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COR#00/208

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

AND

IN THE MATTER OF CARTAWAY RESOURCES CORPORATION

AND

IN THE MATTER OF ROBERT ARTHUR HARTVIKSON AND
BLAYNE BARRY JOHNSON

HEARING

PANEL
Joyce C. Maykut, Q.C., Vice Chair
Joan L. Brockman, Member
Roy Wares, Member

DATES OF HEARING
July 27-30, August 3-4, 11-13, 16-17, 20, 23-25, 1999

DATES OF SUBMISSIONS
September 2-3, October 1, 4, 12, 1999

APPEARING FOR COMMISSION STAFF
J.A. (Sasha) Angus
Patricia A.A. Taylor

APPEARING FOR BLAYNE BARRY JOHNSON
Howard Shapray, Q.C.

APPEARING FOR ROBERT ARTHUR HARTVIKSON
Wade Nesmith

FINDINGS OF THE COMMISSION

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1.0 INTRODUCTION

[para 1]
These proceedings were initiated on July 17, 1998, when a notice of hearing was issued under section 161(1) of the *Securities Act* R.S.B.C. 1996, c. 418 against Robert Arthur Hartvikson, Blayne Barry Johnson, Robert James Disbrow, Eric Savics, David Mackenzie Lyall, Christopher Michael Stuart and First Marathon Securities Limited regarding their conduct relating to the affairs of Cartaway Resources Corporation, between September 1994 and September 1997 (the relevant period).

[para 2]
Prior to the conclusion of the hearing, Disbrow, Savics, Lyall, Stuart and First Marathon entered into settlement agreements with the Executive Director. See section 2.6.

[para 3]
An amended notice of hearing was issued on July 23, 1999, against the remaining respondents, Hartvikson and Johnson. The amended notice contains allegations concerning their role in

Cartaway while they were salespersons registered under the Act and employed by First Marathon. First Marathon was an investment dealer registered under the Act and the agent for Cartaway, a company whose shares were listed for trading on the Alberta Stock Exchange (the "Exchange"). A large part of Commission staff's case focused on Hartvikson and Johnson's failure to address the conflicts of interest that arose as a consequence of their being part of a Cartaway control group consisting of First Marathon brokers, while First Marathon acted as agent in two of Cartaway's financings.

[para 4]
The allegations in the amended notice are dealt with in more detail in section 3, however they can be summarized as follows. During the relevant period Hartvikson and Johnson acted contrary to the *Act* and to the public interest when they:

- subsequent to purchasing Cartaway's control block with the other First Marathon brokers, acquired certain mineral claims through a nominee private company, which was controlled by them, with the intention that the claims would be vended into Cartaway;

- failed to fully disclose the extent of their involvement in Cartaway and in the nominee company;

- purchased Cartaway shares in a $0.125 private placement before material information regarding the acquisition of the mineral claims by Cartaway had been disclosed;

- purchased Cartaway shares in the $0.125 private placement on behalf of other First Marathon employees in circumstances where Cartaway did not qualify to use the exemption relied upon;

- shortly after the $0.125 private placement closed, placed First Marathon clients in a $1 special warrant financing;

- made statements under oath to Commission staff that were not true; and

- breached the full-time employment requirement for registered salespersons.

[para 5]
On the basis of the facts and allegations in the amended notice, the Commission was asked to determine whether it is in the public interest to make orders against Hartvikson and Johnson:

- under section 161(1) of the *Act* removing their statutory exemptions, prohibiting them from acting as directors or officers of any issuer and prohibiting them from engaging in any issuer's investor relations activities;

- under section 162 of the *Act* directing them to pay administrative penalties; and

- under section 174 of the *Act* directing them to pay prescribed fees and charges for the costs of or related to the hearing.

[para 6]
Since 1995 the *Act* was revised and most of the sections were renumbered. We have referred to the new section numbers in the *Act* unless there were substantive amendments in a particular provision under consideration. Where it was appropriate to do so we specifically identified and referred to the previous legislation.

2.0 BACKGROUND

2.1 Overview

[para 7]
First Marathon was a member of the Vancouver, Alberta and Toronto stock exchanges and was registered as an investment dealer under the *Act*. Its head office was in Ontario and it had offices in Calgary and Vancouver. Stuart, Larry Birchall, Matt Aufricht and Charles Fraser were employed by First Marathon, in its Calgary office, and were registered as brokers under the *Securities Act* (Alberta). Stuart was a vice president of corporate finance and the branch manager of the Calgary office. Hartvikson, Johnson, Lyall and Savics were employed by First Marathon, in its Vancouver office and were registered representatives under the *Act.* Disbrow was a director and a vice-chairman of First Marathon and was the branch manager of its Vancouver office.

[para 8]
In the summer of 1994 Birchall and Stuart began looking for a clean shell whose shares were trading on the Exchange for the purpose of vending in business opportunities that became available to them. Cartaway, which at the time was in the business of licensing residential garbage containers in Kamloops, British Columbia, was brought to their attention and they began putting together a group to acquire it. In October 1994, a group of eight First Marathon brokers, including Hartvikson and Johnson, acquired the control block from Cartaway's existing control group. William De Jong and Stuart became directors, with Stuart as president. One of the existing directors stayed on the board to deal with the garbage container business.

[para 9]
By the spring of 1995 the Voisey's Bay area of Labrador was experiencing a major staking rush as a result of a significant nickel, cobalt and copper discovery by Diamond Fields Resources Inc., a First Marathon client. In early April Hartvikson and Johnson were presented with an opportunity to acquire a group of claims in the Voisey's Bay area. The vendor wanted cash and free trading shares of a public company. Within a day of being offered the claims, Hartvikson and Johnson, with the approval Stuart and with the intention of ultimately vending the claims into Cartaway, made an oral agreement with the vendor to acquire the claims on the terms the vendor requested. The vendor did not know which public company would be involved but trusted that Hartvikson and Johnson would make sure he received free trading shares. Cartaway made no disclosure of this agreement. At the same time Hartvikson, Johnson, Stuart and the other brokers agreed to proceed with a brokered private placement of up to seven million units of Cartaway to finance the acquisition of the claims. Hartvikson and Johnson then began to seek out other Voisey's Bay claims and to look for experienced and competent management for Cartaway. Their intention was to have Cartaway develop a large Voisey's Bay area play that would be financed through First Marathon.

[para 10]
Without disclosing its change in business or the acquisition of the Voisey's Bay claims, Cartaway announced on April 19, 1995 its intention to proceed with a brokered private placement of seven million units at $0.125 per unit. Each unit consisting of one common share and one warrant entitling the holder to purchase an additional common share at $0.20. By this time the eight First Marathon brokers had already committed to take down, or place with friends, all of the private placement. The proceeds were stated to be for the expansion of Cartaway's operations into new, but unidentified, business ventures. First Marathon acted as agent for the private placement.

[para 11]
Hartvikson and Johnson then negotiated the acquisition of other Voisey's Bay claims through a private company they controlled, which had been set up to warehouse the claims for Cartaway. By May 4 Hartvikson and Johnson had hired new management for Cartaway and had negotiated agreements in principle on additional Voisey's Bay claims that would be vended into Cartaway.

Without disclosing the change in business, the acquisition of the Voisey's Bay claims or the proposed new management Cartaway closed the $0.125 private placement on May 5. The eight First Marathon brokers and their families took down over 82% of the placement, bringing their holdings to over 64% of Cartaway's issued and outstanding shares on an undiluted basis. With a share purchase warrant price of $0.20 and with the shares trading at $0.68 on May 5 the eight brokers were in the money by a factor of over three and held over 70% of Cartaway's issued and outstanding shares on a fully diluted basis.

[para 12]
On May 8 Cartaway announced the closing of the private placement and stated that the $875,000 proceeds were to fund as yet undetermined assets. On May 12 Cartaway's stock was trading at $0.95. At Cartaway's request the Exchange halted trading pending an announcement. Stuart advised the Exchange that Cartaway was looking to acquire a large parcel of claims in the Voisey's Bay area but had no firm transactions to disclose. Stuart also advised the Exchange that the $0.125 private placement had not been conducted with prior knowledge of the acquisition of the Voisey's Bay claims.

[para 13]
Shortly after closing the $0.125 private placement Cartaway began work on a $1 private placement to fund acquisition and exploration of the claims. In June Cartaway acquired the Voisey's Bay claims primarily through the acquisition of all the outstanding shares of the private company in which they were warehoused. By this time the shareholders of the private company were for the most part the vendors of the Voisey's Bay claims. The Cartaway shares to be issued to the vendors as consideration were subject to performance escrow. However the First Marathon brokers and their families had already committed to swap 1.2 million free trading Cartaway shares for an equal number of the vendors' escrowed shares to meet the first vendor's demand for free trading shares.

[para 14]
On June 23 Cartaway released an offering memorandum for a brokered private placement of four million special warrants at $1. First Marathon was agent for the offering. The offering memorandum did not disclose the role of Hartvikson and Johnson in acquiring the claims for Cartaway, the swap of free trading shares to vendors, the extent of the shareholdings of the eight First Marathon brokers or any consequent conflicts of interests. On June 29 Cartaway issued a news release announcing a change in business direction to natural resource exploration, the arm's length acquisition of rights to a large parcel of Voisey's Bay claims and a change in management. The release also announced the $1 private placement. On July 4 the Exchange lifted the halt and trading opened around $2.00 before closing at $1.80. On July 11 the $1 private placement closed. It had been over subscribed by a factor of four to one. All of it was placed with First Marathon clients.

[para 15]
Sometime in July or August a stock analyst published a report that was critical of the role of the First Marathon brokers, suggesting that they were in a conflict of interest when they were shareholders of Cartaway at the same time First Marathon was brokering Cartaway's private placements. After that, First Marathon ceased to perform any corporate finance activities on behalf of Cartaway apart from assisting in preparing the prospectus that qualified the securities issued under the $0.125 and the $1.00 private placements. New financings were subsequently arranged through other underwriters.

[para 16]
In the spring of 1996, Cartaway announced that it had encountered significant mineralization in its first drill holes on the claims and its share price rose dramatically to $23. Subsequent assay results did not confirm the mineralization, and Cartaway's share price dropped just as sharply and

ultimately fell below $1. Investigations into Cartaway's activities and the role of First Marathon and its employees resulted in regulatory proceedings and settlements involving the Toronto Stock Exchange, the Alberta Securities Commission and this Commission.

[para 17]
This hearing and our findings deal only with the allegations that pertain to Hartvikson and Johnson as stated in the amended notice of hearing and the evidence that was admitted in relation to them. Other matters have been dealt with in separate proceedings and settlements.

2.2 The Acquisition of Cartaway's Control Block

[para 18]
In the summer of 1994 Birchall and Stuart began looking for a clean shell whose shares were trading on the Exchange for the purpose of vending in business opportunities that became available to them. In July 1994, William De Jong, a lawyer with the Calgary law firm of Ballem McDill, introduced his friend Birchall to an opportunity to acquire the existing control block of Cartaway. Birchall in turn spoke to Stuart as head of First Marathon's Calgary office. Cartaway was attractive to Birchall and Stuart because it was a clean shell trading on the Exchange with a relatively low market capitalization. Cartaway's balance sheet at September 30, 1994 showed total assets of $328,230, with cash of $184,723, and total liabilities of $41,018. Its income statement for the year ending September 30, 1994 showed net income of $1,967. According to Stuart *"it made sense to put together a group to acquire the control block."*

[para 19]
From the beginning the intention was to change Cartaway's business direction by vending in some new business venture. As Birchall testified *"We knew we were going to change the direction of the company if we were able to secure the shares…"* and he and Stuart *"wanted people who were intelligent, and cooperative, and who had the business acumen to help us move the company forward."* Stuart testified *"the group was put together on the basis that they may be people who could find or come across a business venture that might be appropriate to take Cartaway forward".* The group consisted of four brokers from the Calgary First Marathon office and four brokers from the Vancouver First Marathon office, including Hartvikson and Johnson. At the hearing, Stuart testified that there was no agreement or understanding between the eight First Marathon brokers in the group to act jointly or in concert. In an internal First Marathon memorandum dated June 15, 1995 Stuart, in explaining his role as a director of Cartaway, stated in part, as follows:

"In the fall of 1994, a large block of common shares of Cartaway became available in part from the then directors of Cartaway. A group, of which I was one, took advantage of this situation and purchased this block. As we intended that eventually we would find a new business venture for the company, but were uncertain in which industry it would be in, we did not want to appoint inappropriate third party directors. Accordingly, at that time, two of the then directors resigned and Mr. Bill DeJong of a local law firm and I joined the board."

[para 20]
Hartvikson testified that he was approached by Birchall who spoke to him about Cartaway as *"an opportunity that had come up to pick up a large block of the stock -- and a number of brokers in the Calgary office were buying shares in this block, and they wanted to have some involvement from the Vancouver people."* According to Hartvikson the thinking was that they should have *"value added shareholders*". In other words if they owned shares they would be more likely to think of Cartaway *"as a potential receptacle"* for *"an interesting property or an interesting situation"* than if they did not own shares. He said that when he agreed to participate there was no agreement to act jointly or in concert with the other First Marathon brokers. He simply saw this an opportunity to make some money and have a closer relationship with the Calgary brokers.

Initially he thought the Calgary office would be looking for an oil and gas deal to put into Cartaway.

[para 21]
Johnson testified that without giving it much thought he agreed to buy a portion of the available Cartaway control block simply because the other brokers would be involved and he saw it as a good business opportunity. Johnson testified that at that time he did not know they were buying a shell or that there was a control issue. He assumed Birchall would be looking at oil and gas deals and believed that eventually there would be an opportunity to make some money with Birchall involved.

[para 22]
Initially the purchase of the control block was to go through Birchall's holding company as reflected in a letter of agreement dated July 21, 1994. Under the agreement the company agreed to purchase 3.6 million of the 6,483,079 issued and outstanding Cartaway shares from the existing control group. The agreement provided that the shares, which were held by five shareholders, were free trading subject to the normal control block restrictions as imposed by the *Alberta Securities Act.* On July 26, 1994, Cartaway issued a press release announcing that a group controlling 56% of Cartaway had agreed to sell its block of shares to an undisclosed purchaser for a price of $0.10 per share for a total of $360,000. On July 26, 1994, the Exchange halted trading in Cartaway pending the completion of the change of control.

[para 23]
The purchase of the control block did not proceed through the holding company as the agreement contemplated. Instead, the shares were purchased directly by the eight First Marathon brokers and Scott Ratushny pursuant to a subsequent share purchase agreement with an effective date of September 1, 1994. Ratushny, who purchased an insignificant number of shares, had acted as finder by initially bringing Cartaway to De Jong's attention. According to Stuart, it was always contemplated that the eight brokers would be purchasing their shares directly as each of the brokers wanted to be able to deal with their own shares. Stuart believed the setting up of the transaction to proceed through Birchall's holding company was an incorrect presumption on the part of De Jong.

[para 24]
The agreement provided that all current directors and officers of Cartaway would resign and would vote to appoint such new directors and officers as the purchasers would designate. Stuart felt it was not appropriate that Birchall become president because Birchall was a retail broker and there was the possibility that retail accounts might trade the stock, and so he, Stuart, took on that role. With the exception of one director Charles Mitchell, who agreed to stay on for continuity, the existing board resigned and De Jong and Stuart were appointed directors.

[para 25]
The transaction closed October 3, 1994. The closing agenda noted Birchall, Stuart, Hartvikson, Johnson, Lyall, Savics, Aufricht, Fraser and Ratushny, as purchasers, were represented by Birchall and Stuart and by their solicitors Ballem McDill. On October 4, 1994, Cartaway issued a news release announcing *"a change in control"* through the sale of up to 3.6 million common shares at $0.10 per share pursuant to a purchase and sale agreement dated September 1, 1994. The release noted the sale was from the five named shareholders of the control group to Stuart, Hartvikson, Johnson, Birchall, Lyall, Savics, Aufricht, Fraser and Ratushny. Only Stuart's relationship with First Marathon was mentioned. The appointment of De Jong and Stuart, as directors and Stuart as president and secretary was also noted as well as the fact that the agreement required the resignation of Cartaway's existing officers and directors.

[para 26]

On October 17, 1995, the Exchange required 10% of the 3.6 million share control block to be distributed to other members of the Exchange. As a result the First Marathon brokers ended up holding 45.6% or 2,940,000 shares of Cartaway as follows: each of Stuart and Birchall held 7.6% or 490,000 shares, each of Hartvikson, Johnson, Lyall and Savics held 5.7% or 370,000 shares, and each of Fraser and Aufricht held 3.8% or 245,000 shares. Ratushny purchased 50,000 shares. This resulted in an equal division between the offices with the Calgary brokers holding 22.8% and Vancouver brokers holding 22.8% of Cartaway's shares.

2.3 Cartaway's Change in Business

[para 27]
Cartaway did not issue a news release announcing its change in business direction to natural resource exploration until June 29, 1995. The following evidence relates to Cartaway's change in business.

2.3.1 The $0.125 Private Placement

[para 28]
Birchall testified that he and Stuart, at least, began looking for opportunities to put into Cartaway as soon as they felt reasonably certain that they would get the controlling shares. Stuart testified that nothing of interest surfaced and within six months it became apparent to him that Cartaway needed more money in its till to make it more attractive and able to pursue new business ventures. Stuart said that it was at this time that he began thinking about doing an equity issue.

[para 29]
Stuart testified that sometime in early April he discussed with Hartvikson and Johnson the idea of proceeding with a private placement. Stuart said Hartvikson and Johnson did not control the decision to proceed with the private placement but he wanted their approval and input. He needed the support of the Vancouver brokers because they were putting up more money than the Calgary brokers. In fact they put up well over four times the amount put up by the Calgary brokers. Stuart said he discussed with Hartvikson and Johnson the structure and pricing of the private placement, for which they had to be on side, together with the path in which Cartaway would be headed. Stuart said he discussed it particularly with Hartvikson and Johnson as opposed to the other brokers and it was at this time that they first indicated to him that there were mining opportunities starting to surface in the Voisey's Bay area.

[para 30]
Hartvikson recalled that the proposal to proceed with the private placement first arose when Stuart told him that Cartaway was getting so low in cash that it barely had enough money to meet listing requirements. At the same time Stuart told him that they needed to raise some money in order to have credibility in their search for appropriate projects for the company. Hartvikson said Stuart wanted to get his, Hartvikson's, agreement to put more money into Cartaway. Hartvikson believed this conversation was sometime around April 6 based on a reference in Hartvikson' diary entered on April 6, 1995 that notes in part "*PP→CWA* [Cartaway]". Hartvikson also recalled that it was shortly after his meetings with the first vendor of the Voisey's Bay claims, which were on April 4 and 5, that he brought the proposal for vending the Voisey's Bay claims into Cartaway to Stuart's attention. Hartvikson testified that it appeared to him at the time that while Stuart was prepared to consider the proposal he had not ruled out pursuing other ventures, including an oil and gas deal in Argentina.

[para 31]
Johnson said that he was asked his opinion about doing the private placement but he believed it was simply because he was a shareholder. Johnson said that it was not his or Hartvikson's decision to make to proceed with the private placement, but Stuart's and the other directors'.

Johnson said that at no time prior to his commitment to the private placement, did Stuart indicate that it was likely that Cartaway would agree to buy the Voisey's Bay claims that he and Hartvikson were thinking of acquiring.

[para 32]
Both Hartvikson and Johnson testified they made an oral, but binding, commitment to take at least $100,000 worth of units in the private placement before the private placement was announced. As it turned out Hartvikson took down 15.8% of the private placement while Johnson, Lyall and Savics each took down 16.9%, representing 66.5% of the private placement. Stuart and Birchall each took down 7.1% and the four Calgary brokers took down in total 15.5%. The only other significant purchaser who bought into the private placement, Canaccord Capital Corporation, took down 11.4% of the offering. Following the private placement, the four Vancouver brokers and their families owned about 52% of Cartaway's shares on a fully diluted basis.

[para 33]
Canaccord's president, Peter Brown, testified that when he was approached to participate in Cartaway's private placement by Johnson and Savics sometime in early April 1995, he was told they were looking for some seed capital to fund new areas of investment and a new management team. The two areas Brown said were under consideration were a South American oil play and an area play of Voisey's Bay claims. Brown conceded this did not accord with a memo he wrote to Canaccord's compliance department on July 9, 1997 in which he stated that the purpose of the private placement was to fund the acquisition of a major position in the Voisey's Bay area. Brown testified that the memo was incorrect to the extent he had forgotten to mention the prospect of doing a South American oil play. Regardless, Brown said he only made the investment because he wanted to encourage a relationship with the First Marathon team. As he noted in his memo and as he emphasized in his testimony he believed that the group at First Marathon had done a lot of first-class resource business. At $0.125 and with the sponsorship of First Marathon he said he couldn't see much risk. He attributed the omission in the memo to the fact that he had dictated it quickly and well after Cartaway had become one of three companies that had accumulated a large land position in the area and he simply recalled it as a Voisey's Bay play.

[para 34]
Hartvikson said he originally agreed to participate in the private placement when Stuart had indicated to him that it could be done around the 10 cent level. So on April 17, 1995 when he saw the stock price going up Hartvikson said he called Stuart to remind him to get the announcement out on the private placement as quickly as possible to set the price. However, Cartaway's trading history indicates that between March 30 and April 17, 1995 the stock traded only four days on small volumes. On March 30 it closed at $0.15, on April 7 at $0.16, on April 12 at $0.19, and on April 13 at $0.16.

[para 35]
On April 17, 1995, Stuart sought the Exchange's approval for Cartaway to proceed with a brokered private placement of up to 7 million units, each unit consisting of one common share and one share purchase warrant entitling the holder to purchase an additional common share within two years from closing of the private placement. Following discussions between Stuart and the Exchange, the pricing was fixed at $0.125 a share and $0.20 a share on the exercise of a share purchase warrant. A board resolution with an effective date of April 15, 1995 approved the brokered private placement on the above terms with First Marathon.

[para 36]
Stuart testified that although he knew at the time of announcing the private placement that this *"was going to be a mining deal"* no decisions had yet been made with respect to the acquisition of specific properties. As a result when Cartaway issued a press release and filed a notice with the

Exchange on April 19, 1995 that described the private placement, it stated that the proceeds would be used to fund new, but unidentified, business ventures. On the same day Stuart wrote to the Exchange confirming the terms of the placement and confirming that in the event of a change of control or change of business Cartaway would file a comprehensive filing statement. None of the April 19 news release, Exchange filing or Stuart's letter to the Exchange specifically referred to the First Marathon employees' participation in the private placement other than noting in the Exchange filing that certain insiders of Cartaway would be subscribers. This was in response to a query on the Exchange form as to whether any of the placement was non-arms length. On April 19, 1995 the stock stated trading at $0.18 and closed at $0.30. On April 27 it was at $0.35 and started to move thereafter as follows: April 28 at $0.40, May 2 at $0.50, May 3 at $0.55, May 4 at $0.60, May 5 at $0.68, May 9 at $0.80, May 10 at $0.83, May 11 at $0.84 and May 12 at $0.95.

[para 37]
The following table shows the holdings of Cartaway shares of the eight First Marathon brokers when they acquired the control block, and the number of shares they purchased under the private placement and held following the private placement (including on a fully diluted basis) together with the percentages these holdings represented.

First Marathon brokers	*Oct/94 Shares held*	*Oct/94 % shares held*[(1)]	*May 5/95 Private Placement Shares purchased*	*% private placement*	*May 5/95 shares held after private placement*[(2)]	*May 5/95 % held after private placement*	*May 5/95 Shares held on fully diluted basis after private placement*[(3)]	*May5 /95 % Held on fully diluted basis after private placement*[(4)]
Stuart	490,000	7.6	500,000	7.1	990,000	7.34	1,490,000	7.3
Birchall	490,000	7.6	500,000	7.1	990,000	7.34	1,490,000	7.3
Fraser	245,000	3.8	80,000	1.1	325,000	2.41	405,000	1.98
Aufricht	245,000	3.8	16,000	0.2	261,000	1.94	277,000	1.35
Calgary	**1,470,000**	**22.8**	**1,096,000**	**15.5**	**2,566,000**	**19.03**	**3,662,000**	**17.90**
Hartvikson	370,000	5.7	1,104,000	15.8	1,474,000	10.93	2,578,000	12.59
Johnson	370,000	5.7	1,182,000	16.9	1,552,000	11.5	2,734,000	13.35
Lyall	370,000	5.7	1,180,000	16.9	1,550,000	11.5	2,730,000	13.33
Savics	370,000	5.7	1,180,000	16.9	1,550,000	11.5	2,730,000	13.33
Vancouver	**1,470,000**	**22.8**	**4,646,000**	**66.5**	**6,126,000**	**45.43**	**10,776,000**	**52.61**
Total	2,940,000	45.6	**5,742,000**	**82.0**	**8,692,000**	**64.47**	**14,438,000**	**70.49**

Notes:
(1) 6,483,079 Cartaway shares were issued and outstanding
(2) 13,483,079 Cartaway shares were issued and outstanding
(3) share purchase warrant exercise price was $0.20 and on the day the private placement closed the Cartaway shares closed at $0.68, more than three times the exercise price
(4) 20,483,079 Cartaway shares on a fully diluted basis

[para 38]
In addition to the above, Canaccord took 800,000 shares in the private placement or 11.4%, other Marathon employees took 224,000 shares or 3.2%, and others took 234,000 shares or 3.4%.

