paid to the finder and the note agent, \$325,000 in the aggregate, were disclosed on the cover page of the prospectus. With van der Weij's \$71,000, these fees would have made the aggregate fees almost \$400,000.

We find that Silverspar's obligation to pay a fee of \$71,000 to van der Weij in connection with the issue of the special notes ought to have been disclosed in the prospectus because it was required under Form 14 and because it was a material fact. Other than the drilling and upgrading on the West Kentucky Property, there was little going on in Silverspar at this time. Van der Weij and Fox ran the company. The prospectus cover page disclosed the fees paid to the finder and note agent and concluded by stating that no additional fee would be paid to any other person. We get the

impression that van der Weij did not read the prospectus. If he had, he would have known that the statement was not correct. Further, we find that if he did read the prospectus, the omission was one that he ought to have noticed. He was the chief financial officer and himself the recipient of the \$71,000 finder's fees. That there was disclosure of the payment of \$20,000 in fees for his assistance in completing the prospectus and investigating the new properties highlights the fact that the issue of fees to van der Weij had been specifically considered in preparing the prospectus. Indeed it is difficult to understand how van der Weij could have failed to notice such an omission in light of this and in light of the prominence given to such payments on the first page of the prospectus.

2. the failure to disclose that funds raised by the offering had been spent as of the day the prospectus was receipted

The prospectus described in its "Use of Proceeds" section, the use of proceeds as at the date of the closing of the private placement. However, by August 31, 1993, Silverspar had received an advance from those private placement proceeds of approximately \$2.5 million and had begun spending it shortly thereafter. By the time Silverspar had filed its preliminary prospectus in January 1994, it had spent approximately \$1.2 million and by the time it filed its prospectus on April 28, 1994, approximately \$1.6 million of the proceeds had been spent. This represented over 50% of the approximately \$3.1 million of proceeds that had not been allocated to the purchase of the West Kentucky Property. We find that the earlier spending of the proceeds was a material fact that should have been disclosed in the prospectus.

We agree with Commission staff that in describing its use of proceeds, Silverspar was not required to disclose the precise amount of offering proceeds it had spent as of the date of the prospectus as this would have been impractical. However, we are of the view that Silverspar was required to disclose as of a current date particulars of the offering proceeds that had then already been spent. This disclosure would have to include a description of the purpose and amounts of those expenditures and appropriate related disclosure in other parts of the prospectus.

Again with only Fox and van der Weij running the company, and with van der Weij being the chief financial officer, we find that van der Weij must have had a fairly accurate picture of the finances of Silverspar at any given moment. It is reasonable to conclude, and we find, that he would have known that approximately \$1.6 million of the offering proceeds had been spent when he certified the prospectus. We find that van der Weij ought to have known that this expenditure was a material fact and ensured that Silverspar's prospectus disclosed as of a current date that a significant portion of the offering proceeds had already been spent, including a description of those expenditures.

3. the failure to disclose that the exercise of the option was contingent upon satisfactory exploration results

Commission staff argue that the prospectus does not disclose that the option on the West Kentucky Property was contingent upon receiving satisfactory results from the proposed exploration program. Commission staff construes the various descriptions in the prospectus as either unreservedly declaring that the proceeds “will be used” to exercise the option, or, at worst, as failing to warn the investor that the option will not necessarily be exercised. Staff say the prospectus also failed to disclose any alternative use for the \$2.6 million in the event Silverspar chose not to exercise the option to purchase the West Kentucky Property.

The nature of an option is to give the holder of the option the legal right to stop anyone else acquiring the property, while allowing the holder of the option to delay the acquisition of absolute title until, within the option period, the option holder is ready, able and willing to proceed.

The prospectus disclosed that Silverspar had acquired an option to purchase the West Kentucky Property. The prospectus also disclosed that Silverspar intended to follow the exploration program for the West Kentucky Property that the Orcan Report had proposed. In addition the prospectus disclosed that Silverspar planned to thoroughly analyze and evaluate the potential of those portions of the West Kentucky Property that warranted further exploration and development. Furthermore \$1 million of the offering proceeds had been allocated for the exploration and development program for the West Kentucky Property and \$2.6 million of the offering proceeds had been allocated to pay for the West Kentucky Property if a decision was made to exercise the option.