[para 39]
On May 8, 1995, Cartaway issued a news release followed by a material change report on May 10, announcing the closing of the private placement and that the aggregate proceeds of $875,000

would be used to fund future, as yet undetermined, assets. Stuart testified that at this time there was no justification for being more explicit about what those business ventures might be because nothing had proceeded far enough to make disclosure. He said it could have been misleading to announce Cartaway's intention to go into Voisey's Bay then because it could have fallen apart.

[para 40]
On May 12, 1995, the stock was trading at $0.95 and Stuart asked the Exchange to halt trading in shares of Cartaway, because he felt that the stock was getting ahead of itself and there were no firm transactions to let it continue to run. He also said that to the extent Cartaway *"was pursuing at that stage more actively properties, it would have made vending in properties very difficult if the stock continued to increase".* Stuart said he discussed the request for a halt with De Jong saying *"With this stock running like this, it's going to be difficult to do any kind of a transaction for stocks. Or we should get this thing halted, bring it to a head."* He also discussed it with Hartvikson who said the stock should be halted because it was getting away. In his interview of February 28, 1997 with Commission staff, Hartvikson was asked whether he was aware of the rise in Cartaway's share price from $0.18 to $0.95 between April 19 and May 12. After indicating he was, Hartvikson was asked whether he knew why that might have been. He stated in response:

"A. Again, I can only speculate. I know I was not buying stock and I remember being concerned about it because of the obvious implications of what the heck was going on. If Michael [Stuart] *was talking to these people and a deal was going to be done, then somehow there was a leak coming out of the system, so -- and I remember -- actually I remember having a discussion with Michael saying, look, what's going on here? If you're getting somewhere you should be halting the stock.*

"Q. And did he ever indicate to you that he had the same concern?

"A. He may have, yeah."

[para 41]
Roy Homyshin, the Manager of Listings at the Exchange testified that in light of the short time between the May 5th closing and Stuart's May 12 statement to the Exchange of Cartaway's intentions to go into Voisey's Bay, he sought confirmation from Cartaway that the private placement was not conducted with prior knowledge of the acquisition of the Voisey's Bay claims. In particular he wanted to know if there was anything that Cartaway was acquiring imminently or was on the back burner in order that the Exchange could then determine if the private placement had been appropriately priced. In a letter dated June 2, 1995 Stuart advised Homyshin that at the time of pricing the private placement no agreements, letters of intent or verbal commitments had been made regarding Cartaway. In the letter he also stated that:

"I was personally involved in discussions regarding an oil venture in Argentina and was examining a couple of other potential projects brought forward by one of the other directors. Cartaway was also approached on the possibility of using the company to participate in the activities going on at Voisey Bay and indicated (sic) our potential interest. However, neither myself nor the other directors were involved in early discussions regarding Voisey's Bay."

[para 42]
Stuart indicated in the letter that in order to pursue these resource ventures Cartaway would need to demonstrate that it had money in its till. He went on to state that:

"Accordingly, to raise the required capital to have serious discussions, it was necessary to approach parties who understood the risks that none of the ventures being discussed would come to fruition, and that funds could sit idly in Cartaway for a continued period of time. As a

result, a large part of the issue was placed with parties who already had exposure to the company and were familiar and comfortable with the principals….I would point out that we still have not finalized the agreements with the vendors of the company/properties."

[para 43]
In light of this response, Homyshin reviewed the private placement questionnaire and undertaking forms that placees were required to file with the Exchange to help him decide if anyone was loading up on cheap stock. He determined that the purchasers of the big blocks of shares were four brokers at First Marathon, Hartvikson, Johnson, Lyall and Savics. Homyshin noted that with Canaccord also acquiring 800,000 shares for its own account, almost all of the placement was going to pros. However once he saw that the private placement questionnaire and undertakings indicated that none of these placees owned other shares in Cartaway, he said he ceased his enquiry. He said that he would have been concerned had he known of the broker's earlier shareholdings and of the extent of First Marathon's involvement. Homyshin testified that the pricing of the private placement could have been affected had there been a material change in the affairs of Cartaway between the date of the setting of the price of the private placement and the May 5th closing.

[para 44]
Hartvikson, Johnson, Lyall, and Savics denied in their private placement questionnaires and undertakings filed with the Exchange that they owned any shares in Cartaway or had any direct or indirect relationship to Cartaway. Except for the signatures, each of these forms appeared to be filled out in the same handwriting, which Hartvikson and Johnson said was not theirs. Both Hartvikson and Johnson acknowledged that the form was wrong in that it failed to disclose the shareholdings of either in Cartaway. Hartvikson explained that he had had an assistant sign the form for him while he was away. Johnson testified that he did not read it and did not recall if the whole document was before him when he signed it. Both said that the forms were filled in by administrative staff and while they were clearly wrong there was obviously no intention to deceive as they previously disclosed their Cartaway holdings to the Exchange at the time they purchased Cartaway shares in October 1994.

[para 45]
The reports for exempt distributions filed under the *Act* relating to Hartvikson and Johnson with respect to the $0.125 private placement indicate that Cartaway relied on the statutory exemption that permits Cartaway to issue securities to person who purchases securities as principal and for an amount not less that $97,000. The reports disclose that Hartvikson bought 1,104,000 shares for $138,000 and Johnson bought 1,182,000 shares for $147,750. While Hartvikson and Johnson testified that each purchased at least $100,000 worth of shares for their own account each admitted that a portion of the total shares subscribed for were for other First Marathon employees and friends who wanted to participate in the private placement but could not afford to do so directly because they could not meet the prescribed threshold on their own.

[para 46]
Hartvikson and Johnson testified that they bought shares for other First Marathon employees based on a legal opinion First Marathon had received in 1992 on another transaction and which had been used as a precedent ever since. Hartvikson said that the legal opinion was accompanied by a form of loan agreement to facilitate this kind of participation in private placements. The agreement provided for the employee to loan funds interest free to the placee on the basis that the funds would be applied by the placee, as principal, to purchase a certain number of securities. The loan did not become due until some fixed date after the statutory hold period expired and was considered repaid in full by the delivery of the securities notwithstanding market value at the time of repayment. In the meantime, the securities were held by the placee as security for the loan.

[para 47]
Hartvikson and Johnson said that Disbrow, as their supervisor and boss, assured them the arrangement was legal and it was a way of complying with the $97,000 exemption. Hartvikson said that not only was Disbrow aware of it, he encouraged it because it allowed other First Marathon employees who didn't have a lot of money to invest in the private placement. Johnson testified that in some cases he wouldn't ask for the money up front nor would he make them pay if the price of the stock was down. As Johnson said, the philosophy was to have everyone in the office participate in the economic success of their deals. Hartvikson and Johnson also testified that they considered the First Marathon employees who participated as sophisticated because they worked for First Marathon.

2.3.2 489895 BC Ltd.

[para 48]
The first vendor of Voisey's Bay claims to approach Hartvikson and Johnson was the Hunter Group. It was a partnership between Matthew Mason and John Robbins's private companies, 455702 BC Ltd. and 495699 BC Ltd., and its business was staking and selling exploration properties. Lawrence Barry worked for the Hunter Group as a landman. Hoping to take advantage of the staking rush in the Voisey's Bay area, Barry staked 1,102 claims on approximately 70,000 acres in Labrador between March 26 and April 3, 1995. Taking the name of a nearby river, these were eventually referred to as the Koguluk claims. When Hartvikson and Johnson were approached on April 4, 1995 by Mason to purchase the Koguluk claims, Mason said his group wanted cash and free trading shares in a public company. Advice as to how to go about acquiring the claims in these circumstances was sought by Hartvikson and Johnson from Maitland and Company, a law firm in Vancouver.

[para 49]
The first recorded meeting at Maitland's offices was on April 18, 1995, when Hartvikson met with Michael Seifert and subsequently Ron Paton. Seifert was a senior lawyer with Maitland with whom Hartvikson had dealt before and from whom Hartvikson sought advice regarding structuring the fundamental aspects of this deal. Paton, who was junior to Seifert, provided some legal advice to Hartvikson and Johnson on specific issues related to the matter, but it appears that Paton was primarily responsible for the preparation of documents.

[para 50]
One of the first things Hartvikson sought advice about was the availability of prospectus exemptions in British Columbia and in Alberta with respect to Cartaway's proposed $0.125 private placement. Paton said that in addition to advising Hartvikson about which specific exemptions were available, he advised Hartvikson on April 18 or 19, that the critical date for pricing the private placement was the date the notice was received by the Exchange. Paton also told Hartvikson that the placement price was based on the closing trade price on the day prior to the notice date and that it would be subject to adjustment if a material change was announced between the notice date and closing date and the purchaser was aware of the material change.

[para 51]
Hartvikson also sought advice from Seifert about the available options for the best structure to acquire the mining claims. Seifert testified that he recommended against an initial public offering over a reverse take-over for the simple reason of the time involved in preparing and filing a prospectus. Seifert stated *"I think any securities lawyer would have given that advice. It's quicker. It was a very -- excuse my language – "hot" property, and therefore time was of the essence."* Seifert also stated *"Like any mining play or 'area play' as the term is used in the industry, people don't have control over how long that interest will -- will continue in the marketplace, and therefore people do try and get things moving sooner than later."* With this advice the decision was made to use a shelf company, 489895 B.C. Ltd., to purchase the mineral

claims. Seifert testified that the purpose of 489895 was *"to acquire as much …interest in property -- mining interests in the Voisey's Bay area of Labrador."*

[para 52]
On April 24, 1995, Paton was given instructions to prepare the corporate organization documents with Stuart Bethune as sole officer, director and shareholder of 489895. Hartvikson and Johnson testified that they did not become directors, officers or shareholders of 489895 because they were busy with their business at First Marathon and they needed someone who could administer the private company and deal with its financial affairs. They also said that a limited company was used to assemble the claims so as to limit their personal exposure to liability regarding the acquisitions. Bethune, a friend of Johnson's, came on board at Johnson's request. Bethune's background was in filmmaking and he acknowledged that he had no relevant experience in running a mining company. Johnson testified that the idea was to have Bethune play a meaningful role in 489895. If over time Bethune did well the plan was to have him involved in whatever entity 489895 ended up becoming. Johnson said that when he approached Bethune to get involved he didn't know the Voisey's Bay claims were going into Cartaway and there were no agreements yet with the Hunter group. Bethune said that one day Johnson simply told him that he no longer was on the board. Bethune assumed this occurred when 489895 was acquired by Cartaway. According to Hartvikson and Johnson, Bethune wasn't as effective an administrator as they had hoped and it simply wasn't necessary to have him involved any more. Bethune did not receive any compensation for his activities in 489895. However he said that on Johnson's advice of there being a good chance of a reasonable return, he purchased some Cartaway shares on May 1, 1995, through a friend of his and Johnson's in Alberta. Bethune also said that although he purchased these shares on May 1, 1995, through this friend Johnson didn't actually tell him at the time that the name of the company in which he was investing was Cartaway.

[para 53]
Hartvikson and Johnson agreed that they directed 489895's affairs and negotiated the fundamental terms of the agreements acquiring the Voisey's Bay claims directly with the various vendors. Hartvikson and Johnson also provided instructions to Maitland regarding the business terms for the documents pursuant to which 489895 would acquire the claims. Bethune's role was primarily limited to signing documents when instructed to do so and he was not involved in any of the negotiations with the vendors of the claims. Johnson said that he did not ask Bethune to get involved in 489895 to be a subterfuge to conceal his own involvement in assembling the Voisey's Bay claims.

[para 54]
Initially instructions were given to Paton for Bethune to be the only shareholder of 489895. When Bethune was interviewed by Commission staff he testified that he believed he was the sole officer, director and shareholder. However on May 30, 1995, Paton was instructed by Hartvikson to change on an *"urgent"* basis the corporate records to reflect the fact that another friend, Randy Singh, was to be the sole shareholder. According to Hartvikson and Johnson, Singh, who resided in Georgetown, Guyana, was an experienced geologist to whom they initially turned for general advice regarding the idea of an area play in the Voisey's Bay area. Johnson testified that he involved Singh in their dealings because *"We didn't have any expertise in assembling an area play. We didn't have any expertise in geology. There were many questions that we needed answers to, and Mr. Singh was a good source of information. He was also someone who we trusted, we had made a lot of money with in the past. And he was a confidant that we felt we could speak to off the record and get advice."* Johnson considered his advice *"very valuable in the beginning, because we didn't have any other source of information. So certainly in the beginning. As time went on, it became less valuable, but in the beginning I found it have* (sic) *valuable."* Johnson said that he and Hartvikson believed that because of Singh's contacts in Latin America the company could acquire mining properties that would enable it to conduct global year-round drilling. For his advice and in exchange for agreeing to participate in such a proposal

Singh was given 250,000 shares. Johnson said that it seemed very reasonable to promise him 250,000 shares *"if anything worked out. It was not costing us anything."* A director's resolution dated effective June 6, 1995, which appeared to be signed by Bethune, provided for 489895 to give Singh 250,000 shares in recognition of his services *"in locating the subject material claims, introducing the parties and facilitating the transactions covered in the agreements".* Hartvikson and Johnson conceded that Singh did not locate any of the Voisey's Bay claims, introduce the parties or facilitate the transactions transferring the claims and to that extent the resolution was incorrect. There was no resolution in the corporate file approving the issuance of shares to Singh for what Hartvikson and Johnson said Singh did to earn them. Both however said that Singh earned the shares and they did not believe that anyone other than Singh was the beneficial owner of them. There was no evidence, documentary or viva voce, to support the evidence of Hartvikson and Johnson.

[para 55]
489895 received all its funds from Hartvikson, Johnson, Lyall and Savics. Approximately $380,000 was given to Bethune for 489895, with Hartvikson and Johnson contributing equal amounts of approximately $150,000 and with Lyall and Savics contributing the rest. Johnson said he wrote the cheques to Bethune and Bethune in turn wrote cheques to 489895. In his interview of September 29, 1997 with Commission staff Hartvikson, in response to being asked whether he was using his own money to tie up the properties, said *"Well, yeah, at this point it started out as being a relatively small amount of money because there was only a few properties. And again, to keep our name out of the limelight, we---basically Blayne was lending money to Stuart* [Bethune] *and Stuart* [Bethune] *lent the money to the company."* On April 22, 1995, Hartvikson left for a wilderness holiday in Utah and did not return until May 7, 1995. During this time he could not be reached, so Johnson put $300,000 up front, expecting that Hartvikson would contribute half, which Hartvikson did when he returned. Hartvikson testified *"the only way that 489895 could get any money is if indeed somebody put the money into the company. As I say, it really came down to us being the people that were most interested in 489 going anywhere, and we were -- we had to lend money to the company."*

[para 56]
Once the claims started to go into 489895, the funds were also used to fund exploration costs and other expenses in relation to those properties. Banking documents for 489895 indicate Johnson's first contribution was $50,000 on April 29, 1995 and his second was $225,000 on May 4. Thereafter cheques were written related to the acquisition and exploration of Voisey's Bay claims. For example on May 4, $25,000 went to 455702 BC, on May 5, $220,000 went to Lawrence Barry and $27,500 to the Newfoundland Exchequer and on May 11, $100,000 went to Walter Nash. 489895's bank account remained active until August 1995, when it was closed and the remaining funds were transferred to Cartaway's corporate account.

[para 57]
Hartvikson said that when he and Seifert had the initial discussion about the possibilities for structuring the deal, they discussed what potential conflicts of interest would arise if Hartvikson and Johnson became shareholders of 489895. On this point Hartvikson testified that he recognized that he and Johnson were in a *"difficult situation"* because they on the one hand, wanted to be beneficiaries of 489895 but, on the other hand, were brokers. As such Hartvikson said he *"did not think it was appropriate for us to be the -- seen to be directors or officers of that private company."*

[para 58]
Hartvikson also testified that he and Johnson *"became convinced that what was going to happen is either we would – we would just work very hard to make sure that it went into a company that we would be shareholders in, whether it was Cartaway, or Peruvian Gold or any of the other companies that we were considering at that time that we were shareholders in. …. If there was*

not going to be a company like Cartaway that we had a substantial interest in, and we would hope that down the road First Marathon was going to be the -- or participating in the financing, then the conflict of interest would not have been so large. But seeing as how we were going through the piece and saying well, it looks like our best bet, and we can't say for sure whether we can persuade the directors or Michael that Cartaway is the best vehicle, but it looks like that probably is our best hope, and therefore it doesn't really matter if we don't own shares in the company because we would be a beneficiary once the thing went into Cartaway. The perceived conflict I saw was more… with me as a shareholder going into a public company and then us attempting to get First Marathon to be the financier. …It would have been difficult to get First Marathon to -- to help finance the company. If we were a beneficial shareholder of this company, it would have been difficult to get First Marathon to -- to fund it."

[para 59]
Hartvikson said 489895 was solely a vehicle allowing all of the vendors that he had managed to put together, to receive shares in the private company so that they would end up receiving shares in the public company *"so in the end it turned out solely to be a conduit to allow this all to happen."*

[para 60]
While he was aware Hartvikson and Johnson were assembling the Voisey's Bay claims, Stuart testified that the first he knew of Hartvikson and Johnson's involvement in 489895 was when he read it in the notice of hearing. Nor was he aware that they were involved in the vending in of claims to 489895.

[para 61]
Johnson testified that Stuart *"would certainly have been aware that Rob* [Hartvikson] *and I were organizing the claims. We never made any secret of that. I would be surprised if Michael didn't know we were loaning this company money. I don't know who he thought would have been loaning it. Did he specifically know about 489895 and the mechanics of how that worked, I don't know if he knew that. But he was certainly aware of the whole process of us assembling claims and I assume that he would have known about the fact that we were the ones loaning money. So the fact that he didn't know the specific mechanics of how that worked, he may not have completely understood that, but he knew that that was the extent of our involvement… we never tried to hide any of this from Michael Stuart."*

2.3.3 The Acquisition of Voisey's Bay Claims

[para 62]
After staking claims in Labrador for the Hunter Group, Barry returned to Vancouver on April 3, 1995. As a result of the brokering of Milan Zipay, Barry, pitched the Koguluk claims to Hartvikson and Johnson on the next day April 4, 1995. Hartvikson said Zipay, whom he had not met before, probably knew to contact him through other people in the street who were aware that he and Johnson had been involved with Diamond Fields, whose discovery in Labrador led to the Voisey's Bay claims rush. Barry testified that Hartvikson and Johnson were very interested and he reported this to Mason. Both Hartvikson and Johnson acknowledged that, as soon as the Koguluk claims came to their attention, they considered the possibility of using Cartaway to organize a Voisey's Bay area play and they agreed that they should pursue Koguluk claims. They considered Cartaway to be a logical destination for the claims and hoped they could convince Stuart to agree.

[para 63]
When Hartvikson and Johnson met Mason on April 4 and 5, 1995 they indicated that they were very interested in the Koguluk claims and that they really wanted to do a large area play in Voisey's Bay bigger than just the Koguluk claims. Hartvikson attempted to persuade Mason that

not only was his group very interested in acquiring the claims but that they were the best people in town to deal with because of the financing ability of First Marathon. Mason testified that he followed First Marathon's successes, in particular Diamond Fields, and believed Hartvikson and Johnson were serious in building a legitimate mining company. However it was primarily First Marathon's financing ability that made him want to do business with them.

[para 64]
At the outset Mason said he made it clear to Hartvikson that his group wanted free trading shares of a public company as part of the consideration for the Koguluk claims. As Mason testified, liquidity was an issue because exploration plays can last only for a very short time and restricted stock put him at risk. Although no agreement was signed or money handed over, Mason said they negotiated a deal on April 5, 1995. In fact, Mason said because it was a seller's market there really was not that much negotiation. Mason testified that he told them what *"we wanted and they agreed".* According to Mason the compensation agreed to was 1.2 million free-trading shares in a public company and $300,000.

[para 65]
After conceding in cross-examination that he did not have a legally binding deal with Hartvikson and Johnson, Mason nonetheless confirmed that, after meeting with them on April 5, 1995, he did not pitch the Koguluk claims to anyone else because *"…my intentions were to do a deal with these fellows. They were very successful, and it's the …exploration expenditures for a block of ground that size are very large. We wanted to do business with them, and we're gamblers. We took a chance that they would do the deal."* Mason testified that he sent Barry back to Labrador on April 9 to stake more claims for the Hunter Group as he said *"we sold our inventory and we were going back for more."* Mason believed there was a ready market for more Voisey's Bay claims and indeed, Hartvikson and Johnson encouraged him to stake more claims for them.

[para 66]
Because Hartvikson and Johnson were interested in a larger area play, Mason put them on to the other vendors of Voisey's Bay claims. All but the Thistle Creek Resources vendors were brought to Hartvikson and Johnson through Mason. Mason knew that to build a serious mining company Hartvikson and Johnson would need good management. He proposed they contact John Ivany, someone whom he felt had considerable experience in junior and senior mining companies and with whom he wanted to work. Hartvikson and Johnson were eager to have Ivany involved because they believed he had the experience and reputation to build a serious mining company. Ivany had indicated to Mason that he would be interested in becoming involved and by the end of April Johnson had Ivany confirm his involvement.

[para 67]
Within a week or two after meeting Hartvikson and Johnson, Mason was introduced to Bethune whom he understood was to be the president of the numbered company into which the claims would go before being vended into a public company. Mason testified that he did not know at the time which public company would be involved other than it would be a company listed on one of the three Canadian exchanges. Hartvikson and Johnson told Mason that Seifert would handle the paperwork.

[para 68]
Maitland's 'paperwork' indicates that the legal work related to the acquisition of the mining claims began immediately following Hartvikson's first visit on April 18, 1995. On April 19, 1995, a file was opened in the name of Cartaway with First Marathon's address. Paton testified that he opened it under Cartaway's name in the expectation that the issuer would be responsible for the expenses associated with the private placement and in anticipation that Cartaway would become a client. By April 20, 1995, Maitland had opened a second file for 489895. However a significant portion of the legal services recorded in Cartaway's work in progress (WIP) records related to the

acquisition of claims by 489895. According to Seifert, these were incorrect postings that were not subsequently corrected because by June 1995, Cartaway had acquired the claims from 489895 and had agreed and did pay for all the legal accounts rendered by Maitland relating to Cartaway and to 489895.

[para 69]
A review of the WIP records and the documents in the files indicates that Mason began dealing with Maitland's offices by April 20 and continued to do so through June 1995. Indeed Mason's relationship with Cartaway continued in a more substantive way. According to Ivany, part of Mason's deal was for him to come on as a director of the public company, which he subsequently did some time in 1996. In addition to participating directly in discussions with Maitland's offices regarding the acquisitions, Mason, as well as some of the other vendors, had lawyers who represented them in finalizing the acquisition agreements that Maitland's offices had drafted.

[para 70]
Mason testified that he first purchased Cartaway shares in the market on April 27, 1995. However he said that he did so not because he was told that Cartaway was the proposed public company acquiring the Voisey's Bay claims, but on the basis of his own "*aggressive research".* He said that he believed that the First Marathon brokers were so good that any time he saw an opportunity to purchase a stock that they had been behind, like Diamond Fields, he bought. He knew that they were behind Cartaway because of their earlier purchases and he simply speculated that it might be the company into which they were planning to vend the claims. Mason said that he was not actually told Cartaway was the public company until sometime later in May 1995.

[para 71]
Apart from the time he was away Hartvikson negotiated the terms of the acquisitions with the vendors directly. Hartvikson testified that he and Seifert, who was *"quite familiar with the process and what was appropriate in terms of what these vendors should be demanding for these properties",* discussed what needed to be done. Hartvikson said that Seifert *"took pretty much all of it on himself"* and called him periodically if he needed specific instructions. In Hartvikson's absence Johnson took over dealing with the vendors both directly and through Maitland. When Hartvikson got back he, rather than Johnson, continued dealing with the vendors and Maitland.

[para 72]
Although there were some differences that stretched out settling the formal agreements, the acquisition agreements had a similar structure. In his interview with Commission staff of September 26, 1997, Hartvikson in answer to how the negotiations for 489895 were handled stated, *"My recollection is that it would have been, number one, minimal negotiations that were happening. Michael Seifert was effectively coordinating things for the company and for Stuart. And the thing that I found interesting at the time is that it was like buying a dozen eggs in the grocery store. There was basically a standard of so much per every hectare that came to the table. If it was 100,000 hectares, the vendor's compensation was X….X in dollars, shares and some royalty always seemed to be part of the equation."* The agreements entered into by 489895 with respect to the acquisition of claims are as follows:

1. letter agreement between **White Wolf Exploration and Jimmy John** and 489895 dated April 27, 1995, under which 489895 acquired an option to earn a 100% interest in 970 Voisey's Bay claims for a total of 100,000 Pubco shares and $1 million, of which $25,000 was payable on execution and $225,000 at closing . Additional terms included the retention by White Wolf of a small % net smelter return royalty ("NSR"). Closing was tied to Exchange approval and the issuance of the Pubco shares. The parties agreed that the letter was a preliminary agreement that incorporated all of the essential terms of their agreement and bound them. They also agreed that they would negotiate a formal agreement to incorporate further terms based on industry

standards and if no formal agreement is reached the letter agreement prevailed. It appears that the first draft of the agreement was sent to Mason and counsel for White Wolf on April 27. Effective June 5 the letter agreement was amended to reflect, among other things, that Pubco was Cartaway and that White Wolf had not yet been able to obtain a title opinion but would use its best efforts to do so as soon as possible but in any event before closing.