We do not agree with Commission staff that the prospectus failed to disclose that the exercise of the option was contingent upon satisfactory exploration results.

We also do not agree with Commission staff that Silverspar was obliged to disclose an alternate use for the \$2.6 million in the event Silverspar chose not to exercise the option. Silverpar’s obligation was to disclose all material facts as at the date of the prospectus. As of the date of the prospectus, Silverspar intention was to exercise the option for US \$2 million if, before the expiry of the option or of any renewal that it might obtain, Silverspar could satisfy itself that the West Kentucky Property was worth that price. There was no evidence before us to indicate that Silverspar’s board had any other intention.

When the prospectus was certified and filed, there were only four months left before the option expired. If it appeared likely to Silverspar, as the evidence indicates, that it would

not be in a position to decide whether to exercise the option before August 31, 1994, Silverspar, for better disclosure in the prospectus, ought to have disclosed that its intention was to negotiate an extension of the option and to continue with the proposed exploration program so as to be in a position to decide whether to exercise the option. There is no evidence before us that at the time of the prospectus there would be any problem in extending the option. We do not find that failure to make this disclosure was material.

4. the failure to disclose that the amounts specified in the use of proceeds for further work on the West Kentucky Property would be spent only on exploration, facility upgrade and maintenance and not on drilling, mining and processing except as those activities incidentally occurred in the process of exploration

The prospectus disclosed that \$1 million had been allocated for further work on the West Kentucky Property, including further exploration, drilling, mining and processing, facility upgrading and maintenance. The prospectus also disclosed that Silverspar intended to follow the exploration program proposed in the Orcan Report, including additional drilling on the Campbell deposits and upgrading to the concentrating plant to bring it up to industry standards for the production of acidspars. Upon receipt of the offering proceeds Silverspar continued to execute the exploration program recommended in the Orcan Report and as disclosed in the prospectus.

In view of the disclosure made in the prospectus, we cannot find that there is any substance to Commission staff's allegation. Accordingly we dismiss this allegation as unfounded.

We have found that the prospectus did not disclose van der Weij's \$71,000 fee and that funds raised by the offering had been spent. Van der Weij, as the vice president and chief financial officer of Silverspar, certified that the prospectus constituted full, true and plain disclosure of all material facts relating to the securities offered. We find that he ought to have known that it did not. Accordingly we find that he failed to ensure that Silverspar's prospectus contained full, true and plain disclosure of all material facts contrary to section 63 of the Act.

3.1.b Were Silverspar's continuous disclosure documents accurate and timely?

Commission staff allege that:

1. Silverspar failed to make timely disclosure of the nature and substance of material changes in its affairs, contrary to section 85 of the Act, including the following:

- i. that it was not spending the proceeds of the offering in the manner set out in the prospectus;
 - ii. that it did not intend to and, ultimately did not, exercise the option on the West Kentucky Property which was to expire on August 31, 1994. Instead, Silverspar entered into an agreement with USX to extend the option;
 - iii. that it was obtaining negative results from the exploration program;
 - iv. that it was considering an alternate business plan and alternate use for the West Kentucky Property other than exploration and development;
 - v. that by October 31, 1994 Silverspar no longer had sufficient funds in its possession to exercise the option on the West Kentucky Property;
 - vi. that it no longer considered that the West Kentucky Property was worth US \$2 million;
 - vii. that it was intending to purchase the West Kentucky Property regardless of the drilling results;
2. Silverspar represented in various press releases, dated August 5, 1993, March 9, 1994 and February 20, 1995, that it owned the West Kentucky Property and a mill concentrator in West Kentucky when in fact Silverspar did not own the West Kentucky Property or any mill and concentrator in West Kentucky and by February 21, 1995 did not have the financial resources to acquire the West Kentucky Property; and
 3. in light of the fact that Silverspar no longer had sufficient funds to exercise the option on the West Kentucky Property and the fact that the results obtained on the exploration program had led the directors to pursue alternate business plans the following statement in the notes to the interim consolidated financial statements for October 31, 1994 were false and misleading:

...while the [West Kentucky Property is] close to becoming a producing mine and generating cash flow, additional capital is required to be able to commence production ...The recoverability of the company's investment in mineral properties, claims and deferred exploration expenditures is dependent upon... the ability of the company to obtain additional financing to commence production on its [West Kentucky Property].