2. letter agreement between **455702** and 489895 dated May 3, 1995, under which 489895 acquired an option to earn a 51% interest in 491 Voisey's Bay claims for 100,000 shares of Pubco plus $25,000 on signing (paid May 5) and another $50,000 on closing. 455702 retained a small % NSR. Like the White Wolf agreement the parties agreed that the letter was a preliminary agreement that incorporated all of the essential terms of their agreement and bound them and prevailed if no formal agreement was signed. The first draft was dated April 18 with copies sent April 24 to Johnson, Mason and Mason's lawyer for review. On June 5 the letter agreement was amended to reflect, among other things, that Pubco was Cartaway and that 455702 had not yet been able to obtain a title opinion but would use its best efforts to do so as soon as possible but in any event before closing which was the earlier of July 31, 1995 or four weeks following the Exchange's approval of Cartaway's acquisitions and concurrent financings.

3. letter agreement between **Tenajon Resources Corporation** and 489895 dated May 29, 1995, under which 489895 acquired an option to earn a 51% interest in 509 Voisey's Bay claims for 100,000 shares of Pubco plus $25,000 on signing and $50,000 on closing. Tenajon retained a small % NSR. First drafts dated April 18 were sent to Mason and Johnson on April 25 for review. On June 5 the letter agreement was amended to reflect, among other things, that Pubco was Cartaway and that Tenajon had not yet been able to obtain a title opinion but would use its best efforts to do so as soon as possible but in any event before closing which was the earlier of July 31, 1995 or four weeks following the Exchange's approval of Cartaway's acquisitions and concurrent financings.

4. letter agreement between **Barry** and 489895 dated May 4, 1995, under which 489895 acquired a 100% interest in 4,000 Voisey's Bay claims for 300,000 shares registered to Barry to be exchanged for Pubco shares, $220,000, paid on May 5 and a retained small % NSR. On May 25, 1995 the agreement was amended to reflect, among other things, that Pubco was Cartaway and that 489895 was negotiating to have Cartaway acquire 489895 and all the mining interests that it held.

5. letter agreement between **Thistle Creek Resources Inc.** and 48989 dated May 11, 1995, under which 489895 acquired a 100% interest in 1,000 Voisey's Bay claims in Labrador for $60,000, a retained small % NSR and 125,000 shares registered to Thistle Creek to be exchanged for Pubco shares.

6. a letter agreement between **Barry on behalf of the Koguluk River Staking Syndicate** and 489895 dated May 15, 1995 under which 489895 acquired a 100% interest in the 1,160 Voisey's Bay claims for a retained small % NSR, $300,000 and 1.2 million shares of 489895 registered to 455699 which were to be exchanged for Pubco shares. These were the Koguluk claims brought by Barry to Hartvikson and Johnson and for which Mason said he had negotiated a deal by April 5, 1995. There was no reference to the Pubco shares being free trading in the letter agreement as the free trading shares Mason demanded were made available by way of a separate 'share loan' agreement with six of the First Marathon brokers or their families. Aufricht and Fraser, both of whom acquired small percentages of the control block and of the $0.125 private placement did not participate. See section 2.3.4.

7. a letter agreement between Seamus Young and the **Cassiar Syndicate** and 489895 dated May 15, 1995 under which 489895 acquired a 50% interest in 1,300 mining claims in British

Columbia for $50,000 staking expenses and 150,000 shares of 489895 registered to 455699 BC which were to be exchanged for Pubco shares. Cassiar retained a small % NSR.

8. on April 19, 1995, a draft prospector's agreement was given to Hartvikson for delivery to Barry under which *"All claims or mining assets staked or acquired by the prospector shall be held in trust by the prospector for the company. The prospector covenants to assign, transfer or dispose of all such claims or mining assets only in accordance with the instructions and directions given to the prospector by the company."* Maitland's records indicate that on April 24 a revised draft prospector's agreement was forwarded to Johnson for review. Hartvikson said he could not recall why he asked for, or was given, this agreement for Barry and he did not know whether this agreement was ever signed. However a letter agreement between **Cartaway and 455702 and Barry** (operating as the Hunter Group) dated May 26, 1995 was executed under which the Hunter Group as Cartaway's agent staked a 100% interest in 16,600 Voisey's Bay claims directly for Cartaway and for which Cartaway agreed to pay, through an advance, approximately $1 million and 400,000 Cartaway shares. The records indicate that on June 5, 1995 Hartvikson faxed a copy of the *"latest version of this agreement"* to Paton with instructions to make *"sure this gets signed with the other stuff today."*

[para 73]
Each of Hartvikson, Johnson and Stuart testified that when the $0.125 private placement was announced on April 19, and when it closed on May 5, Cartaway had not yet made in Stuart's words *"a definitive business decision"* to acquire the Voisey's Bay claims. Stuart testified that to suggest otherwise in the May 8 news release, and presumably in the May 10 material change report he signed, would have been inappropriate and entirely misleading. Two days later on May 12, when the shares were halted Stuart advised the Exchange for the first time that Cartaway was actively negotiating the acquisition of a large parcel of Voisey's Bay claims.

[para 74]
On June 29, 1995, Cartaway issued its news release that disclosed the arms length acquisition of Voisey's Bay acquisitions, its change in business to natural resource exploration, its change in management and a brokered 4 million $1 a unit private placement.

[para 75]
Staff's allegation that the decision to vend the Voisey's Bay claims into Cartaway had been made by May 5, 1995 was strongly disputed by Hartvikson, Johnson and Stuart. Other evidence bearing on this issue follows.

[para 76]
When the Voisey's Bay claims first came to Hartvikson and Johnson's attention they acknowledged that *"Cartaway was in there as one of our first thoughts"* as the ultimate destination of the Voisey's Bay claims. Hartvikson testified that when he and Johnson first brought the Voisey's Bay claims to Stuart's attention around April 6, 1995, it appeared to him that while Stuart was prepared to consider putting the Voisey's Bay claims in Cartaway he had not ruled out pursuing other ventures, including an oil and gas deal in Argentina. Johnson testified that when the Voisey's Bay claims proposal was first put to Stuart he was initially ambivalent about Cartaway acquiring the claims and considered the whole idea somewhat *"flaky".* Johnson testified that at that time Stuart was still looking at the possibility of an oil and gas deal.

[para 77]
Stuart said the oil and gas deal he had been considering was with Cordex Petroleum, a TSE listed company in which he was actively involved in restructuring and financing. Cordex had an extensive oil and gas acreage in Argentina and Stuart thought there was a possibility for Cartaway to do a joint venture with it. Although First Marathon underwrote a $8.9 million financing for Cordex in May 1995, Stuart said he believed in April 1995 that Cordex would still be

interested in getting joint venture partners because of the significant cost of developing their extensive holdings and he continued *"monitoring the Cordex situation at that time".*

[para 78]
Stuart said that when the Voisey's Bay claims were first brought to his attention he did not authorize Hartvikson and Johnson to go and secure the claims for Cartaway as agents but rather he suggested that they *"go and see what people with claims wanted in the way of compensation for vending in and talk to them about Cartaway."* Stuart testified that when the private placement was announced on April 19, he knew *"Cartaway was going to be a mining deal"* although he did not have the specifics of the Koguluk claims. He testified that *"It would have been sometime after announcing the financing. Early April the thing sort of evolved in terms of a description of possible claims that could be available. And first time that I guess I thought there was some sort of seriousness towards availability of claims was when I -- I remember being asked to come out to Vancouver to meet Matt Mason who I thought was the principal party behind the claims. That exercise was mainly trying to convince him that a company listed on an Alberta [Exchange] might be an appropriate vehicle for such claims… I had two meetings with respect to Cartaway; one was the visit out here that I described when I met with Mr. Mason, and another one was a meeting mid-May when I met out here with Mr. Ivany and Mr. Nash."* An entry in Hartvikson's diary on April 19, 1995 regarding a conference call with him, Stuart and Seifert noted "*Summary of CWA [Cartaway] deal possibilities."* Hartvikson could not recall the specifics of the conversation relating to this note. Hartvikson's diary indicates that he called Stuart on April 16, 1995 as well.

[para 79]
Stuart also discussed Voisey's Bay with Birchall around the time of announcing the private placement but believed his discussion was limited to telling him that the fellows in Vancouver had people coming in with respect to mining properties in the area. Birchall, who had been on a Hawaiian holiday with his family since April 1, 1995, returned to Calgary in the afternoon of Sunday April 16, 1995. Birchall believed it was sometime in the following week that he spoke to Stuart who told him that they wanted to change Cartaway's business direction into mining. Birchall said that at the time he was not aware of 489895 and that he had little to do with the organization of Cartaway into a mining company. He said his role was limited to talking to the other brokers about the appropriateness of changing Cartaway's direction. Birchall could not recall whether Voisey's Bay was specifically mentioned but he recalled that he was receptive to the change in direction to mining. Birchall said that it was his practice when he made notes in his diary to frequently enter them on the first open space. An entry in Birchall's diary on April 16, 1995 noted in part as follows *"6,000,000 un. sh +wt (2yr)"* , which Birchall agreed likely refers to units, shares and warrants, and then underneath that *"12 cents"* and *"12 cents, one year, and 15% + 2nd yr"* and then underneath that "*Tek 10% @ $36 non voting* [and] *voting control to Friedland"* and finally underneath that *"70,000 acres 1.2mm sh + 300,000".* Although Birchall said that he had no independent recollection of what these notes referred to, he agreed that the notes, in part reflected the terms of the deal with Mason to sell the Koguluk claims. Apart from Birchall's reference to his practice of sometimes making notes in the first empty page, there was no evidence to suggest that Birchall's diary entry of April 16 was not made on April 16, 1995.

[para 80]
While acknowledging that Cartaway was the obvious home for the Koguluk claims and that they wanted to and hoped to do a deal with Cartaway, both Hartvikson and Johnson testified that they were still looking at other possibilities when the private placement was announced. One of those was with David Henstridge, an exploration geologist and the president of Peruvian Gold Limited, whom they said they approached to purchase the claims. Johnson testified that Henstridge was a good manager of a mining company and an excellent geologist. They had had dealings before and Johnson knew him as an honest operator and someone he would like to continue to support and conduct business.

[para 81]
Henstridge testified that he had several communications with Hartvikson and Johnson in April 1995, relating to the concept of Peruvian Gold becoming involved in Voisey's Bay as well as to other business opportunities unrelated to Voisey's Bay, including possible mergers with other public companies. His diary entries indicated that some of these communications were on April 19, 20, 21 and 24, 1995. Henstridge testified that at that time there was *"literally a mad rush to get claims in Voisey's Bay"* because of Diamond Field's nickel deposit discovery. Voisey's Bay was hot and Henstridge said everybody wanted claims in the area and deals that were getting done were getting done very, very quickly. Any plan that was offered was almost snapped up immediately. The claims were considered valuable assets because they permitted a junior resource company to raise capital quickly. Henstridge said that he too was very much interested in acquiring Voisey's Bay claims but had no recollection of Hartvikson and Johnson saying that they had any claims under their control that Peruvian Gold could readily purchase. Henstridge believed his discussions with them in April 1995 dealt mainly with concept rather than specific claims. Peruvian Gold did get involved in Voisey's Bay on April 26, l995 through a third party who was independent of Hartvikson and Johnson and Peruvian Gold ultimately purchased these claims. However, Johnson and Hartvikson, through First Marathon, were involved in financing these claims for Peruvian Gold. On September 5, 1995 Cartaway and Peruvian Gold signed letters of intent under which each company could earn a 50% interest in certain Voisey's Bay claims held by the other company. Cartaway's news releases for 1996 and 1997 also indicate that the two companies entered into additional agreements regarding the joint exploration and development of mining properties in the Labrador area.

[para 82]
On January 30, 1995, Stockwatch reported that the Vancouver Stock Exchange had accepted notice of an agreement between First Marathon and Diamond Fields under which First Marathon was appointed the company's financial adviser effective July 1, 1994. On March 27, 1995 under Stockwatch headline *"Miner says First Marathon praises Voisey's Bay"* a Northern Miner article is cited that referred to the report prepared by First Marathon analyst John Lydall as saying *"Diamond Fields Resources Voisey Bay discovery is bigger and better than Raglan."* On April 18, 1995, Teck Corporation announced its intention to acquire 3 million Diamond Fields' treasury shares, representing 10.4% of the issued and outstanding shares, at $36 a share for 108 million. Under the agreement dated April 14, 1995 Teck would provide to the company its engineering and mine development team through the conceptual design and pre-feasibility study stages of the Voisey's Bay project at no cost. Teck also agreed to enter a standstill and voting trust with Diamond Fields. On April 18, 1995 Stockwatch also referred to a Financial Post report and noted that *"shares of Diamond Fields soared $3 to a new 52 week- high of $33 Thursday after its latest results at Voisey's Bay showed strong evidence of a new discovery at Voisey's Bay….Market watchers attribute some buying to a speech by a University of Alberta geology professor Roger Morton who says Voisey's Bay may turn out to be a new nickel province. Analyst John Lydall predicts in a First Marathon report that the find may host 48 million tonnes of nickel-cobalt reserves…"* On April 19 Stockwatch reported, in part, that *"Wall Street Journal reports in its Tuesday edition that Teck's investment in Diamond Fields Resources is a vote of confidence in the Voisey Bay deposit, which some say is Canada's best mineral finds in decades."* On May 1 Stockwatch again noted that the Financial Post reported in its Market Eye edition that *"the word on the street in Toronto is that Diamond Field Resources Voisey Bay nickel- copper-cobalt-mega-discovery in Labrador may be developed by a consortium of Teck Inco and Falconbridge… Teck already has a stake and nickel giants Inco and Falconbridge do not want to be shut out of the play"*. The next day the Diamond Field's stock jumped over $7 to $45. On May 3 Stockwatch covered Diamond Field's news release *"Voisey Bay north dipping extension discovered"* and went on to note, in part "*The Vancouver Sun reports in its Tuesday edition that the hottest mineral play in North America, Diamond Fields Resource's nickel, copper and cobalt discovery in Voisey Bay, rose a few more degrees Monday."* Stockwatch noted Diamond Fields rose a further $6.50 to

close at $53.75 on May 4, based on rumours that Canada's two largest nickel producers, Inco and Falconbridge, were talking to Diamond Fields.

[para 83]
Stuart said he attended two meetings in Vancouver regarding Cartaway and the Voisey's Bay claims. He believed they took place sometime in late April or early May and on May 12, 1995. The first meeting was to meet Mason and to discuss what the vendors wanted. Stuart said that he also met Hartvikson and Seifert, whom he understood from Hartvikson was acting for the vendors. According to Stuart he only met with Seifert once. Stuart said he did not bring a lawyer to that first meeting because they weren't at a stage where he felt that legal counsel was necessary, which according to him would not be *"until we were in the end throes of the transaction."* Stuart said the critical issue with Seifert was being able to give some of the vendors free trading stock. Stuart said that he would not commit Cartaway to any transaction unless all of the essential components were in place and this included management. Although the exact date cannot be recalled, it is clear that by late April 1995 Johnson had Ivany on side. At Johnson's request Ivany agreed to set up and put together a management team for the public company and get it started. Ivany recruited Walter Nash, a senior exploration geologist, to be vice president of exploration.

[para 84]
Nash testified that he was first called by Ivany in late April or early May, about meeting a group of people to discuss setting up an exploration program for properties that they had acquired, and were acquiring in Voisey's Bay. Ivany indicated to Nash that these people would be interested in having him on board as vice president of exploration. Nash was made aware at that time that he would be setting up an exploration program for their core properties, which included the Kogaluk, White Wolf, Thistle, Cassiar and Tenajon claims. Based on his travel records, Nash testified that he met with Johnson in Vancouver on May 4, 1995. Nash testified that at that meeting Johnson told him that he was a broker who had been involved in financing Voisey's Bay companies like Diamond Fields and that First Marathon had the ability to finance good exploration programmes. Subject to checking with his wife, Nash accepted Johnson's invitation to become vice president of exploration of what he understood was a public company although he did not know the name. Nash understood that what was proposed was that Hartvikson and Johnson were going to put up funds so that Nash could get the camp, equipment and some of the airborne survey programmes arranged for these specific properties as soon as possible. When asked what the status of these properties were when Nash joined the group Nash said *"there was at least a handshake agreement on them all, and they were finalizing the agreements".* As for what he meant by handshake deal Nash said *"…if you go back to Hemlo, a handshake deal is a deal."*

[para 85]
Once he agreed to accept the position, Nash said he knew that because of the remoteness of the location and the short season that he had to get started right away. Sometime between May 8 and 10, 1995 he hired a chief geologist. On May 11, 1995, he opened a bank account in Pickering, Ontario, where he lived. Within days, approximately $100,000 was wired into the account from 489895 enabling Nash to buy camp equipment and fund other exploration costs for the properties. Nash asked for $100,000 a year and he said he began to receive it from *"day 1*", which he testified was May 10. Nash said it was always envisioned that his job was full time and he simply billed as a consultant at the rate of $400 a day or $100,000 per year until they had "*the corporate accounts and everything set up"* for the public company. Nash then continued on salary with Cartaway at the same amount. The chief geologist Nash hired also continued with Cartaway.

[para 86]
Johnson testified that when he made the commitment on May 4 to allow Nash to purchase equipment and reserve airborne exploration time, he did not have any commitment from Stuart that there was going to be a deal with Cartaway. Indeed Stuart testified that before he would

commit to the deal or loan his free trading Cartaway shares for the swap he wanted to meet Ivany and Nash. On May 12, 1995 Stuart said that he met with Ivany and Nash. Stuart said that it was the bringing on board of Ivany and Nash to be the management group of Cartaway that crystallized his interest in Voisey's Bay as a prospect for Cartaway. Johnson agreed that Stuart was not prepared to commit Cartaway or his own free trading shares for the swap until he came out and *"kicked the tires"* for himself on May 12. That's when Stuart delivered his and the Birchall family's free trading shares for the loan pool at Maitland's offices.

[para 87]
When Hartvikson came back from his holidays on May 8, 1995, he took over dealing with the claims from Johnson. Although he would not agree entirely with the suggestion that he was the one giving instructions to Maitland regarding closing the deal between Cartaway and 489895, Hartvikson did agree that throughout May he was the one who attempted to pick up any pieces that were necessary to get 489895 into Cartaway. This role fell to him in part because Johnson was not a detail man and Hartvikson was the natural go between the vendors and Stuart. Hartvikson said he ensured that management received options. This was reflected in a diary note of May 23 to remind Michael to *"put in options for management directors."*

[para 88]
At some point Hartvikson said all of the claims acquired by 489895 and the proposed management structure were presented as a package to Cartaway and accepted without negotiation. According to Hartvikson and Johnson the earliest date for this happening was May 12, 1995 when Stuart committed to the deal by approving Ivany and Nash and handing his free trading shares over for the share swap. Then effective June 7, 1995 Cartaway, 489895, Bethune and the shareholders of 489895 signed a share exchange agreement under which Cartaway acquired all of the outstanding shares of 489895. In exchange the shareholders of 489895, who by this time were Randy Singh (250,000 shares), Thistle Creek (125,000), 455699 BC (1,350,000) and Barry (300,000) received 2,025,000 escrowed shares of Cartaway, which the parties agreed would be subject to any pooling requirements imposed by the Exchange. Effective June 7, 1995 Ivany became president of Cartaway, Nash vice president and Hugh Mogensen joined Ivany, Stuart and De Jong as directors. On the same day the board approved a stock option plan granting up to 1.1 million shares to certain directors and employees at $0.72 a share over 5 years.

[para 89]
Ivany testified that by the time he got involved all of the claims were in place. He said that he didn't have anything to do with negotiating the terms of any of the acquisition agreements, which had been agreed to prior to his involvement. He said the paperwork seemed to drag on for a long time and to that extent he signed some contracts or documents after the fact. Maitland's records indicate that the due diligence with respect to confirming title continued for some claims practically to the end of July 1995. From Ivany's perspective *"the group in the First Marathon office in Vancouver had negotiated the agreements from Cartaway's viewpoint in that they were being assembled by them and that's where all these deals seemed to be centered."* This included the agreement for the staking and purchase of properties by the Hunter Group or Barry for Cartaway. Ivany understood that Hartvikson and Johnson were instrumental in negotiating these for Cartaway. He said that Hartvikson and Johnson's contact with him once he became president was a *"sort of a continuum".* They *"had been very active in pulling this all together"* and so he would talk about things with them from time to time.

[para 90]
Maitland's records indicate that its offices prepared all the documents related to the acquisition of the claims through to the end of June 30, 1995 when the account was finally sent out to De Jong and Cartaway for payment. These included the acquisition agreements, the share exchange agreement between 489895 and Cartaway, the pooling and escrow agreements, the free trading

share loan agreements and news releases. The records indicate that Maitland was Cartaway's Vancouver law firm primarily responsible for the legal work related to claim acquisitions and change of business and Ballem McDill was its Calgary law firm and primarily responsible for the documents relating to the private placements. For example, a letter of May 18 from Paton to De Jong stated that it was *"intended to provide you with the proposed structure of [Cartaway's] acquisition of approximately 1,000 mining claims in northern British Columbia and a total of 8,160 [Voisey's Bay claims*]." The letter goes on to describe the terms of the assignment of 489895's three option agreements (WhiteWolf, Tenajon and 455702 BC) to Cartaway, as well as the terms of Cartaway's acquisition of the other Voisey's Bay claims, (Barry, Thistle Creek and Cassiar) through the acquisition of 489895 by way of a share exchange agreement. A draft Cartaway news release dated May 18 was enclosed for De Jong's review with the stated understanding that DeJong's office would attend to the filing of documents relating to Ivany's and Nash's appointment as disclosed in the news release. The letter closed with the advice that Maitland's office would prepare the documents concerning the transactions described and forward them for comment and review. The draft news release and subsequent revisions were sent to Hartvikson, and at times Stuart and De Jong, for review. A copy of the draft news release noted the May 19 revisions requested by Hartvikson. Another example is a fax cover note dated May 23, 1995 which enclosed the revised news release, sent by Paton to Stuart and Hartvikson, and asked whether they wanted the news release *"to include reference to a change of the Company's name to better reflect its business."* The draft news release, but for the amount of the $1 brokered private placement, which increased from 2 million to 4 million, was for the most part the same as the news release Cartaway finally issued on June 29. All of the key terms of the WhiteWolf, Tenajon and 455702 BC acquisition agreements as well as the acquisition of 489895, were disclosed. So was the appointment of Ivany and Nash, the change in business direction, the grant of director and employee stock options and the fact that all of the 2.65 million shares issued for the property acquisitions would be subject to overriding Exchange imposed performance escrow and pooling agreements.

[para 91]
Maitland's documents also indicate that Hartvikson, and Johnson while Hartvikson was away, was the contact for instructions and that draft documents were sent to him for review and comment. Hartvikson continued to deal with Maitland in organizing the closing of the deal through May, June and July 1995.

2.3.4 The Share Loan Agreements

[para 92]
Each acquisition agreement that 489895 entered into contemplated that the public company shares that would be issued as part of the consideration for the claims would be subject to performance escrow. However, Mason testified that he made clear to Hartvikson and Johnson when he first pitched the Koguluk claims to them that he wanted free trading shares.

[para 93]
The issue of vendors receiving free trading shares was first raised with the Exchange on May 16, 1995 between Romanzin, Stuart and Dejong when they met to discuss how Cartaway's proposed acquisition of a large parcel of Voisey's Bay claims would proceed. In response to the Exchange's advice that all shares issued would be escrowed subject to an expenditure release, Stuart indicated that this might be unacceptable to the vendors. Instead Stuart asked the Exchange to consider a share swap where '*the present control block'* would be performance escrowed rather than the vendors.

[para 94]
Stuart also advised Romanzin in a follow up letter dated May 17, 1995 that *"certain significant* [Cartaway] *shareholders are prepared to assist the vendors in their liquidity needs on the shares*

by providing a loan pool of shares from which the vendors could sell to be replaced with the release period stock. We understand this process will be acceptable to the Alberta Stock Exchange."