Section 85(1) of the Act imposes upon reporting issuers such as Silverspar a positive obligation to disclose material changes as soon as practicable.

Section 1(1) of the Act defines material change as:

...a change in the business, operations, assets or ownership of an issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer and includes a decision to implement that change by

- a) senior management of the issuer who believe that the confirmation of the decision by the directors is probable, or
- b) the directors of the issuer

The material change report and accompanying press release, must disclose the nature and substance of the change and must be filed as soon as practicable, but no more than 10 days after the change occurs.

Our findings with respect to Commission staff's allegations that the following were undisclosed material changes, are as follows:

i. *that Silverspar was not spending the proceeds of the offering in the manner set out in the prospectus*

Fox testified that by the end of October 1994, Silverspar was beginning to spend on administration, funds that had been allocated to the purchase of the West Kentucky Property. That Silverspar was in this financial position was reflected in Silverspar's quarterly report for the period ended October 31, 1994, and filed December 12, 1994, which noted that at the end of the quarter, Silverspar's working capital of \$2,667,138 was committed to the exercise of the US \$2 million (then Cdn \$2,706,600) option and to sustain company operations. The quarterly report for the period ended January 31, 1995, and filed March 31, 1995, confirmed that the trend of spending funds, allocated to the option, on administration was continuing in that Silverspar had a working capital of \$2,009,581 that was committed to the exercise of the US \$2million (then Cdn \$2,814,400) option and to company operations. The quarterly report also stated that although Silverspar was close to generating a cash flow by producing fluorspar at its mill, additional capital was required to be able to exercise the option to purchase the West Kentucky Property.

Silverspar's financial reporting and management discussion reflected in these quarterly reports, along with Silverspar's news releases reporting what was happening in the company during this period, disclosed how Silverspar was spending the proceeds of the offering. In our view, the fact that Silverspar began spending on administration funds allocated to the option was adequately disclosed and was not, in the circumstances, a material change in the affairs of Silverspar.

Accordingly, we dismiss Commission staff's allegation that Silverspar should have disclosed as a material change the fact that Silverspar was not spending the proceeds of the offering in the manner set out in the prospectus.

ii. that Silverspar did not intend to and, ultimately did not, exercise the option on the West Kentucky Property which was to expire on August 31, 1994. Instead, Silverspar entered into an agreement with USX to extend the option.

Silverspar's disclosure in the prospectus was that exploration work would be done on the West Kentucky Property in accordance with the recommendations in the Orcan Report and that once the exploration work was done and assessed a decision would be made whether to exercise the option. The prospectus did not state when the exploration work and subsequent assessment thereof was to be completed. As it turned out the exploration program was not complete by the end of August 1994, when the option expired. Realizing this was going to be the situation Fox initiated discussions with USX in July 1994, to negotiate an extension of the option and by August 1, 1994, he had negotiated a verbal agreement with USX to extend the option for one year. This agreement to extend was finalized on September 9, 1994, and announced on the same day. In our view, the fact that the option was extended was not a material change.

Based on the evidence before us, the extension of the option occurred in the ordinary course. There was no evidence that there was any risk the option would not be renewed. However, had Fox been unable to reach an agreement to extend the option, then Silverspar would indeed have been faced with a material change in its business and assets that required disclosure according to section 85 of the Act.

Accordingly, we dismiss Commission staff's allegation that Silverspar did not intend to exercise the option on the West Kentucky Property before August 31, 1994.

iii. that Silverspar was obtaining negative results from the exploration program

Silverspar's press releases confirm that it disclosed the exploratory drilling results on the Campbell deposits as they became available. Fox testified that although he, personally, had concerns about the viability of mining the West Kentucky Property based on some of the drilling results, he felt it was inappropriate for Silverspar to issue a press release to that effect or to even pass on his personal views to Silverspar's board as Moodie had been professionally retained to assess the results and viability of the project. There was no evidence before us that Fox discussed his personal views with the directors of Silverspar. The directors were relying on Moodie to interpret the exploration results. The exploration program was not complete. Silverspar had not received Moodie's report. Because the actual drill results were announced as they became available, the

opportunity to assess this information, for whatever it was worth in that stage of the recommended exploration program, was available to everyone. In our view, Commission staff failed to establish that Silverspar was obtaining negative results from the exploration program.