[para 95]
Stuart testified that the share loan proposal arose because of Mason's insistence on getting free trading shares as a condition to vending in the claims. Stuart said Mason knew he was going to have to end up with escrow shares and was concerned about the amount and timing for release. The share loan proposal, which according to Hartvikson was Seifert's idea, was the mechanism to get Mason free trading stock. Hartvikson said he knew Mason and his group wanted free trading shares. However Hartvikson said that at the outset when he asked Seifert to set 489895 up, the process was not clear. Hartvikson said *"we didn't spend a lot of time in that meeting talking about the share structure and how it would all work."* Stuart said that it was around the time that Ivany had agreed to come on board that Mason began applying pressure to conclude the deal. Stuart said Mason wanted to know with some confidence that they had a vehicle that had a million free trading shares. The deposit of the free trading shares in Maitland's vault was that show of good faith.

[para 96]
Johnson testified that Mason began to really pressure them for free trading shares and threatened to take the deal elsewhere if they didn't commit. Johnson said Teck's investment on April 18, 1995 in Diamond Fields gave considerable credibility to the whole Voisey's Bay land play. Johnson said to keep the deal together he called the other brokers to see if they would voluntarily commit their free trading shares for the swap. Johnson said they, including Stuart, agreed. Johnson said that he had no prior agreement with Hartvikson to provide free trading shares for the swap until Hartvikson got back from holidays on May 8, 1995.

[para 97]
Hartvikson testified that on his return from holidays he knew that there was *"more than a handshake deal on one property, and that there were a number of other properties that were still in the process".* Hartvikson said that they were concerned that Mason and his group were going to walk away because there was no deal and they were so focused on getting free trading shares. He said the good faith shares were to assure Mason that they could do the deal even though there were no agreements, escrow or otherwise, that gave the vendors any rights to the shares held in trust at Maitland. Until things were solidified with regard to the private company and Cartaway, Hartvikson said the shares would sit there just waiting for something definitive to be decided. As to the continuing influence over 489895 when Mason and his group were in fact the majority shareholders, Hartvikson said *"[t]he only reason we were able to exert any influence was because Matt Mason trusted that we would give good advice, and that we would make the deal happen that would ultimately make him happy and make him money."*

[para 98]
The good faith shares contributed by Hartvikson and Johnson started their journey on April 20, 1995. On that day each of Hartvikson and Johnson directed that 240,000 shares in their First Marathon RRSP accounts be moved to their Canadian margin accounts. On the next day, April 21, each of Johnson and Hartvikson requested the transfer agent to deliver these shares in street form out of their respective accounts. According to the documents, two share certificates were issued and delivered in street form on April 28, 1995, for Johnson's 240,000 shares and for Hartvikson's 240,000 shares.

[para 99]
Both Hartvikson and Johnson testified that they began moving their shares initially because of their concern of becoming Cartaway insiders once the May 5 private placement went through. To address the problem Hartvikson said he decided to follow through with an agreement he made

with his mother earlier in the year to help her build up her business and at the same time take advantage of the fact that her company was in a lower tax bracket. He said he agreed to sell 240,000 Cartaway shares to his mother's company at as close to cost as possible. Hartvikson said the agreement with his mother was dated effective February 20, 1995, to reflect when he and his mother actually agreed that they would do something with her company. The fact that the agreement was not drafted by Paton until July 1995, was simply an administrative or housekeeping matter for Paton.

[para 100]
Hartvikson said the first step was on April 20th, when he transferred 240,000 of his shares from his RRSP account to his margin account. The second step was the transfer of 60,000 shares to his mother and 180,000 shares to her company, Concourse Investments Ltd. On April 28 a share certificate for 240,000 Cartaway shares was delivered in street form to Hartvikson although he said that he did not pick up his share certificate until he came back from holidays. He testified that based on a diary entry for May 10, 1995, *"CWA to lawyer"* he believes he delivered the share certificate to Maitland's offices on that day. Hartvikson denied he initiated the movement of his shares on April 20 so they would go into the pool of free trading shares for the vendors. However he agreed that the share certificates representing the 240,000 shares that he agreed to give his mother and her company ended up at Maitland's offices as part of the good faith shares.

[para 101]
Hartvikson testified that based on his diary note of May 9th, *"check on who is an insider in CWA",* he recalled that when he returned from holidays he mentioned to Lyall and Savics to make sure that they were not insiders and told them how he transferred a number of shares to his mother. He said they agreed that was a good idea and asked him to arrange for Maitland to put together similar agreements for them. In July 1995, these agreements were prepared by Paton and bear various dates in February and March 1995 as directed by Hartvikson to Paton in a handwritten note headed "Schedule A" which set out the name of each lender opposite the number of shares loaned. The note also contained a direction given by Hartvikson to Paton *"to vary the dates around"* when he was preparing the agreements that reflected the transfer of beneficial ownership of shares to Hartvikson's mother, Savics' company and to the Johnson and Lyall family trusts. Hartvikson said the creation of the share transfer agreements to address the insider concerns and the gathering of shares certificates together for the share loan agreements just happened to be going on at the same time. Hartvikson said it was left to him to try and sort out and get people to deliver some stock over to Maitland as a *"sign of good faith even though at that point we certainly didn't have anything final with Cartaway".*

[para 102]
Johnson also testified when he ordered 240,000 shares from his RRSP account to his margin account on April 20, it was because he was concerned about becoming an insider of Cartaway in light of his large commitment in the private placement. His motivation for moving those shares at that time was not driven by Mason's demand for free trading shares. He said that he had a family trust set up a year previously and his intent was to gift the shares to his family trust so that he would not hold over 10% of Cartaway's shares. Like Hartvikson's agreement with his mother and her company, Johnson's share transfer agreement with his family trust had an effective date of February 20, 1995. Johnson could not recall how his share certificate was delivered to Maitland's offices, but believed it was delivered with Hartvikson's on May 10, 1995. When the shares were eventually swapped he understood that the restricted shares were moved into his family trust. Copies of Hartvikson and Johnson's share certificates were not available.

[para 103]
The documents indicate that the other good faith certificates were obtained as follows. On May 1, 1995, Savics requested delivery in street form of 300,000 Cartaway shares from his account with instructions for them to be released in Vancouver. A share certificate was issued but no copy

was available. On May 10, 1995 Savics requested delivery in street form of 180,000 Cartaway shares from his account and a certificate was issued for 180,000 shares on the same day. On May 12 this certificate was delivered to Maitland's offices. On May 1, 1995 Lyall requested 180,000 Cartaway shares be delivered from his account with instructions to be released in Vancouver. A share certificate was issued but no copy available. On May 3, 1995 a series of share certificates in street form were issued for 35,000 Cartaway shares from Curtis Birchall's account, 35,000 Cartaway shares from Lauren Birchall's account, 35,000 Cartaway shares from Tyson Birchall's account, 35,000 Cartaway shares from Ruth Birchall's account and 40,000 Cartaway shares from Larry Birchall's account. Also on May 3, 1995 a series of share certificates in street form were issued for 50,000 Cartaway shares from Stephanie Stuart's account, 50,000 Cartaway shares from Ryan Stuart's account, 50,000 Cartaway shares from Derek Stuart's account and 30,000 shares from Broda Stuart's account. No request date was available for these certificates.

[para 104]
Maitland's ledger card recording the date of receipt and deposit of the share certificates indicates that 13 certificates were deposited in Maitland's vault on three separate days in May. In the space provided on the card opposite *"Date Submitted"* was written May with what appears to have been a single digit number now written over as a thick stroke beside " /95". Above that were additional deposit dates of May 10 and 12, 1995. Maitland's WIP notes share certificates were received May 10 and 11, 1995. Hartvikson said that he did not take Stuart's certificates to Maitland's offices because Stuart brought those shares with him to the meeting on May 12th. Hartvikson understood that Stuart wanted to meet with the people involved in the companies, like Ivany and Mason, before doing something like delivering his own shares to Maitland's offices.

[para 105]
Two separate share loan agreements concerning these good faith shares were subsequently executed between the First Marathon lenders, Seifert, as trustee, and two of the Voisey's Bay vendors. Both had effective dates of July 4, 1995. Under one agreement, in exchange for 125,000 escrowed Cartaway shares, Thistle Creek received 125,000 free trading Cartaway shares from Stuart's children: Stephanie Stuart as to 25,000 shares, Ryan Stuart as to 50,000 shares and Derek Stuart as to 50,000 shares. Under the other loan agreement, in exchange for 1,350,000 escrowed Cartaway shares, 455699 BC [Mason's group] received 1,075,000 free trading Cartaway shares from the following: Johnson Family Trust for Johnson's 240,000 shares, Concourse Investments (180,000) and Lorraine Hartvikson (60,000) for Hartvikson's 240,000 shares, Scouter Holdings for Savics's 180,000 shares, Lyall Family Trust for Lyall's 180,000 shares, Ruth Birchall as to 180,000 shares, Broda Stuart as to 30,000 shares and Stephanie Stuart as to 25,000 shares.

[para 106]
Effective June 7, 1995, Cartaway and the shareholders of 489895, who by then were each of the vendors of the Voisey's Bay mineral claims and Randy Singh, and who held a total of 2,025,000 shares in 489895, executed a share exchange agreement whereby the 2,025,000 shares in 489895 were exchanged for 2,025,000 shares of Cartaway at a vend in price of $ 0.72 a share.

[para 107]
The Exchange imposed an overriding performance based escrow agreement on the Cartaway shares issued in conjunction with the acquisition agreements from 489895, 455702, WhiteWolf and Tenajon and as well as the shares issued for the direct acquisition of claims from the Hunter Group. Under the agreements the escrowed shares, which were held in two separate pooling agreements, would be released on a performance escrow basis of one common share for every $0.72 of deferred expenditures.

[para 108]

The Exchange accepted Stuart's proposal to obtain consent from 51% of the Cartaway shareholders instead of requiring a shareholders' meeting to approve the change in business. The consenting shareholders were the eight First Marathon brokers and their families and Canaccord for a total approval of over 70%.

2.3.5 The $1 Private Placement

[para 109]
At the same time that Stuart advised the Exchange on May 12, 1995 that Cartaway was actively pursuing the Voisey's Bay claims, Maitland began preparing the draft news release regarding Cartaway's change in business. The news release also noted that a brokered $1 special warrant financing was to be completed in conjunction with the change in business and management and was needed to pay for the acquisitions. According to Hartvikson the financing was expected to close in June 1995. This proposed financing was also brought to the Exchange's attention in the meeting of May 16 between Romanzin, Stuart and DeJong.

[para 110]
Stuart said the financing was taking longer to close than expected and Cartaway required additional capital for ongoing acquisitions and exploration. At the beginning of June 1995, Stuart, Johnson and Hartvikson agreed to provide Cartaway some bridge financing until the $1 financing closed. The three loaned a total of $275,000: Hartvikson $112,500, Johnson $112,500 and Stuart $50,000 in exchange for interest payable plus 50,000 stock options each to Hartvikson and Johnson and 25,000 options to Stuart exercisable at $1.50 for a period of one year. Disclosure of the loans and options was given to the Exchange on June 8, 1995. At the time of the pricing, the stock was not trading. When it was halted on May 12, 1995, it was at $0.95. When it was lifted on July 4, it closed at $1.60.

[para 111]
On June 23, 1995 Cartaway released an offering memorandum for a proposed private placement, for which First Marathon as agent agreed to place 4 million special warrants at $1 per special warrant for series A warrants, each series A warrant was exercisable for one common share (issued on flow through basis) and each series B special warrant was exercisable into one common share and one half warrant. Each whole warrant entitled the holder to purchase one common share at a price of $1.50 per share until July 15, 1997. By all accounts, demand for the special warrants far outstripped supply by a factor of four to one. The halt was lifted on July 4, 1995 and when the financing closed on July 11, 427,500 series A special warrants were issued and 3,572,500 series B special warrants were issued. That day the shares closed at $1.60. Only 500,000 (12%) of the 4 million warrants were placed by the Calgary brokers and 88% were placed with clients of Vancouver brokers, the majority being placed with clients of Hartvikson, Johnson and Lyall.

[para 112]
The offering memorandum disclosed Cartaway's change in business to resource exploration and development and change in management. It stated that the proceeds of the offering would be used to finance among other things, the acquisition and development of mining claims that had been acquired on an arms length basis. The acquisition agreements and claims were described with no reference to Hartvikson and Johnson. The offering memorandum and June 29 news release disclosed that the vendors' shares were subject to pooling conditions but neither disclosed the role of Hartvikson and Johnson in acquiring the claims for Cartaway, the swap of free trading shares to vendors, the extent of the shareholdings of the eight First Marathon brokers and any consequent conflicts of interests.

[para 113]

The offering memorandum listed the agent's address as the Vancouver address of First Marathon. Hartvikson and Johnson testified that the decisions related to the $1 financing were not made by the First Marathon brokers in the Vancouver office. Hartvikson said that he and Johnson would have been consulted on the $1 private placement because they were expected to sell it to their clients but he said he had little to do with the preparation of the offering memorandum. Johnson agreed that he was consulted about this placement because it was a corporate finance matter but he said he was not involved in the decision with respect to the pricing which he assumed was made between the Exchange and Cartaway's board of directors.

[para 114]
Hartvikson and Johnson did not consider they were promoters of Cartaway nor were they disclosed as such in the offering memorandum or subsequent prospectus qualifying the $0.125 and $1 private placements. Hartvikson and Johnson believed that it was not their responsibility to approve and issue the offering memorandum but that of Cartaway's management and board of directors.

[para 115]
Stuart said he didn't consider either of Hartvikson or Johnson to be promoters of Cartaway nor did any of the lawyers involved suggest to him that they were. Stuart was also of the view that Hartvikson and Johnson did not have anything to do with respect to the timing of Cartaway's disclosure of material facts or material changes. According to Stuart, Hartvikson and Johnson had no official capacity with Cartaway in either April or May of 1995, no authority whatsoever to bind Cartaway to any arrangements during that period and no authority from the company to reorganize its business affairs. Stuart was described as, and subsequently signed, as a director and as a promoter in Cartaway's November 3, 1995 prospectus qualifying the securities underlying the $0.125 and $1 private placements. Cartaway paid Bethune $380,000 on August 17, 1995 for the funds that Hartvikson, Johnson, Lyall and Savics had loaned to Bethune for 489895's use. Bethune in turn paid the money back to Hartvikson, Johnson, Lyall and Savics.

2.4 Subsequent Events

[para 116]
Sometime in the summer of 1995, the July-August 1995 edition of the *Kaiser Bottom-Fishing Report* was published and was critical of the conduct of the First Marathon brokers in the Cartaway financings. Kaiser reported that what he found particularly disturbing about the Cartaway deal was that much of the *"cheap equity went to a group of influential brokers who work for the firm that brokered the higher priced financing. Although everybody owns less than 10%, from a practical point of view Cartaway is controlled by a group of First Marathon brokers. It is a classic example of a new breed of company where the brokers are the primary shareholders of the company their firm is financing with their clients' capital. … [A] broker with a significant conflict of interest should not have a role best served by an independent third party."*

[para 117]
By mid September 1995, Cartaway decided to proceed with another financing for 2 million special warrants to be issued at $2. Following the publication of Kaiser's report, First Marathon management decided that it would no longer be involved as agent in future Cartaway financings. The agent for the 2 million special warrant financing was Maison Placements. One of the terms of the financing was that the shares and special warrants purchased under the $0.125 private placement would be subject to a voluntary pooling agreement.

[para 118]
The pooling agreement required that upon clearance of the prospectus qualifying the $0.125 private placement securities, the parties exercise their warrants. The agreement allowed that 25% of the pooled shares would be released at the time Cartaway traded at $5 or more for 20 days

and the remaining shares held under the voluntary pooling agreement would be released on May 5, 1996 or an earlier date as agreed to by the parties.

[para 119]
Between November 1995 and the end of April 1996, Cartaway continued to pursue its exploration programs and issued various news releases reporting on, among other things, the progress it was making on its Voisey's Bay claims.

[para 120]
On April 30, 1996, Cartaway issued a press release disclosing the commencement of drilling on one of its Voisey's Bay claims. On that day, the closing share price for Cartaway was $3.76. On May 8, 1996, Cartaway issued a press release disclosing that significant mineralization had been encountered in the first two drill holes on the claim. The news release further disclosed that the mineralization included significant visible chalcopyrite, which is a copper mineral. In the five trading days after May 8, Cartaway's share price increased to $13.90. On May 16, 1996, Cartaway issued a further press release disclosing visual results from the third drill hole, giving a percentage estimate for chalcopyrite and stating that pentlandite, a nickel mineral, had been encountered. Cartaway's share price peaked at $26 and closed at $23 on that date. On May 17, 1996, Cartaway issued a press release disclosing assay results for the drill holes that did not support the earlier visual indications of mineralization. The heavy trading volume that followed the press release caused a system failure at the Exchange and trading did not reopen in Cartaway's shares until May 21, 1996. By the close of business on May 21, 1996, the common shares of Cartaway were trading at a price of $2.78 and by July 1996 they were trading at under a $1.

2.5 First Marathon's Internal Policies and Operating Guidelines

[para 121]
Gerhard Wetzel, vice president compliance of First Marathon in 1996, testified that First Marathon made a series of changes following the events related to the collapse of Cartaway's share price in May 1996. The first was by First Marathon's CEO Lawrence Bloomberg who spoke to the branch managers and other senior employees to ensure that everyone clearly understood that no employee of First Marathon should act in the legal role of a '*promoter*' for any issuer and that no employee should individually or with others purchase or otherwise acquire a corporate shell to be used to obtain access to public markets for financing. Wetzel said that this specific policy was not in place in 1994 and 1995 although there was *Guideline for Business Conduct* that referred to a conflict of interest policy. The Guideline stated, among other things, that:

"The officers, directors, and employees of your firm, its subsidiaries and affiliated companies, occupy positions of trust. It is therefore essential that all observe a high standard of personal integrity and that we understand and adhere to this Guideline for Business Conduct. The responsibility for fulfilling our ethical commitment to clients, shareholders and the public rests with each and every one of us. The Company has no more valuable asset than its reputation for integrity and the highest standard of ethical business conduct.

"The maintenance of such high ethical standards is your Company policy and a requirement of law. More specifically, securities legislation addresses the fact by virtue of you being a member of the securities industry, any one of you may become privy to confidential information with regard to which you must maintain confidentiality.
…
"Client Interests - Clients' interests must always take priority over employees' interests. For example, client orders must be completed before employee transactions may take place. Clients must always be dealt with honestly and in good faith.

"Conflicts of Interest - Your firm expects that every employee will avoid any activity, interest or association which might interfere or even appear to interfere with the independent exercise of his/her judgment in the best interest of your Company, its shareholders, clients, and the public.

"(a) Unless otherwise specifically approved in writing by the designated officers of the Company, all personal trading accounts, including commodity accounts, must be with your Firm.

"(b) No employee may act as a proprietor, employee, officer, director or partner without limited liability, of an outside publicly traded business interest, without the written permission of the President and any one of the Senior Officers/Directors of your Firm. All outside business connections must be reported so that they can be scrutinized and continuously monitored for potential conflicts. To the extent that employees are engaged in outside activities, whether for personal profit or not, they must take care that such activities are not in conflict or competition with their duties and responsibilities to your Firm."

[para 122]
Following Wetzel's inquiry and report in September 1996, First Marathon developed and implemented an *Employee Investment Policy.* It was designed to address, among other things, supervisory concerns and potential conflicts that arise in circumstances where employees of First Marathon either individually or collectively own a significant percentage of the securities of any issuer. The policies stated, among other things, that:

- no employee of First Marathon will act in the legal role of a promoter for any issuer;

- no employee of First Marathon will, individually or with others purchase or otherwise, acquire, directly or indirectly, a corporate shell to be used to obtain access to public market financing;

- employees of First Marathon are required to notify the Vice President of Compliance of First Marathon when their holdings of any public company reaches five per cent of the issued and outstanding shares; and

- the collective holdings of First Marathon employees of the issued and outstanding shares of any public company must not exceed 19.9% without the written consent of the Vice President of Compliance of First Marathon.

[para 123]
Wetzel also testified that the participation of brokers in private placements was not unusual and was the practice not just in First Marathon but in other firms that were involved in the junior capital markets. He did not know of any rule that precluded, prohibited or limited brokers from investing in private placements in April and May of 1995. He agreed that First Marathon had always provided a very entrepreneurial environment for its brokers where entrepreneurship was encouraged, not discouraged. In June 1996, Wetzel sent a memorandum to all branch managers in First Marathon to remind them that they were required to comply with not only the technical wording of the private placement rules but also with the spirit of the underlying investor protection rules. The memorandum stated in part that *"regulators seek to ensure that the private placement exemption is used only in connection with sales to persons who are legitimately making the full investment themselves. To ensure compliance with these rules requires that precautions be taken to ensure that each investor is investing at least the minimum subscription amount and that no artificial groups or other entities are created to allow issuance of securities under this exemption to persons who are not investing at least the minimum amount."*

2.6 The Settlements

[para 124]

Under the settlement agreement with the Executive Director dated January 29, 1999 First Marathon acknowledged that it failed to properly apply business procedures contrary to section 44(1) of the *Securities Rules,* B.C. Reg. 194/94, and failed to ensure that Disbrow, as First Marathon's Vancouver branch manager, carried out his duties to properly supervise employees. As a consequence, First Marathon acknowledged that it may have inadequately addressed the potential conflicts of interest that arose among its Vancouver brokers, Stuart, Cartaway and First Marathon's clients. It agreed that the breaches and circumstances *"created an unacceptable risk that the integrity of the capital markets might be compromised."* Based on its admissions, First Marathon undertook to pay $50,000 to the Commission, as a contribution to the costs of the investigation and to donate $450,000 to the Mineral Deposit Research Fund at the University of British Columbia. In August 1998, First Marathon and the Toronto Stock Exchange settled disciplinary proceedings related to Cartaway and other matters and as a consequence First Marathon agreed to pay a fine of $3.5 million.

[para 125]
In the settlement agreement with the Executive Director dated January 29, 1999, Disbrow admitted he failed to adequately supervise Hartvikson, Johnson, Lyall and Savics in breach of section 66 of the *Rules.* In August 1998, Disbrow was fined $110,000 by the Toronto Stock Exchange and suspended for three months from any job in the capacity of a member of that exchange. He also agreed to a permanent suspension in certain supervisory capacities as an exchange member. Based on his admission and the Toronto Stock Exchange settlement, the Executive Director agreed to a settlement with Disbrow under which he undertook to obey the *Act* and abide by First Marathon's new management policies.

[para 126]
In the settlement agreement with the Executive Director dated April 9, 1999 Savics and Lyall acknowledged that when each purchased units as principal in the $0.125 private placement each split the placement with persons who did not qualify for the relied upon exemption facilitating a breach of section 61 of the *Act.* They also agreed that they ought to have known of Hartvikson and Johnson's involvement as promoters of Cartaway, which resulted in conflict of interest issues that were not properly addressed. Savics and Lyall each undertook to pay $25,000 to the Commission, to comply with the *Act* and the *Rules* and, while each remains an employee of First Marathon to comply with the provisions of its *Employee Investment Policy.*

[para 127]
In the settlement agreement with the Executive Director dated May 8, 1999 Stuart agreed that any orders imposed by the Alberta Securities Commission in similar proceedings concerning this matter would be imposed on a reciprocal basis by this Commission. On September 28, 1999 Stuart settled with the Executive Director as a result of settling with the Alberta Securities Commission on September 10, 1999. Under the agreement Stuart is prohibited from acting as a director of any issuer for a period of five years and is prohibited from acting in any designated compliance or supervisory position with a member of the Alberta Exchange. He also agreed to pay $5,000 to the Commission towards costs of the investigation.

2.7 Misrepresentations to Commission Staff

[para 128]
On February 28, 1997 and on September 26, 1997, a British Columbia Commission staff investigator and an Alberta Securities Commission staff investigator interviewed Hartvikson and Johnson under oath. Both Hartvikson and Johnson were accompanied by counsel at their respective interviews. On February 25, 1997 Commission staff sent letters to their respective counsel outlining the areas to be covered in the upcoming interviews. These included their initial involvement with Cartaway, agreements dealing with their Cartaway shares, the $0.125 private

placement, the acquisition of Voisey's Bay claims by Cartaway, the swapping of escrow shares for free trading shares and their role in the management of Cartaway.

[para 129]
During the February 28, 1997 interview, Johnson was asked *"When did you first hear about the land deal, or the property acquisitions at Voisey's Bay?"* In response Johnson asked *"you mean in relation to Cartaway?"* Commission staff responded *"yes".* Johnson then stated *"I don't know the date, I'm sorry"* and then went on to refer to a meeting with a *"Mr. Zipany"* (later identified as Zipay) together with Hartvikson. Johnson is then asked *"Do you have any idea of what day this was?"* and he answers *"no, I'm sorry, I don't".* Commission staff then began another question with the words *"was it…"* and without waiting for the conclusion of the question Johnson stated that it was *"after the private placement closed"* and *"No it closed. Then the Argentinean deal fell apart…"* When Commission staff again attempted to refer to a specific time line for the above events, Johnson stated *"I don't remember the dates. I can't I'm sorry. I'd have to go back and check my files to get… but I do remember the placement had already closed; the money had been committed, and so there was nothing in there."* And finally towards the end of that interview, again when Commission staff referred to Johnson's statement that the call from Zipany (sic) didn't come in until after May 5 or after the closing of the deal, Johnson stated *"I'm not a hundred percent sure, but my recollection is that this time …and I may be wrong in my time line – that everybody was still looking at the Argentina oil thing, I thought"* and *"I can't be completely sure on that in terms of the time line, but I don't think it was, no."* Also in this first interview, Commission staff put a series of names of persons and companies to Johnson and asked what he knew of them. When *"BC numbered company 489895"* was mentioned the reporter recorded Johnson as shaking his head in the negative. Also in this first interview, Johnson stated that it was Mason and his group, Ivany and Stuart that were primarily involved in the negotiating of the claims and not him.