Accordingly, we dismiss Commission staff's allegation that Silverspar had obtained negative results from the exploration program.

iv. that Silverspar was considering an alternate business plan and alternate use for the West Kentucky Property other than exploration and development

Silverspar disclosed in its prospectus that its business plan was to follow the exploration and development program outlined in the prospectus with a view to discovering commercial bodies of ore on the West Kentucky Property. In describing the risk factors of this plan, the prospectus stated that there was no certainty that the exploration and development program outlined would result in the discovery of commercial ore bodies. The prospectus also stated that Silverspar's ultimate success would depend on its ability to develop a cash flow.

On May 26, 1994, Silverspar announced that for the immediate future it intended to follow the Orcan Report program, in which up to 10,000 feet of drilling was recommended to test the Campbell deposits. At the same time Silverspar announced that discussions were underway with an independent agent to market fluorspar concentrate and establish potential customers. The intention to market fluorspar concentrate and establish customers while continuing to develop the Campbell deposits, was also stated in Silverspar's quarterly report for the period ended April 30, 1994, and filed June 24, 1994. On November 1, 1994 Silverspar announced that it was considering purchasing fluorspar from US government stockpiles to provide "several years of low cost feed to our Salem plant prior to developing the Campbell deposits." Press releases for November 23, 1994, January 20, 1995, February 20, 1995, and March 20, 1995, traced the progress of Silverspar in developing this approach.

In our view, the evidence does not establish that Silverspar had abandoned its plan to exercise the option, although the timing may have changed. Silverspar was faced with the unavailability of Moodie's report and a need for cash flow to maintain operations. To address this situation a short term tactic was implemented - processing US government stockpiles - while efforts continued to improve the long term plan to exercise the option by negotiating with USX for a reduction in the price. This was to allow the exploration program to be completed and the results assessed. In our view this was not a change of business plan by Silverspar, rather it was a tactic along the way to

implementing, ultimately, its long term business plan to make Silverspar into a profitable producer of fluorspar.

On April 10, 1995, Silverspar's board approved by resolution that there be a "change of the business emphasis from production of minerals to the processing of ore bodies and that the Company and its subsidiary not engage in any mineral exploration except as part of a joint venture, or until such time as Board approval has been obtained in writing for this activity."

In our view this resolution did not evidence a change in the long term business plan of Silverspar. Instead it was a clear statement from the board that it intended to control management by stating that there would be no further mineral exploration except in two specific circumstances - as part of a joint venture or until the board gave its written approval. We do not agree with Commission staff that at least by this date, if not sooner, Silverspar had decided not to pursue the option. Indeed the evidence indicated that, prior to May 31, 1995, Silverspar's incumbent management and thereafter Silverspar's new management, both strove to keep the option alive with the intention of exercising it.

Accordingly, we dismiss Commission staff's allegation that Silverspar was considering an alternate business plan and alternate use for the West Kentucky Property other than exploration and development.

v. that by October 31, 1994, Silverspar no longer had sufficient funds in its possession to exercise the option on the West Kentucky Property

Silverspar's audited financial statements for the year ended July 31, 1994, and the quarterly report for the quarter ended July 31, 1994, and filed December 7, 1994, stated that Silverspar's working capital of \$3,149,049 was committed to the exercise of the US \$2 million West Kentucky Property option and to sustain company operations. At that date the US \$2 million option price required Cdn \$2,583,200. Silverspar's quarterly report for the period ended October 31, 1994, and filed December 12, 1994, noted that at the end of the quarter, Silverspar's working capital of \$2,667,138 was committed to the exercise of the US \$2 million (then Cdn \$2,706,600) option to purchase the West Kentucky Property and to sustain company operations. The October quarterly also stated that the recoverability of the company's investment in mineral properties, claims and deferred exploration expenditures was dependent upon the ability of the company to obtain additional financing to commence production.