[para 130]
In his second interview of September 26, 1997 when his previous answers about Zipany (sic) coming in after May 5, were put to him, Johnson said referring to Commission staff, *"…you revisit this question. And it's clear that I really don't have the time line very good. I may have been getting mixed up with the fact that the private placement had been announced and not closed. Upon looking at the documents and on reflection, I realize I misspoke there."* Also in his second interview, Johnson stated that the Koguluk claims went into 489895 first before going into Cartaway because *"we didn't have any clear commitment that they would be able to go into Cartaway. Cartaway was still, at this time, moving along the path of doing an Argentinean oil deal,and there was very little enthusiasm amongst anybody other than myself and Rob initially , to do a Voisey's Bay area play. So we decided, by ourselves, and it started off as a very small thing, that we would accumulate some claims in this company and then somehow benefit by either flipping them into a new company or selling them for a higher price."*

[para 131]
Johnson testified at the hearing that he was completely unprepared for his first interview and had no documents to refer to refresh his memory about events that occurred more than two years earlier. He conceded that some of the answers in that interview were clearly incorrect but that he either qualified them in the very same interview or clarified and corrected them during his second interview. He testified that he was cautioned by his counsel to answer questions put to him narrowly but he had absolutely no intention to mislead Commission staff in the interviews.

[para 132]
In Hartvikson's first interview on February 28, 1997, he stated that his first contact with the Hunter Group was in late April 1995 and that he was not extensively involved in negotiations concerning the vend ins and the shares that the vendors were going to receive. He believed these to be primarily between Stuart and the vendors' lawyers, although he said *"I think Michael did certainly*

keep me, or at least Blayne abreast of what was happening because we were quite excited about this at the time. We'd just made a lot of money with Diamond Fields. It looked like a good situation, a lot of property with potentially some decent people involved, and we wanted to be kept abreast of what Michael was doing."

[para 133]
In his second interview on September 26, 1997 Hartvikson, like Johnson, stated that because they had no clear commitment from Cartaway, they purchased the Koguluk claims through 489985 knowing they would personally benefit no matter what company eventually acquired the claims from them. In his second interview, Hartvikson stated that he did have contact with the Hunter Group prior to the closing of the private placement.

[para 134]
As to the extent of his involvement in April, and May, and June and into July of 1995 Hartvikson stated *"I certainly recall being involved in a lot of administrative matters, primarily because nobody else seemed to be prepared or willing to do it. And I was a person that knew the people on the private company side, certainly the vendors, and I knew Michael Stuart. And I was the only person in Vancouver that sort of knew everything generally to the point where if something needed to be done, I knew who needed to be contacted."* When pressed to admit he was involved extensively in the negotiations that resulted in the claims going first into 489895, Hartvikson said *"-- I guess I disagree in the sense that the "negotiations" imply a lot of detail, which definitely Blayne and I left to our lawyers, to Maitland and Co., to deal with that. So in terms of hours per week that I spent on this, it was not a lot."*

[para 135]
In explaining the inaccuracies in his interviews Hartvikson said:

"…particularly having reviewed all of the case in great detail, and having had a chance to look at this, my diary -- or rather my Day-Timer -- I was quite involved in the private company. And I've reviewed this transcript myself, because my lawyer asked me to because of the number of inaccuracies in this, and I must say that it's very clear that I wasn't prepared very well at all for this interview. I didn't have my Day-Timer with me at that time. And in fact, one thing that becomes quite obvious particularly, because I was confused as to even when I had met with Milan Zipay for the first time. I believe I indicated that I met with him in late April. The one thing that isn't mentioned at all here is the fact that I was away from April 22nd to May 7th, which surprised me because that was a big thing for me that particular year. It's quite clear that I just hadn't realized it happened right in the middle of -- of this -- of Cartaway and then the private company. And because I had forgotten that relatively crucial piece of information, I was compressing a lot of -- a lot of my facts, and confusing what had happened before I went away with when I came back. And, quite frankly, it led to a lot of inaccuracies."

2.8 Evidence of Hartvikson and Johnson

[para 136]
In addition to testimony already referred to, Hartvikson and Johnson gave the following evidence.

Johnson

[para 137]
Johnson attended university for several years leaving with a few credits short of a business degree. He became a registered salesperson in 1986 and started working at First Marathon's Vancouver office in 1990 where he stayed until late 1996. Johnson is not presently registered under the *Act* and resides in Ireland.

[para 138]
Johnson said that when he joined First Marathon, it was one of the most successful brokerage firms in Canada and was *"at the pinnacle of the business at that time. We had the following of every major institution in North America. We had the number one metals and mining analysts. We had one of the top-ranked junior mining analysts in the country".* As to First Marathon's attitude to entrepreneurship, he said *"…the main thing about the entrepreneurship is we were encouraged to invest our own money in stories we believed in. We became known for owning our own stories. Rather than seeing it as a conflict, our clients found it a commitment to the stories we were endorsing."* Johnson said it was his practice if he owned a stock in a company to tell his clients that he owned that stock. This occurred when he was first recommending a stock to a client or suggesting that a client sell whether it was Cartaway or any company in which he had investments. It was in this environment that Johnson said he focused primarily on servicing institutional accounts.

[para 139]
Johnson believes the allegations generally are without merit but particularly unfounded and unfair are those alleging that he favoured his own interests over those of his client and those alleging that he lied to Commission staff in the interview process. As for the allegations of unresolved conflict, he said, *"We disclosed our positions in Cartaway to our clients. We took our stock out of the market, restricted it for a year. We restricted it, and then when it became cleared, we restricted it again, so that we put the playing field so that in fact our clients were on a better footing than we were. We invested in Cartaway at 12 and a half cents when it was inappropriate for, in my view, my clients to do so. It was a shell in the garbage business, and I made that commitment and invested in that as a purely speculative venture that I would have been, and would still be uncomfortable in recommending to my clients. I had never ever recommended an investment of $100,000 in a shell company to any client, before or after. I just don't think that that was the business that we were in. It was a risk I was prepared to take for myself, but certainly not one that I was willing to recommend for my clients. Then what happens is Rob and I assemble all these claims. We build an institutional grade area play. We loan our own money to the venture. Take, I think, you know, some pretty significant financial risks ourselves, and then we transfer the benefit of us taking that risk. And using our entrepreneurial skills to pull this thing together, we transferred the opportunity to the Cartaway shareholders. The Cartaway shareholders who were not part of the 45 ½….. to a person they all made money - that opportunity would never have existed if Rob and I wouldn't have taken personal risk. If it never would have gotten to we had all the pieces, we never could have presented it to Cartaway, it never could have become something appropriate for our clients."* Furthermore, Johnson did not believe he ever owed a duty to Cartaway, but rather that it owed him a duty as a shareholder. He said he never received any complaints from clients regarding Cartaway.

[para 140]
Johnson testified that the allegations in this matter have had serious and destructive repercussions on him personally and professionally. In short, he said he was devastated by them. Johnson said that he *"had spent my whole professional life not dealing with scum bags, trying to make a positive contribution to the job I was doing, and I really felt that I was one of the good guys. And to have the allegations put forth that I lied, that was doing things that were in harm to my clients for me were very difficult. It's been very hard for my parents. They believe I am a good person, and -- but they find the whole thing very confusing, and I can't explain it to them."*

[para 141]
Johnson also said that the allegations have affected his ability to conduct business. He has chosen to not participate in many opportunities that have been available to him, like directorships, simply to avoid the possibility that his name by association could tarnish a company with which he was involved. He said that he voluntarily decided to do this until this matter was sorted out. To the extent he has participated in any business activities he feels obliged and does disclose the

circumstances as best as he can to those involved. Trading reports to the end of May 17, 1996 show that Johnson made profits of $1,737,269.17 in trading Cartaway shares.

Hartvikson

[para 142]
Hartvikson has a Bachelor of Science in Civil Engineering, a Masters in Business and Administration and is qualified as a CFA. He became a registered salesperson in 1985 and started working at First Marathon's Vancouver office in 1988 where he stayed until late 1996, primarily focusing on the mining sector. He is not presently registered under the Act and resides in Ireland. At the time of the hearing he indicated that with these proceedings outstanding he felt it was pointless to try and act as a broker until these matters are resolved.

[para 143]
He believed that staff's allegations against him are without any merit and he was particularly offended by the allegations that he made misrepresentations and lied to Commission staff in the interview process. He said he was completely unprepared for his first interview but always tried to be truthful and forthright with Commission staff.

[para 144]
Similarly the allegation that he was not employed full time as a salesperson is without any foundation. He said that he worked as a salesperson at First Marathon at least 60 hours a week, often from 6:30 a.m. to 5 p.m. and was always in the office during trading hours. He testified that neither he nor Johnston spent more than two hours a week on 489895 or Cartaway during April and May 1995.

[para 145]
Hartvikson said that when he talked to Seifert in the formative stages of setting up the private company he was advised that to avoid any conflict of interest he could not be a shareholder of 489895. On that basis he felt that he had dealt with any conflict of interest issues and accordingly felt that he and Johnson were arm's length from Cartaway on the acquisitions.

[para 146]
Hartvikson said that he did not mention to any of his clients about his role in 489895 and the acquisition of the Voisey's Bay claims, *"not because I was trying to hide it from them, but more because the thing that my clients were interested in was the fact that was I really behind Cartaway; and if I was, how could I demonstrate that. And the key way was the fact that I had a lot of shares, and I felt it important to disclose that I bought those shares at prices that were lower certainly than they were paying."* He stated that he was conscientious about making sure that his clients, who owned shares in Cartaway or were interested in buying shares in Cartaway, knew he had a substantial position in the stock at 12 and a half cents.

[para 147]
Despite the comments in the Kaiser report Hartvikson believed that they *"had done everything properly and correctly, and, in hindsight, maybe aggressively."* He said that he didn't want his clients to find out from anyone other than him that he owned a lot of cheaper stock so he made a point of telling them. He said that *"in most cases clients that bought the stock from me considered that a plus, because they felt that I personally must really believe in the company and would be working hard to make sure it was a success."* Like Johnson he believed he worked hard for his clients and his clients benefited from his entrepreneurship and personal risk taking. He said there were no complaints from any clients about him. Trading reports to the end of May 17, 1996 show that Hartvikson made profits of $3,480,835.62 in trading Cartaway shares.

3.0 FINDINGS AND ANALYSIS

3.1 The Public Interest

3.1.1. The Allegations

[para 148]
The amended notice of hearing alleged that Hartvikson and Johnson acted contrary to the public interest as follows.

- By buying control of Cartaway and continuing thereafter to act as brokers and principals in the sale of Cartaway's shares, they put themselves in a position where their interests were in conflict with their duties to their clients and to Cartaway. They did nothing to resolve the conflicts, but rather acted in their own interests and not in the best interests of their clients and Cartaway.

- By purchasing their shares in the private placement prior to disclosing the acquisition of the mineral claims, which was a material fact, and then selling shares to their clients at higher prices after disclosure of the acquisition, they transferred much if not all of the risk of investing in Cartaway from the participants in the private placement to their clients and ensured that they, and not their clients, would have the opportunity of earning the largest return from investing in Cartaway.

- By arranging the private placement to allow them, and the other First Marathon brokers, to acquire many shares at a low price prior to disclosing acquisition of the mineral claims, they acted in their own interests to the exclusion of duties owed to Cartaway. Cartaway could have issued shares upon disclosure of the acquisition of the mineral claims at a higher price per share, thereby avoiding diluting the interests of the then present shareholders unnecessarily.

- As registrants, and as employees of First Marathon, they failed in their duty and in their capacity as gatekeepers in the financial industry to refuse to engage in transactions that would tend to bring the integrity of the capital markets into disrepute and instead acted in their own financial interests.

[para 149]
Commission staff did not pursue the allegation in the notice that Hartvikson and Johnson breached Vancouver Stock Exchange Rule F.2.08 and F.2.10, and By-law 29 of the Investment Dealers Association and we will not deal with it further.

[para 150]
Dealing with these allegations, it is useful to first address some preliminary matters, which we have for convenience posed as questions.

3.1.2 What is the Commission's Jurisdiction to Make Regulatory Orders Against Hartvikson and Johnson Based on Conduct Alleged to be Contrary to the Public Interest?

[para 151]
Johnson argued that the Commission's public interest jurisdiction is, if it is proper at all, to be used primarily to make prophylactic orders necessary to maintain the integrity of the capital markets and prevent specific transactions that are seen to be contrary to the legislation. He argued the Commission's jurisdiction is not a license to make up new policy to apply *ex post facto* in order to declare that there has been a breach of the public interest as Commission staff is attempting to argue here.

[para 152]

He argued that the Commission's public interest mandate does not allow it to make orders for breach of a conceptual, fluid standard of conduct which, by reason of its vagueness, has been held to be incapable of any meaningful definition. In support of this argument Johnson relied on the comments of Lamer, C.J.C. in *R. v. Morales*, [1992] 3 S.C.R. 711 at p. 732:

"As currently defined by the courts, the term "public interest" is incapable of framing the legal debate in any meaningful manner or structuring discretion in any way."

[para 153]
Johnson argued it would be an error of law and a violation of fundamental justice for the Commission to sanction the respondents for breaches of standards of commercial conduct that that did not exist in 1995.

[para 154]
Hartvikson adopted these arguments and added that the Commission, when considering the issuance of orders in the public interest, should be guided by the reasoning of Mr. Justice Reid for the Ontario High Court of Justice in *Re CTC Dealer Holdings Ltd., et al. and Ontario Securities Commission et al.* (1987), 59 O.R. (2d) 75. (Leave to the Ontario Court of Appeal refused.) Hartvikson argued that this case stands for the proposition that the Commission should not invoke its general public interest mandate unless there is some emergent market conduct that, absent intervention by the Commission, would cause a real and present danger or irreparable harm to shareholders or to the public markets and therefore to the public interest.

[para 155]
Hartvikson also argued that the authority of the Commission to issue orders where there has been no specific breach of the legislation should only be invoked where it is necessary to prevent future harm to the integrity of the capital markets. In support he relied on the comments of Mr. Justice Laskin of the Ontario Court of Appeal in *Committee for Equal Treatment of Asbestos Minority Shareholders v. OSC* (1999), 43 O.R.(3d) 257 at 272:

"The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventative, intended to be exercised to prevent likely future harm to Ontario's capital markets. The past conduct of offending market participants is relevant but only to assessing whether their future conduct is likely to harm the integrity of the capital markets."

[para 156]
In our view, there is nothing vague about the Commission's public interest mandate under section 161 of the *Act.* In fulfilling our statutory mandate we may exercise our discretion to make orders under section 161 of the *Act* where there is no contravention of the legislation if we are of the view that the public interest requires the making of such orders. Furthermore, we disagree with Hartvikson's interpretation of Mr. Justice Reid's reasons in *Re CTC Dealer Holdings.* Those reasons are clear that the Commission's jurisdiction to issue orders (under provisions similar to section 161 of the *Act)* where there has been no specific breach of the legislation is limited only by its assessment of what is required in the public interest. It is useful to quote at some length from the reasons as they address several aspects of the respondents' arguments. At page 138 Reid J. stated:

"That brings me to the next major attack. It was on the jurisdiction of the Commission under s. 123 [section 161 of the *Act*] *Appellants contend that the discretion that section confers on the Commission was not intended to be exercised in the absence of a concurrent breach of the Act, or regulations made under the Act, or of policies declared by the Commission in the form of policy statements. Thus, the Commission cannot lawfully make an order in the absence of such a breach. Since no such breach exists here, it was submitted that the order is made without jurisdiction. To interpret the section differently would, in appellants' submission, confer an*

unprecedented, unjustified, unintended and unreviewable discretion on the Commission. It would place the Commission 'above the law'. Simply by labelling something as being contrary to the public interest, the Commission could invoke a jurisdiction beyond effective review by any court. Thus the Commission, by this bootstrapping device, could create a jurisdiction for itself it was never intended to have.

"In respect of this argument it is worth first noting that s. 123 on its face makes no reference to any breach of the Act, regulations or policy statements being required. The discretion granted to the Commission is not, by anything found in s. 123, confined to circumstances in which a breach occurs.

"Secondly, there are many provisions in the Act conferring discretion on the Commission. An examination of such sections discloses that some are expressly confined to breaches of the Act or regulations. Section 11(1) is an example. The Commission may appoint a person to make an investigation where a sworn statement has been made that a breach of the Act or regulations (or of the Criminal Code) appears probably to have occurred. There are, as well, other provisions in which, like s. 123, no such requirement is stipulated.
…
"I accept the difference in wording as intentional. It is too obvious to ignore. When the Legislature intended a discretion to be exercised only where a breach had occurred it has said so. When it has not said so, the inference appears compelling, that no such limitation is implied, and none should be inferred.

"There is authority of long standing that would support the view that s. 123 is not to be read as implying any such restriction.
…

"Finally, the Commission may properly form its opinion to suspend or cancel any registration in the public interest without proof of actual injury to the public.

"I appreciate that appellants draw a distinction between the cancellation of registration and interfering with the private arrangements of non-registrants, but I do not think that distinction, even if valid, diminishes the relevance of that observation to the task of construing a grant of a power to be used "in the public interest". Such power, it seems to me from Mitchell, may be exercised without proof of injury to the public, or to any particular member of the public.

"I would have thought those pronouncements closed the door years ago on these contentions. Appellants raise the spectre of an "unfettered" discretion in the Commission. They say, rightly, that an unfettered discretion would place the Commission above the law. Yet to suggest that the discretion conferred by s. 123 is "unfettered" in that sense is unjustified. The fetter consists in a finding that something proposed or done is contrary to the public interest. True, the Commission referred in its reasons to its "unfettered" power and to that extent, armed appellants with this dart. Yet a fair reading of its reasons makes it clear that the Commission was acutely aware of the necessity for something contrary to the public interest to exist before its powers could be used. It is throughout those reasons acknowledged that the public interest was an overriding fetter on its exercise of discretion. I think it is beyond question that the Commission meant unfettered by the necessity for a concurrent breach of the Act, regulations or policy statements to exist. The reference to a "broad and unfettered power" is made crystal clear by the context in which those words were used. The Commission was discussing the contention that it could not exercise its powers under s. 123 in the absence of a concurrent breach of the Act, regulations or policy statements. In that context it referred to its rejection of that same contention in Re Cablecasting Ltd., [1978] O.S.C.B. 37. It then referred to its "broad and unfettered power" under s. 123, and went on immediately to say (reasons, p. 74):

"'To accede to counsel's contention that a specific breach of the legislation or of a policy statement must be shown before s. 123 can be invoked would not only be contrary to the plain wording of s. 123, but also would be a failure by the Commission to exercise the mandate vested in it by the legislature.'

"In my opinion, a fair reading of the Commission's words in context disposes of appellants' contention.

"Were the Commission ever to use its discretion in the irresponsible fashion suggested by appellants, it would be subject to prompt correction in this court. Thus, if the Commission were to label something as contrary to the public interest in the absence of any evidence to support that view, it would have misused its jurisdiction. Similarly, if the Commission were to act malafide, perversely, maliciously, arbitrarily or capriciously it would have misused its powers, and be open to correction in this court. But when the Commission has acted bona fide, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad per se, and requires the decision to be struck down."

[para 157]
And then at pages 146 and 147 Reid J. went on to state:

"Last, it is complained that the Commission is inventing policy "on the spot" and if it is permitted to do so no one in the market-place will know where he stands. The Commission is accused of "changing the rules". I think that both that fear and that contention are groundless. The Commission has observed that not all eventualities can be covered by published policy statements. That is too self-evident a proposition to be gainsaid. The situation here is proof of its truth.

"As for suddenly changing the rules, the parties to this transaction were surrounded by sophisticated legal and financial advisors. If anyone should know the rules, it is surely they. As far back as 1978, the Commission made known its concern over transactions that constituted "flagrant abuse" of the market-place apart from any overt breach of policy, and by implication the Act and regulations. By its decision in Re Cablecasting Ltd., [1978] O.S.C.B. 37, the Commission served a warning that could hardly be ignored. In rejecting the contention that a breach of the Act, regulations, or a policy statement had to be demonstrated in order for the Commission to exercise its jurisdiction under the predecessor section to s. 123, the Commission said:

"'Dealing with the second point, Mr. Atkinson contended that the Commission may not issue a cease trading order unless it has found a contravention of the Act, regulations or a policy statement. This contention seems to the Commission to miscast the role of policy statements. Under the Act -- not only section 144, but also a number of other sections – the Commission is vested with discretions that must be exercised in the public interest. The Commission has followed the practice of publishing policy statements indicating the circumstances in which these discretions will be exercised. This is appropriate, to provide advance indication of applicable rules and a chance to comment thereon. But Mr. Atkinson's contention seems to us to view the situation from a wrong perspective. The obvious conclusion, that the individual with an imagination sufficiently fertile to invent an unethical scheme which skirts the words of all published pronouncements may carry out that scheme with impunity, demonstrates the difficulties of the position.'

"The Commission repeated its concern over unethical practices in Re Lindzon, [1982] 4 O.S.C.B. 43(c). It emphasized its earlier decision in the following terms:

"'In Cablecasting, the Commission considered whether the transactions proposed detracted from the credibility of the capital markets or [were] otherwise inconsistent with the best interests of investors.'

"This theme has occupied the Commission in other connections and, in dealings where there is diverging interest between insiders and other shareholders, the Commission has been concerned about fair or even handed dealings as between these classes of shareholders.

"In Federal Commerce & Navigation Ltd., [1981] 1 O.S.C.B. 20(c), the Commission re-emphasized its determination not to allow "the sophisticated gloss of technicality" to frustrate the "basic philosophies that underline the securities laws of the province". It said:

"'In conclusion, the decision of the Commission has been based upon an interpretation of the provisions of the By-law arrived at in light of the Commission's understanding of the philosophy and the intent behind the rules established by those provisions. In restating the basic tenets or general principles discussed in the Kimber Report, the Commission wishes forcibly to draw to the attention of the public that, although technical interpretation is necessary, it is the expectation of the Commission that the participants in the capital markets of this province will be guided by the basic philosophy and rationale from which the securities laws of this province were developed. The sophisticated gloss of technicality must not be used to obscure the true intent and import of the basic philosophies that underlie the securities laws of the province. Technical interpretations that run contrary to these basic philosophies and principles will not be acceptable to the Commission.'"

[para 158]
The issue and scope of the Commission's public interest jurisdiction has been well settled by the Supreme Court of Canada. The Court's reasons in *Pezim v. British Columbia (Superintendent of Brokers),* [1994] 2 S.C.R. 557 confirm the Court's approval of the approach taken by Reid J. in *CTC (supra)* defining the Commission's public interest jurisdiction.

[para 159]
Finally, we note that the comments of Lamer, C.J.C. in *R. v. Morales* regarding the term *"public interest"* were made in the context of a criminal proceeding and in our view are not applicable when considering the meaning of the Commission's public interest jurisdiction under section 161 of the *Act*. As for the comments of Mr. Justice Laskin in the *Asbestos Minority Shareholders* case, we agree that the Commission's public interest jurisdiction is not punitive. However in our view, because of the regulatory nature of the Act, including our ever-present concern for investors and the integrity of the capital markets, the Commission's public interest jurisdiction is remedial, protective and preventative.

[para 160]
Now a comment about the nature of the market under consideration. At all material times Cartaway was a reporting issuer in Alberta and its securities were traded only on the Exchange. Although the Exchange was situated in Alberta it must be recognized that investors in all the Canadian jurisdictions could buy and sell Cartaway shares on the Exchange. Consequently, on that basis the Exchange was a national exchange and there was a national market for Cartaway shares. Although Alberta has its own securities legislation, its continuous disclosure requirements are in substance the same as those in British Columbia and Ontario. The reality of a national securities market has also been recognized in *National Policy 40, Timely Disclosure* which is a policy adopted by all the securities regulatory authorities in Canada and the policy applicable to all issuers whose securities are publicly traded in Canada. The requirement to make timely disclosure of material changes in section 85 of the *Act* applies to reporting issuers. Cartaway did not become a reporting issuer in British Columbia until November 3, 1995. As a consequence during the period prior to that date, Cartaway was bound only to meet the continuous disclosure

requirements of the *Alberta Securities Act* (S.A. 1981, c. S-6.1, as amended) and the disclosure policies of the Exchange. The timely disclosure policies of the Exchange, as well as the other Canadian exchanges, are in substance the same as *National Policy 40.*

[para 161]
Residents of British Columbia were trading Cartaway shares in the secondary market through the facilities of the Exchange. In addition Hartvikson and Johnson were resident in British Columbia and registrants under the *Act* employed in First Marathon's Vancouver office. With their participation in the acquisition of Cartaway's control block in September 1994 and the distribution of the securities under the $0.125 and $1 private placements to residents in British Columbia we find that Cartaway was trading securities in this province.