Silverspar's quarterly report for the period ended January 31, 1995, and filed March 31, 1995, disclosed that it had working capital of \$2,009,581 committed to the exercise of the US \$2 million (then Cdn \$2,814,400) option and to company operations. The

quarterly also stated that although Silverspar was close to generating a cash flow by producing fluorspar at its mill, additional capital was required to be able to exercise the option to purchase the West Kentucky Property.

Silverspar disclosed as required, the state of its finances with particular reference to the amount of its working capital committed to exercise the option, in US and Canadian dollars, and to sustain company operations, in its quarterly reports and audited financial statements. The disclosure in these quarterly reports and financial statements was accurate, including the fact that by October 31, 1994, Silverspar's working capital of \$2,667,138 would not have been sufficient to exercise the US \$2 million (then Cdn \$2,706,600) option.

Silverspar had already announced on September 9, 1994, when it announced that the option had been extended, that negotiations were in progress whereby an early exercise of the option would significantly reduce the purchase price. With this information, investors were alerted to the possibility that ongoing negotiations might reduce the option price so that, Silverspar might have been in a position whereby it would have, or could obtain, sufficient capital to exercise the option before it expired. Fox also testified that USX had informally agreed to a reduced option price of \$US 1.8 million and that further negotiations in November, 1994 were expected to reduce the option price further.

In these circumstances, we are of the view that, while Silverspar was obliged to disclose in its quarterly report for the period ended October 31, 1994, that at the end of the quarter, Silverspar's working capital of \$2,667,138 was committed to the exercise of the US \$2 million (Cdn \$2,706,600) option to purchase the West Kentucky Property and to sustain company operations, it was not obliged to report this information as a material change. In our view, this information did not indicate a change in the business, operations, assets or ownership of Silverspar that would reasonably be expected to have a significant effect on the market price or value of any of its securities.

Accordingly, we dismiss Commission staff's allegation that Silverspar ought to have disclosed as a material change in its affairs the fact that by October 31, 1994, it no longer had sufficient funds in its possession to exercise the option on the West Kentucky Property.

vi. that Silverspar no longer considered that the West Kentucky Property was worth US \$2 million

On September 9, 1994, when Silverspar announced that the option had been extended, it stated that negotiations were in progress whereby an early exercise of the option would significantly reduce the purchase price. In addition, Fox testified that USX had

informally agreed to a reduced purchase price of \$US 1.8 million and that further negotiations in November 1994 were expected to reduce the purchase price further. On the basis of this evidence, it appears that the parties to the option realized that the West Kentucky Property was worth less than US \$2 million. The fact that the parties had contemplated a reduced purchase price was disclosed to investors. This fact did not result in a material change in the affairs of Silverspar.

Accordingly we dismiss Commission staff's allegation that Silverspar ought to have disclosed as a material change in its affairs the fact that it no longer considered that the West Kentucky Property was worth US \$2 million.

vii. that Silverspar was intending to purchase the West Kentucky Property regardless of the drilling results

We found that Silverspar's prospectus disclosed that Silverspar had a one year option to purchase the West Kentucky Property and that a specific exploration program recommended by the Orcan Report had been planned to assist Silverspar in determining whether it was ready, able and willing to exercise the option. By the end of the summer of 1994, Silverspar had drilled six of the 10 holes recommended in the Orcan Report. The Orcan Report stated that at least drill 10 holes were necessary to evaluate the potential of the Campbell deposits. Moodie was to evaluate all of the drill results and assess and report to Silverspar on the potential of the West Kentucky Property before Silverspar could determine whether to exercise the option. There is no evidence to suggest that Silverspar abandoned the exploration program although the timing may have changed.

In addition, there was no evidence before us to suggest that Silverspar was intending to purchase the West Kentucky Property regardless of the drilling results. Indeed we had already found that although Silverspar had an option to purchase the West Kentucky Property, it would not necessarily purchase the West Kentucky Property if the exploration results did not warrant it. In our view it defies business logic to hold that because Silverspar had been granted an option, it was irrevocably committed to exercise the option whether or not the West Kentucky Property had commercial mineral values and whether or not, in the light of the best available information, the price was warranted.

We find that there was no change of intention by Silverspar regarding the West Kentucky Property. We conclude Silverspar always intended to exercise the option if, before the expiry of the option or of any renewal that it might obtain, Silverspar could satisfy itself that the West Kentucky Property was worth the purchase price then stipulated in the option.

Accordingly we dismiss Commission staff's allegation that Silverspar intended to purchase the West Kentucky Property regardless of the drilling results.

2. Commission staff's allegation that Silverspar represented in various press releases dated August 5, 1993, March 9, 1994 and February 20, 1995, that it owned the West Kentucky Property, when in fact it did not.

In our view, Silverspar's reference to the West Kentucky Property and mill as "its mill and property", when it only held an option to acquire a 100% interest and not a 100% freehold interest in them, was not a misrepresentation considering the circumstances in which those references were made. In our view, Silverspar's prospectus and subsequent disclosure documents made it sufficiently clear that Silverspar only had an option to purchase the West Kentucky Property, including the mill, and did not own it outright.

Accordingly we dismiss Commission staff's allegation as unfounded.

3. Commission staff's allegation that the notes to the interim consolidated financial statements for October 31, 1994 were false and misleading

This allegation was based on Commission staff's assertion as fact that Silverspar no longer had sufficient funds to exercise the option on the West Kentucky Property and that the results obtained on the exploration program had led the directors to pursue alternate business plans. As our findings are otherwise on these two points, we also find that Commission staff's allegation that the notes to the interim consolidated financial statements for October 31, 1994 were false and misleading, is without foundation and we dismiss it accordingly.

3.2 Did van der Weij and Fisher abuse their powers as directors to confer unauthorized personal benefits upon themselves?

Commission staff allege that van der Weij and Fisher improperly used their powers as directors of Silverspar to confer US \$91,650 of unauthorized personal benefits upon themselves. Commission staff argue the issuance of the cheques totaling US \$91,650 was in breach of van der Weij's and Fisher's employment contracts and in breach of the April 10, 1995 director's resolution. Commission staff argue that these actions constitute an abuse of a director's powers.

Fisher argues that these actions were taken fairly in the circumstances to secure payment of amounts owed to him and to van der Weij and any accountability for them should be determined by the courts and not by the Commission.

Section 118(1) of the *Company Act* R.S.B.C. 1996, c.62 states:

- 118 (1) Every director of a company, in exercising the director's powers and performing the director's functions, must
- (a) act honestly and in good faith and in the best interests of the company, and
 - (b) exercise the care, diligence and skill of a reasonably prudent person.
- (2) The provisions of this section are in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors of a company.

When Fisher wrote the cheques and deposited corporate funds into his own bank account on May 15, 1995 he did so without any colour of right existing at that time. That he and van der Weij believed new management might not honor their employment contracts and outstanding expenses if they were terminated was irrelevant. When Fisher wrote the cheques on Silverspar's account he knew that both he and van der Weij were still employed by Silverspar and that, contrary to their duties as such, he and van der Weij as directors and officers were taking Silverspar's money for their own and personal benefit.

Accordingly we find that in causing the cheques to be issued on May 15, 1995, van der Weij and Fisher failed to act honestly and in the best interests of the company, contrary to section 118 of the *Company Act*.

3.3 Did Fisher fail to properly manage or supervise the management of the affairs and business of Silverspar, including failing to ensure that Silverspar met its disclosure obligations under the Act ?

Commission staff allege that Fisher failed to manage or supervise the management of the affairs and business of Silverspar, contrary to his obligation to exercise the skill, care and diligence of a reasonably prudent person. Staff allege this failure encompassed Fisher's failure to ensure that Silverspar met its disclosure obligations under the Act.

In support of this argument Commission staff alleged that Fisher:

- when he left Canada from September, 1993 to September, 1994 delegated his role as a director to Fox, did not expect Fox to report to him and did not oversee Fox's performance of delegated duties;
- during the first three months of his absence, as the only "outside" director he failed to ensure that the public was informed that he had appointed Fox, an "inside" director, as his alternate director and that Fisher was not himself performing his duty as a director;