[para 162]
It is within this context that we will exercise our public interest jurisdiction and carefully consider the allegations against Hartvikson and Johnson in light of all of the evidence.

3.1.3 Were Hartvikson and Johnson 'control persons' of Cartaway?

[para 163]
Section 1(1) of the *Act* defines control person as follows:

"*control person* *means*

(a) a person who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, or
(b) each person in a combination of persons, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and, if a person or combination of persons holds more than 20% of the voting rights attached to all outstanding voting securities of an issuer, the person or combination of persons is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer."

[para 164]
In *R.v. Armaugh* (1994), 6 C.C.L.S. 260 at 263 the Ontario Court of Justice considered the meaning of control person in the context of determining whether there had been an illegal distribution. Although there is no definition of 'control person' *per se* in the Ontario Securities Act, it is referred to in the definition of distribution, which includes:

"…a trade in previously issued securities of an issuer from the holdings of any person, company or combination of persons or companies holding a sufficient number of securities of that issuer to affect materially the control of that issuer, but any holding of any person, company or combination of persons or companies holding more than 20 per cent of the outstanding voting securities of an issuer shall, in the absence of evidence to the contrary, be deemed to affect materially the control of that issuer".

[para 165]
The court determined that because of this wording there may not be a definitive conclusion in all circumstances as to whether a person is or is not a control person. Therefore it concluded there must be an examination of the entire circumstances of each case and it becomes a question of fact for the trier to make a determination of material control, bearing in mind the 20% deeming rule. Quoting from David Johnston, *Canadian Securities Regulation* (1977) at p.144 the court noted:

"The critical requirement is not control per se, but material effect on control. Although not expressly so defined, in ordinary circumstances control means the ability to exercise a majority of the voting rights at shareholders' meetings, and more particularly, the power to elect a majority of the board of directors. Furthermore, it is de facto or practical control rather than de jure control. Thus the percentage holding of voting shares required to exercise control will vary with the size of the company, the number of outstanding shares, and the manner in which they are held."

[para 166]
The court then confirmed that the clearest case of control is the power to select the board, or the majority, of directors of an issuer. Absent such clear indication other factors must be considered. In considering what these might be, the court looked to the expert opinion of a securities lawyer who testified as to what circumstances he would look for to form the basis for a combination. They were *"the relationship between individuals, usually a family relationship; inter-corporate holdings or similarities of the ownership incorporation and then possibly an agreement or understanding to act together".*

[para 167]
The definition of control person under the *Alberta Securities Act* is similar to that in the *Ontario Securities Act.* Although our definition of '*control person'* has the additional words *"acting in concert by virtue of an agreement, arrangement, commitment or understanding"*, we as the trier of fact are faced with essentially the same task as the court in *Armaugh.* We must assess all of the evidence to determine whether Hartvikson and Johnson were in a combination of persons, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which held a sufficient number of shares to affect materially the control of Cartaway.

[para 168]
In our view the evidence is overwhelming, and we find, that from at least October 3, 1994 to July 4, 1995, Hartvikson and Johnson with the other six First Marathon brokers were a combination of persons, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which held a sufficient number of shares to affect materially the control of Cartaway. As a consequence we find that Hartvikson and Johnson were control persons of Cartaway within the meaning of "control person" in section 1(1) of the *Act.* In making this finding we considered the following to be particularly relevant.

[para 169]
In July 1994, Birchall and Stuart agreed *"it made sense to put together a group to acquire the control block"* of Cartaway when it became available because it was precisely what they were looking for - a clean shell trading on the Exchange with a relatively low market capitalization. Stuart and Birchall then put a group together on the basis that they were people who could find or come across a business venture that might be appropriate for Cartaway and who were *"intelligent, and cooperative, and who had the business acumen to help us move the company forward."* Hartvikson's statements that they should have *"value added shareholders"* and if they owned shares they would be more likely to think of Cartaway *"as a potential receptacle"* than if they did not own shares, indicates that he also perceived the eight First Marathon brokers as a group. It is also significant that the group was not just any group, but a group of eight brokers who worked together, albeit in two separate offices, for the same employer - First Marathon, a registrant under the *Act.* This ensured that the financing of any new business venture would be financed through First Marathon. Through First Marathon the group had access to the public markets and they could control how the financing would take Cartaway forward. Hartvikson and Johnson used First Marathon's financing capability to convince Mason and Nash to deal with them. Indeed First Marathon's financing ability was a significant factor for Mason in doing the deal with Hartvikson and Johnson on April 5.

[para 170]

We find that the stated agreement, arrangement, commitment or understanding of the group of eight First Marathon brokers once they secured the control block shares on October 3, 1994 was to change Cartaway's business direction by vending in some new business venture with new management and finance its going forward through First Marathon. Hereinafter we refer to the group's agreement, arrangement, commitment or understanding as the group's common purpose.

[para 171]
The group of First Marathon brokers acquired 45.6% of Cartaway's shares for $294,000 under one agreement. Although the acquisition was split equally between the two offices it is clear that the brokers saw themselves, and acted, as a group, as Stuart's memo indicated. **"***A group, of which I was one, took advantage of this situation and purchased this block. As we intended that eventually we would find a new business venture for the company, but were uncertain in which industry it would be in, we did not want to appoint inappropriate third party directors."* There was a common acknowledgement that they needed to control the board of directors to achieve their common purpose. Consequently the acquisition agreement which they and the existing control group signed, provided that all current directors and officers of Cartaway would resign and would vote to appoint such new directors and officers as the purchasers would designate. They were De Jong, Birchall's friend and Cartaway's corporate solicitor, Stuart and Charles Mitchell, an existing director they asked to stay on to look after the garbage container business. Stuart became the president and director because they knew that the other brokers would eventually be selling, and did sell, Cartaway shares to retail client accounts and Stuart, presumably because of his position in First Marathon, would not.

[para 172]
As the court recognized in *R.v. Armaugh, (supra)* the clearest case of control is the power to appoint the board. The 'change of control' announced in Cartaway's news release of October 4, 1994 was not just a sale of control by the old control block shareholders to several individual purchasers but a passing of material control to the new control block purchasers, the group of eight First Marathon brokers.

[para 173]
Nothing significant happened in Cartaway's affairs until April 4, 1995 when Hartvikson and Johnson were presented with an opportunity to acquire the Koguluk claims. We find that by April 4, 1995 the common purpose of the group to change Cartaway's business direction by vending in some new business venture became particular. The common purpose of the group now was to acquire the Koguluk claims, and hopefully other Voisey's Bay claims, for Cartaway and do a large area play. We find that a fundamental element of the group's common purpose was that the financing of Cartaway would be structured in such a way as to ensure that the First Marathon group acquired a substantial number of shares before it was made public that Cartaway was going into Voisey's Bay and before the $1 private placement was announced. This drove how the deal went forward and the group's conduct thereafter reflected their common purpose.

[para 174]
Indeed, nothing that the First Marathon brokers did after appointing their board of directors, with Stuart as president, showed that they were not acting as a group. This was reflected in the group allowing Hartvikson and Johnson, with Stuart's approval, to lead in assembling a block of Voisey's Bay claims. This included making the April 5 deal with Mason, finding new management, instructing counsel and negotiating the acquisition of other Voisey's Bay claims, and parking the claims in 489895 until after the $0.125 private placement had closed. This was reflected in Hartvikson, Johnson, Lyall and Savics providing unsecured interim funding of $380,000 to 489895 to cover costs related to the claims. This was reflected in the First Marathon brokers taking down most of the $0.125 private placement and placing the rest with their friends and associates when the shares were trading at $0.68. (This occurred because they took advantage of the brokered private placement rules of the Exchange when they set the price of the private

placement.) This was reflected in the First Marathon brokers holding, on a fully diluted basis, over 70% of Cartaway's shares after the $0.125 private placement closed. This was reflected in six of the First Marathon brokers providing a pool of good faith free trading shares to be swapped for the vendors' escrowed shares. Indeed it was Stuart who asked the Exchange to consider a share loan arrangement where *'the present control block'* would be performance escrowed rather than the vendors' shares. This was reflected in the First Marathon brokers coming together to provide the required 51% shareholder approval for the change in business to avoid the necessity of a special meeting. This was reflected in the $1 private placement proceeding after the $0.125 private placement closed where a majority of the 4 million units were sold to their clients. It is clear that the common purpose of the group of eight First Marathon brokers was achieved because they controlled Cartaway.

[para 175]
As a consequence we found that each of Hartvikson and Johnson, was a control person of Cartaway within the meaning of section 1(1) of the *Act.*

3.1.4 Were Hartvikson and Johnson promoters and de facto directors and officers of Cartaway?

[para 176]
Section 1(1) of the *Act* defines promoter, to include, *"if used in relation to an issuer, a person who acting alone or in concert with one or more other persons, directly or indirectly, takes the initiative in founding, organizing or substantially reorganizing the business of the issuer".* This definition of promoter is the same as the definition of promoter in the *Alberta Securities Act.*

[para 177]
We find the evidence overwhelming that Hartvikson and Johnson directly or indirectly took the initiative in substantially reorganizing Cartaway's business. As a consequence we find that each of Hartvikson and Johnson, and the other first Marathon brokers by virtue of being control persons, was a promoter of Cartaway within the meaning of *"promoter"* in section 1(1) of the *Act* and that each of Hartvikson and Johnson was a *de facto* director and officer of Cartaway. In making these findings, we have considered all of the evidence but relied particularly on the following to support our finding.

[para 178]
Hartvikson and Johnson' pre-eminence in substantially reorganizing Cartaway's business was manifested as soon as the Koguluk claims came to their attention. They agreed that it was worthwhile to pursue the claims and immediately thought of Cartaway as the public company into which the claims should ultimately be vended. They realized immediately that they needed to contact Stuart. Stuart's agreement was necessary, as it was their assurance of board approval. Once Stuart was on side they took steps to fulfil the control group's common purpose. The first step was making a deal with Mason on April 5, 1995. This included agreeing to the fundamental terms of the acquisition - $300,000 and 1.2 million free trading shares of a publicly traded company. From this time forward until at least July 4, 1995, Hartvikson and Johnson, with Stuart, made all of the business decisions for Cartaway. There simply was no one else doing anything for Cartaway.

[para 179]
Hartvikson and Johnson organized 489895 so that it was made to appear that 489895 and its assets, the Voisey's Bay claims, had no connection to Cartaway or to Hartvikson and Johnson. Although Hartvikson testified that they wished to stay out of the limelight to ensure First Marathon's senior management would approve financing Cartaway, it is clear to us that the primary purpose of 489895, which Hartvikson and Johnson controlled and of which they were *de facto* directors and officers, was to warehouse the Voisey's Bay claims for Cartaway until after the

$0.125 private placement closed. In this regard, we accept Hartvikson's statement that 489895 turned out solely to be a conduit to allow this all to happen. In accomplishing this we find that Hartvikson's and Johnson's conduct in this regard was deceitful and intended to mislead. They used Bethune as a front person, which showed us the extent of their commitment to the common purpose. Bethune was the sole director and officer when he played no role in managing the business and affairs of 489895. Indeed, while he signed documents for 489895 it is clear to us he had no idea what he was doing. Further when the Vancouver brokers loaned money to 489895 the money was given to Bethune and then Bethune loaned the money to 489895. Furthermore it was at Hartvikson's and Johnson's direction that Singh received shares of 489895 by way of a resolution that falsely stated he provided certain services to 489895. We do not know why Singh received these shares but the resolution demonstrates, and we find, that that Singh received these shares improperly and as a consequence received shares of Cartaway improperly.

[para 180]
Hartvikson and Johnson, with Stuart's approval, determined when to give notice to the Exchange to set the price for the $0.125 private placement, they placed with Canaccord the only part of the $0.125 brokered private placement that appeared to go to a third party, they instructed counsel, they conducted negotiations for the claims, they provided funding to cover expenses related to the claims, they arranged the share swap so Mason would get free trading shares and would close the deal, they found new management and arranged for new management to get options, they decided how to proceed with, and with Lyall, placed most of the $1 private placement and they decided when Cartaway disclosed material information. Hartvikson's, and when he was away Johnson's, advice and instructions were sought and given on draft agreements, news releases, and even Cartaway's change in name. As Hartvikson pointed out, he did what needed to be done to close the deal. We find that his and Johnson's conduct in this regard was not simply attending to administrative details. They were at the very heart of Cartaway's reorganization.

[para 181]
It is also significant to note that although the acquisition of the control block in October 1994 was split evenly between the Vancouver and Calgary brokers, the Vancouver brokers took 66.5% of the $0.125 units with the Calgary brokers taking only 15.5%. Consequently following the private placement, on a fully diluted basis the Vancouver brokers controlled more than 50% of the shares of Cartaway. Similarly only 500,000 units of the 4 million $1 private placement were placed by the Calgary brokers. The rest were placed with clients of the Vancouver office, the majority being placed with clients of Hartvikson, Johnson and Lyall. Once the Koguluk claims were targeted for acquisition the Vancouver First Marathon office, under Hartvikson and Johnson's direction, dominated in achieving the control group's common purpose. As Ivany stated, *"the group in the First Marathon office in Vancouver had negotiated the agreements from Cartaway's viewpoint in that they were being assembled by them and that's where all these deals seemed to be centered."* This included the agreement for the staking and purchase of properties by the Hunter Group or Barry for Cartaway. Ivany understood that Hartvikson and Johnson were instrumental in negotiating the claims for Cartaway. He said that Hartvikson and Johnson's contact with him once he became president was a "*sort of a continuum"* as they *"had been very active in pulling this all together".*

[para 182]
We find that Hartvikson and Johnson were the driving force behind Cartaway's reorganization as soon as they were offered the Koguluk claims on April 4, 1995. From then on to at least July 4, 1995, all of their actions were to effect the control group's common purpose to change Cartaway's business direction by vending in some new business venture and finance it going forward through First Marathon. In short they found Cartaway's new business, new management and most of its new capital. Consequently Hartvikson and Johnson were promoters of Cartaway

within the meaning of "*promoter*" in section 1(1) of the *Act* and ought to have been disclosed as such in the offering memorandum of June 23, 1995 and in the prospectus of November 3, 1995. Further, we find that Hartvikson and Johnson were acting as undisclosed *de facto* directors and officers of Cartaway from April 5, 1995, when they negotiated a deal with Mason, to at least July 4, 1995.

3.1.5 Cartaway's Change in Business - When was the decision made to vend the Koguluk claims into Cartaway?

[para 183]
Hartvikson and Johnson testified and argued that no definitive decision had been made to vend in the Koguluk, or any other Voisey's Bay, claims into Cartaway by May 5, 1995, the day that the $0.125 private placement closed. Hartvikson and Johnson argued that the decision to acquire any Voisey's Bay claims was not made by Cartaway until May 12, 1995. They said that it was not until Stuart came out to *"kick the tires"* himself and meet with Ivany and Nash on May 12, did he hand over his good faith free trading shares and commit Cartaway to the acquisition of the Voisey's Bay claims. In our view the evidence of Hartvikson, Johnson and Stuart suggesting the decision to vend any Voisey's Bay claims into Cartaway was not made until May 12, 1995 is not credible and we have rejected it.

[para 184]
We find that on April 5, 1995, Hartvikson and Johnson, with Stuart's approval, knowing that they would have the approval of the board, on behalf of Cartaway, as undisclosed principals, made an oral agreement with Mason to acquire the Koguluk claims, where the fundamental terms were agreed upon. In making this finding we have considered all of the evidence but relied particularly on the following to support our findings.

[para 185]
By the spring of 1995 there was major rush to get claims in Voisey's Bay because of Diamond Field's significant nickel, copper and cobalt discovery. The Stockwatch articles during March, April and May 1995 show that Voisey's Bay was the hottest play in the resource sector that the Canadian markets had seen for some time. Henstridge's and Mason's evidence confirmed this. Claims in the area were being snapped up as soon as they came on the market with little or no negotiating. Seifert's testimony was no different. His advice to Hartvikson and Johnson was based on his opinion that Voisey's Bay claims were "*hot"* property. We find that the significance of the Voisey's Bay discovery was well known to the industry and in particular to the First Marathon brokers. First Marathon had been Diamond Fields' financial adviser since July 1, 1994 and Hartvikson and Johnson, through First Marathon, had been involved in financing Diamond Field's Voisey's Bay exploration programme. By March 27, 1995 First Marathon analyst John Lydall had made public his highly positive report commenting on the significant potential of the Diamond Fields' discovery. As Johnson testified, First Marathon at this time was *"at the pinnacle of the business at that time. We had the following of every major institution in North America. We had the number one metals and mining analysts. We had one of the top-ranked junior mining analysts in the country".* Indeed when Johnson first met Nash, he told Nash that he was a broker who had been involved in financing Voisey's Bay companies like Diamond Fields and that First Marathon had the ability to finance good exploration programmes.

[para 186]
These were the circumstances in which the First Marathon brokers were looking for a business venture for their shell - a shell in which they had invested $294,000 in October 1994. In our view these circumstances determined what kind of new business opportunities the First Marathon brokers were seriously considering at the beginning of April 1995. It explains why when the Koguluk claims came to Hartvikson's and Johnson's attention on April 4, 1995 they said *"Cartaway was in there as one of our first thoughts".* Stuart's testimony that he suggested to

Hartvikson and Johnson that they talk about Cartaway to Mason at the same time they were to find out what Mason wanted as compensation does not make sense unless that conversation predated the conversation Mason had with Hartvikson and Johnson on April 5 in which they negotiated a deal.

[para 187]
It is inconceivable to us that when Hartvikson and Johnson on April 5, 1995 negotiated a deal with Mason for these claims, including negotiating the fundamental terms of the sale - $300,000 and 1.2 million free trading shares, that they were acting except for Cartaway and with Stuart's approval. Their $294,000 investment had been sitting in Cartaway for almost six months. Not only was this amount significant for the Calgary brokers, it is clear that they had little other money available to invest in Cartaway. The suggestion that under these circumstances the Koguluk claims would go anywhere else other than Cartaway is a '*fool's tale'.* We find that Stuart gave his approval for Cartaway to acquire the Koguluk claims on April 5, 1995 when he was told the claims were available.

[para 188]
Furthermore the conduct of Hartvikson, Johnson and Mason demonstrates to us that while their April 5 deal was not reduced to writing it was a deal nonetheless and each of them believed and acted thereafter as if he had given and received a binding commitment. Mason confirmed that after meeting with Hartvikson and Johnson he did not pitch the claims to anyone else because he believed Hartvikson and Johnson would deliver the 1.2 million free trading shares and $300,000 and he committed on that basis. His commitment was such that he sent Barry back to Labrador on April 9, 1995 to stake more claims for Hartvikson and Johnson in the Voisey's Bay area because he had believed *"we had sold our inventory and were going back for more".* Indeed Mason's commitment went further. He put Hartvikson and Johnson on to all but one of the other Vosiey's Bay vendors and put them in touch with Ivany. Within a month, by May 4 all the claims and new management had been secured.

[para 189]
For their part, Hartvikson and Johnson, after making the deal with Mason, decided with Stuart to move forward with Cartaway's private placement to fund Cartaway's 'new business venture'. Hartvikson's diary places this discussion with Stuart as taking place on April 6, 1995. Presumably commitments to the private placement had already been made by all the brokers before this date for Stuart to say that he felt obliged at this time to discuss with Hartvikson and Johnson the pricing and structure of the private placement and the direction Cartaway was going in. The two of them were putting in almost twice as much money as all the Calgary brokers.

[para 190]
Then after an 11 day wait, about which more will be said later, Hartvikson and Johnson proceeded to make the deal happen for Cartaway and part of that deal was their commitment to get free trading shares to Mason. Hartvikson and Johnson argued that Mason's last minute insistence for free trading shares was a deal breaker and that it was not until Stuart came forward with his free trading shares and approval of Ivany and Nash that they could say with confidence a deal had been made with Cartaway. We find that this explanation is not credible and does not accord with the whole of the evidence. On one hand Hartvikson, Johnson and Stuart said there was the real threat of Mason and his group walking away because there was no deal and they were so focused on getting free trading shares. On the other hand Hartvikson said *"[t]he only reason we were able to exert any influence was because Matt Mason trusted that we would give good advice, and that we would make the deal happen that would ultimately make him happy and make him money."*

[para 191]

Hartvikson's, Johnson's and Mason's conduct showed that they understood the kind of commitment that was necessary to put a deal like this together. They acted accordingly, as did everyone else involved, including Stuart. The good faith share loan arrangement was simply one part of this larger transaction. In our view, the share loan arrangement was not a surprise and not done in isolation. As Johnson said, *"a deal is not something that happens in a moment in time."* When called upon to do so the other brokers voluntarily committed their free trading shares for the swap to keep the deal together. Hartvikson said that when he got back from holidays on May 9, 1995 he was left to pull it all together and make sure it happened and the shares got to Maitland's offices. However it appears that the movement of shares was well under way before Hartvikson got back. Before April 20, for each of Hartvikson and Johnson, and before May 3, 1995 for each of Lyall, Savics, Birchall and Stuart, these brokers had given instructions that free trading Cartaway shares from their, or one of their family member's, accounts be transferred into street form certificates.

[para 192]
Hartvikson and Johnson testified that they started moving their shares to address concerns that they would become insiders on the closing of the private placement. In the circumstances we do not find this explanation to be credible. The share certificates were made out in street form and the share transfer agreements between Hartvikson and his mother and her company, and between Johnson and his family trust were not completed until some three months later in July 1995. We find that the motivation for transferring these shares was for the purpose of providing free trading shares to Mason.

[para 193]
In our view, Birchall's testimony merits comment. Birchall, who was away from April 1 to April 16, 1995, was advised on Easter Sunday, the day he returned, as to what was happening. As a result of the conversation with Stuart on April 16, Birchall noted in his diary the exact particulars of the Koguluk deal with Mason as well as some particulars related to the private placement and Teck's investment in Diamond Fields. In our view, Birchall's evidence refutes Stuart's suggestion that he did not know the particulars of the Koguluk claims until after the private placement. In our view it is further support for our finding that the decision to vend the Koguluk claims into Cartaway was made on April 5, well before Stuart called the Exchange on April 17 about the private placement.

[para 194]
However the evidence was not clear as to why the private placement was announced on April 19 instead of April 6, 1995. Hartvikson's testimony that he prompted Stuart on April 17, 1995 to call the Exchange to set the price of the private placement Exchange because he saw Cartaway's share price rising would make more sense to us if in fact the share price had been increasing at that time. Trading records show that from March 30 to April 17, 1995 Cartaway only traded on four days on low volumes. On March 30 it closed at $0.15 and on April 13 at $0.16. The next day it traded was on April 18 at $0.18. It is a remarkable coincidence indeed that it was on April 18, 1995 that Diamond Fields announced Teck's investment, the particulars of which were in Birchall diary on April 16.

[para 195]
In any event, following on the heels of Stuart's advice to the Exchange on April 17 about the $0.125 private placement and the announcement of Teck's investment in Diamond Fields on April 18, Hartvikson attended Maitland's offices on April 18. As detailed in section 2.3.3, Maitland's files reveal that as soon as Hartvikson sought advice about how the Koguluk claims should be vended into a public company, the only public company under consideration was Cartaway. Although separate files were opened for 489895 and Cartaway by Maitland, a review of all their files indicates that the legal services provided, and indeed billed, were inextricably linked from the beginning.

[para 196]
By May 4, 1995, all of the core Voisey's Bay claims being those held by Koguluk, WhiteWolf, Tenajon, 455702, and Barry had been secured by 489895 for Cartaway. By May 4 Ivany agreed to be involved as president of the public company and Nash's involvement was subject to his wife's approval. By this time Johnson, Hartvikson, Lyall and Savics, without any loan documentation or security, had already loaned $380,000 to 489895 to pay for the expenses related to the acquisition and exploration of the Voisey's Bay properties. From that money $25,000 was paid out on May 4 to 455702 BC, $220,000 to Barry on May 5 and $100,000 to Nash on May 10.

[para 197]
It defies belief, and is contrary to the whole of the evidence, to suggest that the kinds of commitments referred to above were made and entered into without a concurrent commitment from Cartaway to acquire the Koguluk and other Voisey's Bay claims. Who was there to make this commitment for Cartaway? Hartvikson and Johnson suggested it was Stuart's decision to make as the president and that he did not give his approval until May 12, 1995. In our view, this suggestion is simply not credible and is not supported by the evidence. Accordingly we find that the decision to put the Koguluk claims into Cartaway was made on April 5,1995 by Hartvikson and Johnson, with the approval of Stuart, knowing that the other directors would give their approval.