- he failed to establish an adequate system that would operate during his absence so that he could satisfy himself that Silverspar was complying with its continuous disclosure obligations under the Act;
- during his absence:
 - he did not review documents in connection with Silverspar's affairs;
 - though a member of Silverspar's 1993 audit committee, he failed to participate in its review of Silverspar's 1993 financial statements; and
 - he signed and returned to Silverspar his consent to act as a director for 1994 although he did not intend to perform the duties of director for most of that year;
- upon his return to Vancouver in September, 1994:
 - he failed to review and inform himself about the affairs of Silverspar during his absence;
 - he failed to read Silverspar's current disclosures;
 - he failed to be involved in Silverspar's affairs until he participated in an audit committee meeting by telephone in late October, 1994;
 - at that committee meeting, he failed to be sufficiently informed to exercise care, diligence and skill in the proceedings of that meeting;
 - in or about February, 1995 he participated in the preparation of a press release dated February 20, 1995 that was inaccurate; and
 - in April, 1995, he failed to cause Silverspar to disclose that it had changed its business plan.

The relevant provisions of the *Company Act* are sections 117(1), 118(1) and 119. Section 118 is referred to above. Sections 117(1) and 119 read as follows:

117 (1) Subject to this Act and the articles of the company, the directors must manage or supervise the management of the affairs and business of the company.

...

119 The provisions of a contract, the memorandum or the articles, or the circumstances of a director's appointment do not relieve the director from the duty to act in accordance with this Act and the regulations, or from any liability that by virtue of any rule of law would otherwise attach to the director in respect of any negligence, default, breach of duty or breach of trust of which the director may be guilty in relation to the company.

Subject to the articles, the directors were required to manage or supervise the management of the affairs and business of Silverspar. Silverspar's board was bound to that standard of conduct.

Each director, in exercising a director's powers and performing a director's functions, must act honestly and in good faith and in the best interests of the company, and exercise the care, diligence and skill of a reasonably prudent person. Fisher, as a director, was bound to that standard of conduct.

In our view, neither Fisher nor the board of Silverspar can be relieved of their duties under the *Company Act* by the provisions of a contract, corporate resolution or Silverspar's Articles. Regardless of whether the articles contemplated the Appointment of Alternate Director and regardless of how the Appointment was worded, it could not relieve Fisher of his duties as a director and audit committee member under the *Company Act*.

This Commission in *The Matter of Re: Slightham*, [1996] 30 BCSC Weekly Summary 38, considered how directors could best meet their duties to a reporting issuer. The Commission stated:

It is the responsibility of the directors to ensure that a company complies with applicable legislation and its listing agreement. Directors exercising the care, diligence and skill of a reasonably prudent person may delegate this responsibility to the management of the company, but, if they do so, must also set up adequate systems to satisfy themselves that compliance is in fact taking place and, if matters arise that should put them on notice, to take steps necessary to resolve the concern.

This Commission has also given guidance on how members of an audit committee can best meet their duties to a reporting issuer. As a member of the Canadian Securities Administrators, the Commission has adopted the CSA Notice *Re: Audit Committees* published on October 19, 1990. That notice sets out standards of practice which should be followed if an audit committee is to discharge its responsibilities in an effective way. The practices recommended are intended to improve the credibility and quality of financial reporting, and complement the requirements for audit committees set out in corporate law.

However, these guidelines cannot be viewed in isolation. While the Commission strongly advises directors to follow these guidelines to avoid compliance problems, failure so to do may not, in and of itself, be a breach of a director's duties where the director and reporting issuer are otherwise complying with all applicable corporate and securities legislation.

In this case, we found that Silverspar's only failure to meet its disclosure obligations under the Act consisted of the failure to file a prospectus that contained full, true and

plain disclosure of all material facts relating to the securities offered. None of Silverspar's financial statements were alleged, or found to be, inaccurate. The material facts that Silverspar failed to disclose in its prospectus as of a current date were two: that Silverspar had an obligation to pay \$71,000 to van der Weij in connection with the offering and that a significant portion of the offering proceeds that had been allocated to uses other than the purchase of the West Kentucky Property had been spent.

Silverspar's board of directors, in discharging its duty to manage or supervise the management of the affairs and business of Silverspar, had an obligation to ensure that Silverspar's prospectus complied with the requirements of the Act. This it failed to do. What are the regulatory consequences of this finding on Fisher?

On April 28, 1994, Silverspar's board of directors, by consent resolution, approved the filing of the prospectus. Fisher did not attend this directors' meeting and Fox signed the consent resolution on Fisher's behalf. Fisher testified that he had no reason to believe that Fox would not discharge his director's duties properly. Fisher did not sign the prospectus. Considering these circumstances we are of the view that the public interest does not require that we issue a regulatory sanction against Fisher on this issue.