[para 198]
This leaves the other possibilities that Hartvikson and Johnson said were being considered as alternatives to vending in the Koguluk claims into Cartaway. We have found that a critical examination of the alternatives purportedly considered by Hartvikson and Johnson, supports our finding that the decision to vend the Koguluk claims into Cartaway was made on April 5, 1995.

[para 199]
Each of Stuart, Hartvikson and Johnson testified that in early April 1995, when the Koguluk claims first came to Stuart's attention, Stuart had not ruled out pursuing other ventures, including an oil and gas deal in Argentina. Johnson recalled Stuart as more ambivalent about going into Voisey's Bay and he said going the oil and gas route was still a possibility for Stuart at that time. In the meantime Stuart told Hartvikson and Johnson to go find out what the Voisey's Bay vendors wanted and to tell them about Cartaway.

[para 200]
Stuart said that the oil and gas deal he had considered for Cartaway was a joint venture with Cordex Petroleum. Stuart said he was actively involved in Cordex's restructuring and financing and, as a consequence, First Marathon underwrote an $8 million financing for Cordex in May 1995. While Stuart said he believed Cordex would still be interested in getting joint venture partners because of the significant cost of developing their extensive holdings he was reluctant to suggest that a joint venture with Cartaway was one of the things he was discussing with Cordex in April, 1995. On these facts a joint venture between Cartaway and Cordex does not appear to make any commercial sense to us. At this time Cartaway was a shell and according to Stuart, barely had enough money to pay its Exchange listing fees. It is hard to imagine why Cordex would want to joint venture with a company that had nothing and would need to be financed by the same First Marathon clients that financed Cordex.

[para 201]
Further, there is no reliable evidence, *viva voce* or documentary, to corroborate Hartvikson's and Johnson's suggestion that a deal with Cordex was being seriously considered at any time by Stuart, or anyone else in the control group, as a possible business venture for Cartaway. The suggestion that an oil and gas deal was under consideration was simply a smokescreen. What was on the table from April 5 forward was Cartaway getting into mining, starting with the Koguluk

claims, not oil and gas. That Hartvikson and Johnson might have suggested an oil and gas play to someone outside the control group, like Brown in April 1995, does not in our view take away from the evidence that demonstrates, and upon which we made our finding, that an oil and gas venture was not being considered by Stuart, Hartvikson or Johnson as a possible option for Cartaway once the Koguluk claims came to their attention on April 4, 1995.

[para 202]
This leaves Peruvian Gold, the only other mining company that was referred to in the evidence as a possible option. While Hartvikson and Johnson said they initially thought of Peruvian Gold as a possibility for the Voisey's Bay claims because they were large shareholders in the company, the evidence indicates, and we find, that Peruvian Gold was never considered as a potential purchaser of the claims by Hartvikson and Johnson. In large part this was confirmed by Henstridge himself.

[para 203]
Henstridge testified that while he had several communications with Hartvikson and Johnson between April 19 and 24, 1995, relating to the concept of Peruvian Gold becoming involved in Voisey's Bay, he had no recollection of them saying that they had any claims under their control that he could readily purchase. In March, April and May of 1995, Voisey's Bay was the hottest mineral play in North America as a result of Diamond Fields' discovery. Clearly the currency of Voisey's Bay claims increased significantly when it was made public on April 18, 1995 that Teck had invested heavily in Diamond Fields. All of this must be considered in light of the fact that First Marathon was Diamond Fields' agent and Lydall, an analyst with First Marathon, had made public his report on the significance of the Voisey's Bay discovery before the end of March 1995. The media coverage we reviewed was consistent with the testimony of Mason and Henstridge, who said that with the staking rush in Voisey's Bay, deals were getting done very, very quickly. We find that had Hartvikson and Johnson offered any claims to Henstridge there is little doubt that he would have snapped them up immediately because he, like others including Lydall, Hartvikson, Johnson, Stuart and Mason, recognized their value.

[para 204]
We find that when Henstridge discussed the idea of Peruvian Gold becoming involved in Voisey's Bay with Hartvikson and Johnson, the Voisey's Bay claims they had secured to date were not offered to Henstridge. Furthermore, we find that Hartvikson and Johnson did not pass on the other Mason vendor contacts to Henstridge. This does not mean that the concept of Peruvian Gold becoming involved in Voisey's Bay was not discussed - a concept that quickly came to fruition on April 26, 1995 when Henstridge said Peruvian Gold acquired claims through a third party independent of Hartvikson and Johnson. The acquisition of Peruvian Gold's claims were financed by First Marathon and Cartaway and Peruvian Gold subsequently entered into several joint ventures with respect to their holdings in the Voisey's Bay area. If anything, these developments were part of the concept discussion that Hartvikson, Johnson and Henstridge had involving Peruvian Gold in a larger Voisey's Bay area play.

[para 205]
Further, considering the high regard in which Johnson held Henstridge as a resource company president it also seems unlikely that Hartvikson and Johnson would be looking in April 1995, for good public mining company management like Ivany if Peruvian Gold was a serious contender. We also note that, other than diary entries relating to Henstridge, there was no documentation relating to the oil and gas deal or to Peruvian Gold that indicated these were serious options being considered by any of Stuart, Hartvikson or Johnson. This of course is in stark contrast to the evidence upon which we based our finding that Cartaway was the intended public company repository for the Voisey's Bay claims.

[para 206]

In light of all this evidence, we have found that Hartvikson, Johnson and Stuart, as Cartaway's senior management, acquired the Koguluk claims for Cartaway on April 5, 1995 knowing that the acquisition would be approved by the board of directors.

3.1.6 Conflicts of Interest - Did Hartvikson and Johnson, as control persons, promoters and de facto directors and officers of Cartaway, have a duty to act in the best interests of Cartaway? Did Hartvikson and Johnson, as registrants and employees of First Marathon, have a duty to act in the best interests of First Marathon's clients? If so, did Hartvikson and Johnson breach these duties?

[para 207]
In summary, Commission staff argued that after having put themselves in a position where their interests were in conflict with those of their clients and of Cartaway, Hartvikson and Johnson acted in their own interests and not in the best interests of their clients and Cartaway as they were obliged to do. Commission staff also argued that Hartvikson's and Johnson's conduct, as registrants and as employees of First Marathon, demonstrated they failed in their duty as "*gatekeepers"* to refuse to engage in transactions that brought the integrity of the capital markets into disrepute.

Hartvikson's and Johnson's Argument

[para 208]
Hartvikson and Johnson testified and argued that they had no duty to Cartaway and that indeed as shareholders of Cartaway, Cartaway owed them a duty. As for their clients, Hartvikson and Johnson argued that they were more than fair in their dealings with them. They took the risk of acquiring a shell. They used their entrepreneurial skills to turn Cartaway into an institutional grade area play. They loaned their own money to the venture to make the deal happen. They fully disclosed their positions in Cartaway to their clients, including the fact that their stock had been acquired at a much cheaper price. They agreed to restrict their stock twice to benefit Cartaway. After taking these significant financial risks upon themselves they transferred the benefit of that risk-taking as an opportunity to Cartaway shareholders. They did not disclose the extent of their involvement in 489895 because they believed, on legal advice they received that they had dealt with any apparent conflicts by keeping themselves from being on record as directors, officers or shareholders of 489895. Furthermore they argued their involvement in 489895 was incidental as its only function was to serve as a conduit for the claims. What really was more significant to prospective Cartaway shareholders was Hartvikson's and Johnson's personal shareholdings in Cartaway, which they fully disclosed and which they argued were seen universally by their clients as a significant commitment to their own deals. Finally Hartvikson and Johnson argued that to suggest that they preferred their interests to those of their clients is ludicrous considering that all of their clients made money as a result of their, Hartvikson's and Johnson's, risk-taking. These same arguments they say support their position that there was nothing in their conduct that indicated they abused their positions as registrants and employees of First Marathon. That they participated in their own emerging company deal was encouraged by First Marathon and was a standard practice in the industry at the time. To suggest this participation was a failure of their role as *"gatekeepers"* in the securities industry underscores the undefined and obscure understanding of that term. It would be fundamentally unfair to single them out now and say such entrepreneurial yet lawful conduct brought the integrity of the capital markets into disrepute.

Our Findings

[para 209]
In making our findings in this part we intend to first deal with Hartvikson's and Johnson's duties to Cartaway as *de facto* directors and officers. Then we will deal with Hartvikson's and Johnson's duties to clients of First Marathon, as employees and registrants of First Marathon.

Duties as de facto Directors and Officers

[para 210]
Hartvikson and Johnson were not just shareholders of Cartaway. We have found that they were control persons of Cartaway along with other six First Marathon brokers. We found that they with the other six First Marathon brokers were promoters of Cartaway because they "*directly or indirectly"* took the initiative in substantially reorganizing the business of Cartaway. This "*initiative"* was what we found was the common purpose of the control group, Further we found that it followed because Hartvikson and Johnson took the "*initiative*" that they were *de facto* directors and officers of Cartaway. Consequently we have characterized the issues as follows.

[para 211]
As *de facto* directors and officers of Cartaway, Hartvikson and Johnson owed Cartaway the duty and standard of care expected of every director and officer of a company exercising a director's and officer's powers and performing a director's and officer's duties. It is trite law that this duty and standard of care required a director and officer to act honestly and in good faith and in the best interests of the company, and to exercise the care, diligence and skill of a reasonably prudent person. As *de facto* directors and officers of Cartaway, Hartvikson and Johnson had a duty, with Stuart, to ensure that Cartaway complied with its regulatory obligation to meet the continuous disclosure requirements of the securities legislation to which it was subject. Did they do so?

[para 212]
As a reporting issuer in Alberta, Cartaway was obliged to meet the continuous disclosure requirements of the *Alberta Securities Act* and the Exchange's timely disclosure policy, which in all material respects was the same as *National Policy 40, Timely Disclosure.*

[para 213]
Section 1(1) of the *Alberta Act* contains the following definitions:

"(k.1) "material change", when used in relation to the affairs of an issuer, means a change in the business, operations or capital of the 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 the change made by the board of directors of the issuer or by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable; and

"(l) "material fact" when used in relation to securities issued or proposed to be issued means a fact that significantly affects or would reasonably be expected to have a significant effect on the market price or value of the securities;"

[para 214]
Section 118 of the Alberta Act sets out the requirements regarding disclosure of material changes and provides, in part, as follows:

"118(1) Subject to subsection (2), where a material change occurs in the affairs of a reporting issuer, the reporting issuer shall, subject to the regulations,
(a) promptly issue and file with the Executive Director a news release authorized by a senior officer disclosing the nature and substance of the material change, and
(b) prepare and file with the Executive Director a report of the material change within 10 days from the day on which the change occurs.

(2) A reporting issuer may, in lieu of complying with subsection (1), promptly file on a confidential basis with the Executive Director the report of the material change required under subsection (1) together with written reasons for the non-disclosure if
(a) in the opinion of the reporting issuer, the disclosure required under subsection (1) would be unduly detrimental to the reporting issuer's affairs, or
(b) the material change consists of a decision to implement a change made by the senior management of the reporting issuer and the senior management
(i) believes that confirmation of that decision by the board of directors of the reporting issuer is probable, and
(ii) has no reason to believe that any person with knowledge of the material change has made use of that knowledge in purchasing or selling securities of the reporting issuer."

[para 215]
National Policy 40, *Timely Disclosure* is useful to refer to as it has been a long standing guideline for issuers to refer to when there may be doubts about when it is appropriate to disclose material information. It states in part, as follows:

"Material information is any information relating to the business and affairs of an issuer that results in or would reasonably be expected to result in a significant change in the market price or value of any of the issuer's securities.

"Material information consists of both material facts and material changes relating to the business and affairs of an issuer. The market price or value of an issuer's securities is sometimes affected by, in addition to material information, the existence of rumours and speculation. Where this is the case, the issuer may be required to make an announcement as to whether such rumours and speculation are factual or not.

"It is the responsibility of each issuer to determine what information is material according to the above definition in the context of the issuer's own affairs. The materiality of information varies from one issuer to another according to the size of its profits, assets and capitalization, the nature of its operations and many other factors. An event that is "significant" or "major" in the context of a smaller issuer's business and affairs is often not material to a larger issuer. The issuer itself is in the best position to apply the definition of material information to its own unique circumstances.

"Consultation with Regulatory Authorities
Decisions on disclosure require careful subjective judgments and issuers are encouraged to consult on a confidential basis the relevant regulatory authority and, where applicable, the relevant exchange when in doubt as to whether disclosure should be made.

"Immediate Disclosure
An issuer is required to disclose material information concerning its business and affairs forthwith upon the information becoming known to management, or in the case of information previously known, forthwith upon it becoming apparent that the information is material. Issuers are required to provide the relevant regulatory authority with a copy of any news release concurrently upon dissemination to the public.

"Immediate release of information is necessary to ensure that it is promptly available to all investors and to reduce the risk that persons with access to that information will act upon undisclosed information. Unusual trading marked by significant changes in the price or trading volumes of any of an issuer's securities prior to the announcement of material information is embarrassing to management and damaging to the reputation of the securities market since the investing public may assume that certain persons benefited from access to material information which was not generally disclosed.

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"Developments to be Disclosed
Actual or proposed developments that are likely to give rise to material information and thus to require prompt disclosure include, but are not limited to, the following:
1. Changes in share ownership that may affect control of the issuer.
4. Major corporate acquisitions or dispositions.
13. Significant changes in management.
17. Any other developments relating to the business and affairs of the issuer that would reasonably be expected to significantly affect the market price or value of any of the issuer's securities or that would reasonably be expected to have a significant influence on a reasonable investor's investment decision.

"Disclosure is only required where a development is material according to the definition of material information. Announcements of an intention to proceed with a transaction or activity should be made when a decision has been made to proceed with it by the issuer's board of directors or by senior management with the expectation of concurrence from the board of directors. However, a corporate development in respect of which no firm decision has yet been made but that is reflected in the market place may require prompt disclosure. See "Rumours" under Part E and Part G "Confidentiality".
....
"Rumours
Unusual market activity is often caused by the presence of rumours. If the issuer makes a public statement about a rumoured activity, the disclosure must be accurate and not misleading. It is impractical to expect management to be aware of, and comment on, all rumours, but when market activity indicates that trading is being unduly influenced by rumour the relevant securities administrator will request that the issuer make a clarifying statement. A trading halt may be imposed pending a ``no corporate developments'' statement from the issuer. If a rumour is correct in whole or in part, the issuer, in response to the request, must make immediate disclosure of the relevant material information and a trading halt may be imposed pending release and dissemination of that information.
...
"When Information May be Kept Confidential
In certain circumstances disclosure of material information concerning an issuer's business and affairs may be delayed and kept confidential temporarily where immediate release of the information would be unduly detrimental to the issuer's interests. In such a situation, issuers are required under the law of certain provinces to disclose to the relevant securities administrator, on a confidential basis, information that is not being disclosed immediately to the public.
...
"Examples of instances in which disclosures might be unduly detrimental to an issuer's interests are where:
(1) Release of the information would prejudice the issuer's ability to pursue specific and limited objectives or to complete a transaction or series of transactions that are under way. For example, premature disclosure of the fact that an issuer intends to purchase a significant asset may increase the cost of the acquisition.
...
(3) Disclosure of information concerning the status of ongoing negotiations would prejudice the successful completion of those negotiations. It is unnecessary to make a series of announcements concerning the status of negotiations with another party concerning a particular transaction. If it seems that the situation is going to stabilize within a short period, public disclosure may be delayed until a definitive announcement can be made. Disclosure should be made once "concrete information" is available, such as a final decision to proceed with the transaction or, at a later point in time, finalization of the terms of the transaction.

"Withholding of material information on the basis that disclosure would be unduly detrimental to the issuer's interests can only be justified where the potential harm to the issuer or to investors

caused by immediate disclosure may reasonably be considered to outweigh the undesirable consequences of delaying disclosure. While recognizing that there must be a trade-off between an issuer's legitimate interest in maintaining secrecy and the investing public's right to disclosure of corporate information, securities administrators and stock exchanges discourage delaying disclosure for a lengthy period of time since it is unlikely that confidentiality can be maintained beyond the short term.

…

"Maintaining Confidentiality

Where disclosure of material information is delayed, the issuer must maintain complete confidentiality. In the event that such confidential information, or rumours respecting the same, is divulged in any manner (other that in the necessary course of business), the issuer is required to made an immediate announcement on the matter. The relevant securities regulator must be notified of the announcement, in advance, in the usual manner. During the period before material information is disclosed, market activity in the issuer's securities should be closely monitored by the issuer. Any unusual market activity probably means that news of the matter is being disclosed and that certain persons are taking advantage of it. In such case, the relevant securities regulator should be advised immediately and a halt in trading will be imposed until the issuer has made disclosure on the matter."

[para 216]

The continuous disclosure requirements in section 118 of the *Alberta Act,* which in substance are the same as in section 85 of the *Act,* as well as the guidelines in National Policy 40, reflect the most fundamental principle of securities regulation - that all persons investing in securities have equal access to information that may affect their investment decisions. If reporting issuers fail in their obligations on this front, public confidence in the integrity of the securities markets is undermined.

[para 217]

No where is scrupulous adherence to the requirement of timely disclosure of material changes more important than where an issuer proposes to engage in a securities transaction that may involve insiders and others close to the issuer. The Supreme Court of Canada in *Prime (supra)* confirmed the Commission's interpretation of *"as soon as practicable"* in the context of determining when a reporting issuer in British Columbia is required to disclose a material change under section 67, now section 85, of the *Act*. The Court said at page 174:

"The second element of the Commission's conclusion that s. 67 was violated in the context of the share options transactions is that the obligation to disclose "as soon as practicable" takes on a different meaning when an issuer is about to engage in a securities transaction. Where an issuer proposes to engage in a securities transaction...it must ensure that any undisclosed material change is disclosed before proceeding with the transaction. The words "as soon as practicable" have a different meaning in this context than they might in the absence of the securities transaction. Senior Management were responsible for managing the affairs of Prime and Calpine and for ensuring that they complied with their obligations under the Act. In carrying out this responsibility, Senior Management ought to have made reasonable inquiries, before causing Prime and Calpine to engage in securities transactions, to ensure that all material changes in their affairs had been disclosed".

[para 218]

Although the timing of the obligation to disclose a material change in the *Prime* case turned on the meaning of the words "*as soon as practicable*" in section 67 as opposed to "*promptly*" in the equivalent provision in Alberta's section 118, the underlying principle remains the same. A reporting issuer must not proceed with a securities transaction unless there has been disclosure of all material changes.

[para 219]
We found that Hartvikson, Johnson and Stuart, as Cartaway's senior management, acquired the Koguluk claims for Cartaway on April 5, 1995 knowing that the acquisition would be approved by the board of directors. On April 4 Cartaway was still a shell looking for a business. Its balance sheet at September 30, 1994 showed total assets of $328,230, with cash of $184,723, and total liabilities of $41,018. Its income statement for the period showed net income of $1,967. According to Stuart, by the spring of 1995, it had barely enough money to pay its fees to the Exchange. As we earlier emphasized, Voisey's Bay claims were considered *"hot"* property and it was a sellers' market. By April 5 all fundamental terms for the acquisition of the Koguluk claims had been agreed upon. Mason would receive 1.2 million free trading shares and $300,000. At the time 1.2 million shares represented over 15% of Cartaway's shares. This percentage was significant. So was the $300,000, considering Cartaway's financial position. Further, the parties conducted themselves as if they had an agreement. Mason referred other vendors of Voisey's Bay claims to Hartvikson and Johnson, recommended Ivany to head up management and sent Barry back to stake more claims. Finally, the April 5 agreement, which was simple and straightforward, was not documented in a letter agreement until May 15, 1995, because it suited the purposes of Hartvikson and Johnson to have an oral agreement. In our view, this was part of the deceit that Hartvikson and Johnson planned in order to achieve the control group's common purpose.

[para 220]
In these circumstances, we have no difficulty finding that the decision on April 5, 1995, to acquire the Koguluk claims from Mason for Cartaway, knowing that the acquisition would be approved by the board of directors, was a change in the business of Cartaway that would reasonably be expected to have a significant effect on the market price of its securities. As a consequence we find that it was a material change within the meaning of section 1(1) of the *Alberta Act* and Cartaway was obliged to disclose it *"promptly".* According to *The New Roget's Thesaurus,* "*promptly", "right away"* and "*straightway*" are used when expressing earliness. We find that the material change was not disclosed promptly as required. We find that when the material change occurred on April 5, 1995, it should have been disclosed that day or the next day before the opening of trading on the Exchange.

[para 221]
Furthermore, Cartaway had still not disclosed this material change by April 19, 1995, the day that Cartaway announced the $0.125 private placement. By then Teck's investment in Diamond Fields' was made public. Both the media and the market recognized Teck's investment was a vote of confidence in the Voisey's Bay deposit. On April 18, 1995 the shares of Diamond Fields responded and moved $3 to a new 52-week high of $33. Without disclosure of Cartaway's material change of April 5, 1995, the Exchange set the price for the securities in the private placement at $0.125 for the shares and $0.20 for the warrants. We find that Hartvikson and Johnson deliberately misled the Exchange when the notice was filed on April 19.

[para 222]
However there was still an opportunity for the Exchange to consider re-pricing the private placement if the material change of April 5 was disclosed prior to the closing of the private placement on May 5, 1995. This was not done either. Indeed, in our view by this time there had been further developments that lead us to find that there were further material changes in the business and affairs of Cartaway that required prompt disclosure.

[para 223]
We found that by May 4 other Voisey's Bay claims, held by White Wolf, Tenajon, 455702, and Barry, were being acquired for Cartaway. These claims were, with the Koguluk claims, identified by Nash as the core properties that had been acquired for the public company by at least a "handshake" deal. By May 4 Johnson, Hartvikson, Lyall and Savics, without any loan

documentation or security, had loaned $380,000 to 489895 to pay for the acquisition and exploration of these Voisey's Bay claims. By May 4 steps had been taken to secure new management - Ivany agreed to be involved and Nash's involvement was subject to his wife's approval. We find that the acquisition of the additional claims and the proposed change in management were further material changes that were required to be disclosed promptly, which in the circumstances meant before May 5, 1995. This Cartaway's senior management failed to do.

[para 224]
Furthermore, there was an obligation on Cartaway's senior management to disclose all of these material changes promptly to address the probability that persons, other than senior management, were aware of these material changes and were taking advantage of this information in purchasing Cartaway stock in the market. From April 19 to May 4, Cartaway's share price had doubled to $0.60. On May 5 it closed at $0.68. The only material change Cartaway announced during this time was the private placement itself. Hartvikson believed that the rise in share price of Cartaway meant *"somehow there was a leak out of the system"* and that certain persons were taking advantage of it well before May 4, 1995. Indeed Mason's *"aggressive research,"* culminating in his Cartaway purchase on April 27 points to this. By the time of the halt on May 12, Cartaway had moved to $0.95.

[para 225]
We can now only speculate what Cartaway's share price would have been prior to the closing of the private placement if the material changes had been disclosed promptly. A look at what was happening at the time assists in determining how significant and prejudicial to the public interest was the failure to disclose the material changes. By May 1 the media reported that the word on the street was that Diamond Fields' Voisey Bay discovery might be developed by a consortium of Teck, Inco and Falconbridge. The media was now calling Voisey's Bay the hottest mineral play in North America. The next day May 2, Diamond Field's stock jumped over $ 7 to $45. On May 4 Diamond Fields rose a further $6.50 to close at $53.75 based on rumours that Canada's two largest nickel producers, Inco and Falconbridge were talking to Diamond Fields. Stuart testified that on May 5 and when the material change report announcing the private placement was filed on May 10, there still was no justification for saying more than *"the proceeds of the private placement were going to fund as yet undetermined assets"*, because nothing had proceeded far enough to make disclosure. On May 10 the stock closed at $0.83. Despite the progression of the deal with respect to the additional claims and new management and the market's response to Voisey's Bay deals, there was still no disclosure of Cartaway's intention to go into Voisey's Bay when the private placement closed on May 5, 1995 nor on May 10 when Cartaway filed its material change report announcing it had closed. Within two days on May 12, with the stock at $0.95, Stuart called for a halt and advised the Exchange that Cartaway was negotiating the acquisition of a large parcel of claims in the Voisey's Bay area. When the stock resumed trading on July 4, it traded at a high of $2 and closed at $1.80.

[para 226]
We find that Hartvikson and Johnson, as *de facto* directors and officers of Cartaway, failed to ensure that Cartaway met its continuous disclosure obligations. We find that as *de facto* officers and directors Hartvikson and Johnson failed to act honestly and in good faith and in the best interests of Cartaway when they allowed the $0.125 private placement to be priced when they knew Cartaway had not disclosed material information. They knew the material changes were not disclosed and they knew they had purchased over 32% of the private placement and the control group purchased 82% of the private placement. They also knew that following the private placement the control group, on a fully diluted basis, would increase its ownership of Cartaway from 45.6% to 67%.