In light of our findings, we dismiss the other aspects of Commission staff's allegation regarding Fisher's failure to manage or supervise the management of the affairs and business of Silverspar.

4. DECISION

In light of our findings what orders under the Act, if any, are necessary to be made in the public interest against van der Weij and Fisher?

Van der Weij was a director from December 10, 1991 until May 31, 1995 and vice president of finance and chief financial officer from December 10, 1991, until he succeeded Fox as president on February 3, 1995. He was responsible for the preparation of Silverspar's financial statements and he and Fox prepared and issued Silverspar's continuous disclosure documents. As Silverspar's chief financial officer he certified the prospectus to contain full, true and plain disclosure. It did not. A significant omission related to van der Weij himself. As stated earlier, being the chief financial officer and recipient of the \$71,000 fees it is difficult to see how he could not have noticed this omission. The prospectus also failed to disclose as of a current date the fact that a significant portion of the offering proceeds had been spent. Again this fact is one of which van der Weij, as the chief financial officer, would have been aware. Indeed van der Weij must have had a fairly intimate knowledge of the prospectus as he received a

\$20,000 fee, in part, for his assistance in completing the prospectus. Accordingly, van der Weij, as senior management and the chief financial officer in charge with the responsibility of ensuring Silverspar's disclosure documents were accurate, must be accountable for the material deficiencies in the prospectus.

Van der Weij's conduct in instructing Fisher to write cheques on the corporate account thereby conferring unauthorized personal benefits upon himself and Fisher was a serious breach of duties of a director and officer to act honestly and in the best interests of the company. Van der Weij was the chief financial officer and knew, or ought to have known, that causing the cheques to be issued on May 15, 1995 so that the \$US 91,650 was no longer accessible to Silverspar by May 16, 1995, was wrong. As of May 15 or 16, 1995, neither van der Weij nor Fisher had any right to Silverspar's funds in the amount of \$US 91,650. In our view, van der Weij failed to perform to the standard expected of a director and officer of a reporting issuer and must be held to account.

Fisher was a director of Silverspar from May 8, 1985 until May 31, 1995.

As with van der Weij, we found that Fisher's conduct in conferring unauthorized personal benefits upon himself and van der Weij relating to the US \$91,650 was a serious breach of a director's duty to act honestly and in the best interests of the company. Although van der Weij may have instructed Fisher to issue the cheques on May 15, 1995 Fisher knew, or ought to have known, that to do so was wrong. He preferred his interests over those of Silverspar to the company's detriment. For this we found that Fisher failed to perform to the standard expected of a director of a reporting issuer and on this finding he must be held to account.

Accordingly, the Commission considers it would be in the public interest to make orders appropriate to the seriousness of the misconduct of each of van der Weij and Fisher. We therefore order that:

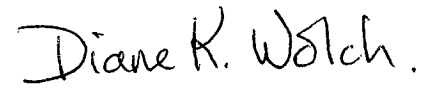
1. under section 161(1)(c) of the Act, the exemptions described in sections 44 to 47, 74, 75, 98 and 99 do not apply to van der Weij for a period of 6 months from the date of this decision; and
2. under section 161(1)(d) of the Act, each of van der Weij and Fisher resign any position each holds as a director or officer of any reporting issuer and is prohibited from becoming or acting as a director or officer of any reporting issuer until each has successfully completed a course of study satisfactory to the Executive Director concerning the duties and responsibilities of directors and officers, and a period of two years has elapsed from the date of this decision;

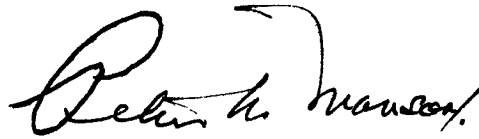
In light of our findings, no order for costs under section 174 of the Act will be made against van der Weij or Fisher.

DATED at Vancouver, British Columbia on October 9, 1997

FOR THE COMMISSION


Joyce C. Maykut, Q.C.
Vice Chair


Diane K. Wolch
Member


Peter A. Manson, Q.C.
Member