[para 227]

We find Hartvikson and Johnson allowed the $0.125 private placement to be priced when they knew that this material information had not been disclosed so as to prevent the Exchange from re-pricing the $0.125 private placement thereby ensuring that they personally benefited along with the other members of the control group. We find that the conduct of Hartvikson and Johnson was deceitful and intended to, and did, mislead First Marathon, the Exchange and the clients of First Marathon who purchased Cartaway shares under the $1 private placement and the public who were buying and selling Cartaway shares in the market. Because Hartvikson and Johnson preferred their own interests to those of Cartaway, Cartaway did not receive fair value for the securities issued pursuant to $0.125 private placement. Consequently we find that Hartvikson and Johnson acted in their own interests to the exclusion of the duties owed to Cartaway. Further, we find that their conduct in this regard was highly prejudicial to the public interest.

Duties as registrants and employees

[para 228]
First Marathon was registered as an investment dealer under the *Act*. Hartvikson and Johnson were registered representatives under the *Act.* In 1995 under section 40 of the *Regulation* every dealer was required to "*establish prudent business procedures for dealing with clients and shall ensure that those procedures are adequately supervised*." As registrants Hartvikson and Johnson were obliged to follow First Marathon's business procedures for dealing with clients. Some of First Marathon's business procedures were reflected in its *Guidelines for Business Conduct.* The *Guidelines* made clear that Hartvikson and Johnson, as registered salespersons employed by First Marathon had a legal duty to act with the *"highest standard of ethical business conduct"* towards clients, shareholders and the public. The *Guidelines* confirmed and emphasized that clients' interests took priority over employees' interests and that clients must always be dealt with fairly, honestly and in good faith. The *Guidelines* stated that every employee was to avoid any activity, interest or association which might interfere or even appear to interfere with the independent exercise of judgment in the best interest of First Marathon, its shareholders, clients, and the public. All outside business connections were required to be reported so that they could be scrutinized and continuously monitored for potential conflicts. To the extent that employees were engaged in outside activities they were required to ensure that their activities were not in conflict or competition with their duties and responsibilities.

[para 229]
We find Hartvikson and Johnson, as registrants and employees of First Marathon, had a duty to act honestly, fairly and in the best interests of the clients of First Marathon, including Cartaway. We also find that Hartvikson and Johnson, as registrants and employees of First Marathon, were gatekeepers of the securities industry and had a duty not to engage in any conduct that would tend to bring the reputation of the securities markets into disrepute.

[para 230]
Did Hartvikson and Johnson meet their duties as registrants and employees of Cartaway? In answering this question it is useful to review our key findings thus far. In summary we found the following.

- By October 3, 1994, when the existing Cartaway control block was acquired, Hartvikson and Johnson were control persons of Cartaway and they had a common purpose with the other six First Marathon brokers to change Cartaway's business direction by vending in some new business venture with new management and finance its going forward through First Marathon.

- By April 4, 1995 the control group's common purpose became focused on the acquisition of the Koguluk claims and other Voisey's Bay claims. Hartvikson and Johnson took the initiative in substantially reorganizing Cartaway's business as soon as they were offered the Koguluk claims on

April 4, 1995 and from that time to at least July 4, 1995 they were acting as undisclosed promoters and *de facto* directors and officers of Cartaway.

- On April 5, 1995, Hartvikson and Johnson, with Stuart's approval, acquired the Koguluk claims for Cartaway, as undisclosed principals, knowing that the acquisition would be approved by the board of directors. By April 5, 1995 a fundamental element of the control group's common purpose was that the financing of Cartaway would be structured to ensure that the control group acquired a substantial number of shares before it was made public that Cartaway was going into Voisey's Bay and before the $1 private placement.

- The decision on April 5, 1995, to acquire the Koguluk claims from Mason for Cartaway, knowing that the acquisition would be approved by the board of directors, was a material change in the business of Cartaway and it was not disclosed promptly as required and not before the $0.125 private placement closed on May 5, 1995.

- Hartvikson and Johnson organized 489895 so that it was made to appear that it and the Voisey's Bay claims it held for Cartaway, had no connection to Cartaway or to Hartvikson and Johnson to fulfil the primary purpose of 489895, which was to warehouse the Voisey's Bay claims for Cartaway until after the $0.125 private placement closed. Hartvikson and Johnson allowed the $0.125 private placement to be priced when they knew material information had not been disclosed so as to prevent the Exchange from re-pricing the $0.125 private placement thereby ensuring that they personally benefited along with the other members of the control group. In this regard Hartvikson's and Johnson's conduct was deceitful and intended to, and did, mislead First Marathon, the Exchange and the clients of First Marathon who purchased Cartaway shares under the $1 private placement and the public who were buying and selling Cartaway shares in the market.

- Hartvikson and Johnson were control persons along with the other six First Marathon brokers and that they together with the other six First Marathon brokers were promoters and because they "*directly or indirectly*" took the "*initiative"* in substantially reorganizing Cartaway's business. This "*initiative"* was the common purpose of the control persons and because Hartvikson and Johnson took this "*initiative"* we found that they were *de facto* directors and officers of Cartaway.

[para 231]
In addition to these findings, we find that when the control group decided that the acquisition and development of the Voisey's Bay claims by Cartaway would be financed by them through First Marathon, Hartvikson and Johnson as brokers placed themselves in a position where their personal interests conflicted with the interests of Cartaway. Indeed, we find that from the moment the Koguluk claims were brought to the attention of Hartvikson and Johnson, their objective as part of the control group, was to structure this entire transaction to ensure that the control group would acquire Cartaway shares at a price substantially lower than the price at which persons not in the control group would acquire shares. From that moment to the closing of the $1 private placement, Hartvikson and Johnson consistently chose to act in their own best interests over those of their clients at First Marathon, including Cartaway, in order to accomplish the control group's common purpose.

[para 232]
We find that in the process Hartvikson and Johnson deceived and misled First Marathon, the Exchange and the clients of First Marathon who purchased Cartaway shares under the $1 private placement and the public who were buying and selling Cartaway shares in the market. We saw this with respect to Hartvikson's and Johnson's dealings with 489895, Bethune and Singh. We saw this with Hartvikson's and Johnson's desire to keep out of "the limelight" and not disclose their role in 489895 and in Cartaway. We saw this Hartvikson's and Johnson's involvement in Cartaway's news releases and communications with the Exchange. We saw this with

Hartvikson's and Johnson's filings with the Exchange. We saw this in Hartvikson's and Johnson's responses to Commission staff.

[para 233]
It is convenient for Hartvikson and Johnson to now suggest that, because there was disclosure in October 1994 about their acquisition of Cartaway shares, there was no intent to deceive when they signed, or in the case of Hartvikson had some else sign, the private placement questionnaires in which they certified they held no shares in Cartaway at the time of the private placement. It was their duty to ensure that the private placement questionnaires, upon which regulators and the public relied and which they certified as true, were in fact true. They were not. Each filed a false and misleading document with the Exchange. As a consequence the Exchange was misled and did not pursue its inquiry. We can now only speculate what damage to the public interest could have been prevented had the Exchange pursued its inquiry to make sure that a group of brokers were not "*loading up on cheap stock."*

[para 234]
That Hartvikson and Johnson knew and understood their duties as registrants where there were conflicts of interest, but chose to disregard them in any event, was made clear to us by their conduct and by the following testimony of Hartvikson. When discussing conflicts of interest with Seifert, Hartvikson said he recognized that he and Johnson were in a *"difficult situation"* because they on the one hand, wanted to be beneficiaries of 489895 but on the other hand were brokers and as such he did not think it was appropriate to be seen as its directors, officers or shareholders. If they were *"it would have been difficult to get First Marathon to -- to fund it*."

[para 235]
If Hartvikson and Johnson had any doubts about what their duties as registrants and employees were that doubt ought to have been dispelled when they read First Marathon's *Guidelines for Business Conduct.* In our view there was no confusion in the *Guidelines* about what their duties as registrants were. We do not accept Hartvikson's and Johnson's argument that Commission staff is trying to impose upon them some new and higher standard of conduct that no other registrant in 1995 was obliged in law to meet. Hartvikson and Johnson simply ignored the standards of conduct they were obliged to meet as registrants and as employees and as set out in First Marathon's *Guidelines.* Their suggestion that they dealt with any apparent conflicts by keeping themselves from being on record as officers, directors or shareholders of 489895 is specious. Similarly we do not accept Hartvikson and Johnson's argument that they took considerable financial risk in putting this deal together to the great benefit of their clients. In our view they took very little risk because they controlled Cartaway and they controlled how Cartaway's financings would proceed through First Marathon. They knew that any money loaned to 489895 to finance the acquisition of the claims or to Cartaway as interim financing, would be reimbursed, as in fact it was. In short, their conduct throughout was motivated by self- interest. They took advantage of every opportunity that their status as registrants gave them.

[para 236]
The issue here is simply whether Hartvikson and Johnson, as registrants and employees of First Marathon, acted fairly, honestly and in the best interests of the clients of First Marathon, including Cartaway. We find that they did not. As a consequence we find that they breached their duties as registrants and employees of First Marathon. By favouring their own interests to the prejudice of those to whom they owed a duty to act fairly, honestly and in their best interests, Hartvikson and Johnson acted contrary to the public interest.

[para 237]
The courts have long recognized that a primary goal of securities regulation is investor protection. As Madam Justice L'Heureux-Dube stated in *Brosseau v. Alberta Securities Commission,* [1989] 1 S.C.R. 301 at page 314:

"Securities acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this Court in Gregory & Co. v. Quebec Securities Commission, [1961] S.C.R. 584, where Fauteux J. observed at p. 588:

"The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business."

[para 238]
The courts have also recognized that other goals of securities regulation include capital market efficiency and ensuring public confidence in the system. As Mr Justice Iacobucci for the Court in *Prime (supra)* stated at page 165 in discussing the nature of the *Act*:

"It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, Canadian Securities Regulation (1977), at p. 1."

[para 239]
It goes without saying that conduct by market participants that results in breaches of the letter and spirit of securities legislation is conduct that brings the capital markets into disrepute and undermines public confidence in the system. It is particularly egregious where it is demonstrated that registrants have taken advantage of their position and have been deceitful and misleading so as to personally benefit themselves to the prejudice of their clients. Such was the conduct of Hartvikson and Johnson. It was conduct that constituted a breach of their duties as gatekeepers of the securities industry. It was conduct that was highly prejudicial to the public interest.

3.2 Distribution of Securities Contrary to Section 61

[para 240]
Commission staff alleged Hartvikson and Johnson distributed securities of Cartaway contrary to section 61 of the A*ct*:

- by splitting the $0.125 private placement with persons who did not qualify for the relied upon exemption; and

- by distributing an offering memorandum with respect to the $1 special warrant financing that they knew was false and misleading.

3.2.1 Splitting the Private Placement

[para 241]
The amended notice of hearing alleged that:

- in the course of investing in Cartaway through the $0.125 private placement, the participants in the private placement including Hartvikson and Johnson caused, or acquiesced in, Cartaway relying upon the exemptions contained in section 74(2)(4) of the *Act*, and section 129(1) of the *Rules*, which requires, first, that the purchaser purchase as principal, and, second, that the trade must have an aggregate cost to the purchaser of not less than $97,000;

- Hartvikson and Johnson, having purchased the shares, then redistributed some of these shares to other First Marathon employees without the benefit of an exemption or a prospectus, in breach of section 61 of the *Act*; and

- Hartvikson and Johnson did not purchase the shares as principals, causing Cartaway to breach section 61 of the *Act.*

[para 242]
Most of the $0.125 private placement went to residents in British Columbia and therefore the distributions thereunder had to be in compliance with the *Act*. We have referred to the provisions in the current *Act* as they are the same as those in the 1995 *Act* save for section numbering.

[para 243]
"Distribution" is defined in section 1(1) of the *Act* to include a trade in a security of an issuer that has not been previously issued.

"Trade**"** is defined in section 1(1) of the *Act* to include:

"(a) a disposition of a security for valuable consideration whether the terms of payment be on margin, instalment or otherwise
…
(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e)."

[para 244]
Sections 61 and 74(2)(4) of the *Act* read as follows:

"61.(1) Unless exempted under this Act or the regulations, a person must not distribute a security unless a preliminary prospectus and a prospectus respecting that security

(a) have been filed with the executive director, and
(b) receipts obtained for them from the executive director.

74.(1) In this section,

(2) Subject to the regulations, section 61 does not apply to a distribution in the following circumstances:
…
(4) the person is purchasing as principal, and the trade is in a security that has an aggregate acquisition cost to the purchaser of not less than a prescribed amount;"

[para 245]
Section 129(1) of the *Rules* provides that for the purpose of section 74(2)(4) of the *Act,* the prescribed amount is $97,000.

[para 246]
Looking at the substance of the matter before us, and despite the legal opinion relied upon by Hartvikson and Johnson, we find that Hartvikson and Johnson purchased some of the private placement not as principals but as agents for other First Marathon employees and friends. The exemption found in section 74(2)(4) of the *Act* is to be used only in connection with sales to persons who are legitimately making the full investment themselves. Each investor must invest at least the $97,000 minimum subscription amount and no artificial groups can be created to allow issuance of securities under this exemption to persons who are not investing at least the minimum amount.

[para 247]
In addition, the loan agreement used to facilitate this kind of participation was not on commercial terms. The loan was interest free and was considered repaid in full by the delivery of the securities notwithstanding market value at the time of repayment. Johnson even testified that in some cases he wouldn't ask for the money up front.

[para 248]
The First Marathon employees and friends who piggybacked onto Hartvikson's and Johnson's private placement subscription did not qualify to use the exemption in section 74(2)(4) of the *Act* because each did not pay the $97,000 aggregate acquisition cost and purchase the securities as principal. No other exemptions were available to Cartaway in respect of the distributions of the securities acquired by Hartvikson and Johnson for the employees and friends, which were purported to be made under those exemptions.

[para 249]
Therefore we find that these distributions to employees and friends, and any acts carried out by Hartvikson and Johnson in furtherance of the distribution, were made in contravention of section 61 of the Act. That Hartvikson and Johnson said they participated in these distributions in reliance on a legal opinion and the express authorization and encouragement of First Marathon's branch manager is a matter for consideration when the panel is determining what, if any, orders are necessary in the public interest.

3.2.2 Misleading Offering Memorandum

[para 250]
The amended notice of hearing alleged that:

- the offering memorandum with respect to the $1 special warrant financing failed to disclose, as required by item 13 of Form 43, that Hartvikson and Johnson were promoters of Cartaway; and

- failed to disclose existing and potential conflicts of interest among Cartaway, First Marathon, Hartvikson, Johnson and other First Marathon employees, as required by item 14 of Form 43;

- as a result, the offering memorandum was false and misleading and not in the required form, in breach of section 133 of the *Rules*;

- because the offering memorandum was not in the proper form, the distribution of shares was illegal and in breach of section 61 of the *Act*; and

- Hartvikson and Johnson sold shares of Cartaway to their clients knowing of the deficiencies of the offering memorandum and participated in the illegal distribution of those shares contrary to section 61 of the *Act.*

[para 251]
Section 1(1) of the *Act* defines:

"material fact" *to mean, where used in relation to securities issued or proposed to be issued, a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value of those securities; and*

"misrepresentation" *to mean*
(a) an untrue statement of a material fact, or

(b) an omission to state a material fact that is
(i) required to be stated, or
(ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made."

[para 252]
Section 133(1) of the *Rules* provided that an offering memorandum required to be delivered in connection with a distribution under section 74(2)(4) of the *Act* must be in the required form.

[para 253]
The form was Form 43 and it required the disclosure of a series of facts or items that are *prima facie* material. *Item 13 - Directors, Officers, Promoters and Principal Holders,* required the identification and principal occupation of all directors, officers, promoters and principal holders of securities and the disclosure of all securities, including options, held by the directors and officers as a group and by promoters and principal holders of securities for the 30 days prior to the date of the offering memorandum. *Item 14 Conflicts of Interest,* required the disclosure of any existing or potential conflicts of interest among the issuer, distributor, promoter, directors, officers, principal holders and persons providing professional services to the issuer that could reasonably be expected to affect the purchaser's investment decision. Attached to the form is a certificate in which the chief executive officer and chief financial officer, or other director, attest to the offering memorandum containing no untrue statement of a material fact or omission of material fact that is necessary to be stated to prevent a statement that is being made from being false or misleading in the circumstances in which it was made.

[para 254]
The offering memorandum with respect to the $1 private placement did not disclose that Hartvikson and Johnson were promoters and *de facto* directors of Cartaway and it did not disclose the fact that the First Marathon brokers were acting as a control group. The offering memorandum did not disclose the role of Hartvikson and Johnson in acquiring the claims for Cartaway, the swap of free trading shares to vendors, the extent of the shareholdings of the eight First Marathon brokers or any consequent conflicts of interests. We find that each of these facts were material facts in that each "*could reasonably be expected to significantly affect, the market price or value of those securities"* offered under the memorandum. We find that these material facts were required to be disclosed in the memorandum to keep it from being false and misleading. As a consequence the offering memorandum contained misrepresentations within the meaning of *'misrepresentation'* in section 1(1) of the *Act.* As a consequence the offering memorandum was not in the required form contrary to section 133(1) of the *Rules.* We do not accept Commission staff's argument that it therefore follows that the exemption in section 74(2)(4) of the *Act* was not available and therefore the distribution was illegal and in breach of section 61 of the *Act.*

[para 255]
However, the matter does not end there. The obligation to file documents in accordance with the *Act* rests with the issuer. It is the duty of senior management and the directors to ensure that an issuer meets its regulatory obligations. By July 11,1995 Cartaway had new management, headed up by Ivany. Hartvikson and Johnson were not required to sign the certificate as directors and officers but we have found that they were promoters and should have been disclosed as such. Further as registrants they were required to deliver the offering memorandum to their clients who subscribed to the private placement and as registrants participating in a distribution of securities they mostly certainly should have read the offering memorandum. We find that, in the circumstances, Hartvikson and Johnson knew or ought to have known that the offering memorandum contained misrepresentations. We find that their use of the misleading offering memorandum to place the securities in the $1 private placement was part of the deception

necessary to accomplish the control group's common purpose. We find that it was conduct that was highly prejudicial to the public interest.

3.3 Misrepresentations to Commission Staff

[para 256]
The amended notice alleged that the following statements made by Johnson were misrepresentations under section 155(1)(a) of the *Act*:

1. in the course of his initial interview in this matter held on February 28, 1997, Johnson stated that he had no contact with the Hunter Group until after the private placement closed and he denied any knowledge of 489895, which was untrue;

2. in the course of his second interview held on September 26, 1997, Johnson stated that he did have contact with the Hunter Group prior to the closing of the private placement, but that the mineral claims offered by the Hunter Group were purchased by 489895 for the benefit of Hartvikson and Johnson and not for Cartaway, which was untrue; and

3. in the course of his second interview, Johnson stated that he did not contact Stuart about the claims until May, 1995, which was untrue.

[para 257]
The amended notice alleged that the following statements made by Hartvikson were misrepresentations under section 155(1)(a) of the *Act*:

1. in the course of his first interview on February 28, 1997, Hartvikson stated that his first contact with the Hunter Group was in late April, 1995, which was untrue;

2. in the course of his second interview on September 26, 1997, Hartvikson stated that he did have contact with the Hunter Group prior to the closing of the private placement, but that the mineral claims offered by the Hunter Group were purchased by 489895 for the benefit of Hartvikson and Johnson and not for Cartaway, which was untrue; and

3. in the course of his second interview, Hartvikson stated that Cartaway was only one of a number of options that he and Johnson considered to purchase the claims, from 489895, which was untrue.

[para 258]
Section 155(1)(a) of the *Act,* as it then was*,* provided that a person who makes a statement in evidence or information submitted or given under this Act or the regulations that, at the time and in the light of the circumstances under which it is made, is a misrepresentation, commits an offence.

[para 259]
In our view, it is for the court to make findings under this section and not the Commission and we decline to make the findings Commission staff seeks. However considering our public interest mandate we feel obliged to consider the evidence given by Hartvikson and Johnson in their interviews with Commission staff along with all of the other evidence. As the evidence and our earlier findings indicate, the statements given by Hartvikson and Johnson in these interviews that Commission staff alleged were untrue, were in fact untrue. Indeed Hartvikson and Johnson conceded that some of the statements they made were incorrect. They however argued that there were good and reasonable explanations for this - lack of proper notice and preparation and the effluxion of time. In our view, these arguments deserve little weight. Not only did Hartvikson and Johnson have notice of the areas to be canvassed, both attended the interviews with experienced

counsel at a time when these events ought to have been fairly fresh in their minds because of the internal investigation by First Marathon and the other attendant publicity. More important to our consideration however is the fact that the misleading nature of the statements in issue related more to Hartvikson and Johnson's failure to disclose the fundamental role they played in Cartaway's affairs and the Voisey's Bay claims. Everyone who testifies under oath has an obligation to ensure that the testimony given is true. Hartvikson and Johnson failed to do this. We find that when registrants conduct themselves in this fashion they bring the reputation of the securities industry and markets into disrepute. We find as a consequence that their conduct in making misleading statements to Commission staff was highly prejudicial to the public interest.

3.3.1 Full-Time Employment

[para 260]
The amended notice alleged that by promoting Cartaway and engaging in its business, Hartvikson and Johnson were not employed full-time as registered salespersons with First Marathon as required under section 63 of the Rules.

[para 261]
In support of this allegation Commission staff argued that:

- because Hartvikson and Johnson were acting as promoters of 489895 and of Cartaway they were working for a company other than First Marathon and this constituted 'outside activities';

- because Hartvikson and Johnson specifically failed to divulge their work for 489895 so as to ensure First Marathon would finance the deal, First Marathon was not aware of the full extent of their outside activities and this violated First Marathon's normal procedures; and

- as a consequence Hartvikson and Johnson put themselves in a position where their duties and responsibilities to their companies interfered with their duties to First Marathon and gave rise to conflicting interests.

[para 262]
Commission staff also referred us to the Commission's decision in *Re: Randhawa* (1997), 37 B.C.S.C. Weekly Summary 38, which considered the application of a similar provision in a Vancouver Stock Exchange rule. The rule provided that registered representatives shall devote their full-time during working hours to the securities business of the members employing him and they should not have any other "gainful occupation". It is useful to refer to the decision at some length as it addresses in our view why we say the arguments that staff make against Hartvikson and Johnson must fail. In *Randhawa t*he Commission stated:

"The Exchange and Commission staff argue that the hearing panel's conclusions that the arrangement created conflicts of interest supported the finding of a breach of rule F.2.21. They point to the following passage from a decision of this Commission in Re Lutz (1993), 1 C.C.L.S. 264 at 270:

"'The purpose of the full time employment requirement, in our view, is to ensure that salesmen in the securities business are committed to the business, are able to maintain an appropriate level of competence and knowledge and <u>are not engaging in other business activities that will interfere with the duties and responsibilities or give rise to conflicts of interest. (</u>emphasis added)'

"This passage says that one purpose of the full time employment requirement is to prevent involvement in other business activities that give rise to conflicts of interest. It is a twisted leap of logic to turn this point around and say that an activity that involves a conflict of interest must be in breach of the full time employment requirement.

"The Exchange also referred us to several passages in the Conduct and Practices Handbook for Securities Industry Professionals as support for this interpretation. However, those passages are very general in nature and, in our view, provide no support for the notion that a registered representative who puts himself in a conflict of interest is thereby in violation of the full time employment requirement.

"The securities business involves many potential and actual conflicts of interest, and there are a variety of regulatory tools that have been devised to address them. Some types of conflicts are prohibited. Others are regulated through disclosure, a requirement to obtain consent of the client, or review by an independent third party. There is no evidence or finding here as to whether Randhawa advised his clients on investing in Achievers shares during the period of his arrangement with Achievers or, if he did, whether he contravened any regulatory requirements in doing so. In any event, those were not the allegations of which Randhawa was given notice in the citation."

[para 263]
On this basis the Commission set aside the hearing panel's ruling that Randhawa had breached the full time employment rule.

[para 264]
Hartvikson's and Johnson's activities in connection with substantially reorganizing Cartaway's business gave rise to conflicts of interest that neither dealt with. However, as in *Randhawa* we say to accept staff's argument here would be *"a twisted leap of logic to turn this point around and say that an activity that involves a conflict of interest must be in breach of the full time employment requirement."* In our view, this allegation is not met and accordingly we dismiss it.

4.0 SUBMISSIONS RESPECTING ORDERS IN THE PUBLIC INTEREST

[para 265]
The parties will have the opportunity to make further submissions before the Commission renders a decision as to what, if any, orders ought to be made in the public interest.

[para 266]
If the Executive Director has further submissions to make on this subject in addition to those made in final argument, we direct the Executive Director to file those submissions with the Secretary of the Commission and to send a copy to each of the respondents on or before October 20, 2000. Respondents wishing to make submissions are directed to file those submissions with the Secretary of the Commission and send a copy to the Executive Director on or before November 10, 2000. Any party that wishes to make oral submissions in addition to its written submissions must request the same of the Secretary on or before October 25, 2000 and a date for oral submissions will be fixed.

DATED September 29, 2000.

[para 267]
FOR THE COMMISSION

J.C. Maykut, Q.C., Vice Chair

2000 BCSECCOM 88

Joan L. Brockman, Member

Roy Wares, Member