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**Michael Patrick Lathigee and Earle Douglas Pasquill,
FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., and
WBIC Canada Ltd.**

Securities Act, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken Judith Downes Audrey T. Ho	Vice Chair Commissioner Commissioner
Hearing Dates	September 16-20, 23, 24; December 6, 2013	
Date of Findings	July 8, 2014	
Appearing		
Derek Chapman	For the Executive Director	
H. Roderick Anderson Owais Ahmed	For the Respondents	

Findings

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1 Introduction

- ¶ 1 This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.
- ¶ 2 In a notice of hearing issued March 1, 2012 (2012 BCSECCOM 66), the executive director alleged that Michael Patrick Lathigee, Earle Douglas Pasquill, FIC Real Estate Projects Ltd.

(FIC Projects), FIC Foreclosure Fund Ltd. (FIC Foreclosure), and WBIC Canada Ltd. (WBIC) contravened the Act by perpetrating a fraud, contrary to section 57(b) of the Act.

- ¶ 3 The executive director alleges that the respondents acted dishonestly when, from February through August 2008, they:
- raised \$21.7 million through the sale of securities to 698 investors without telling the investors important facts about the financial condition of the corporate respondents; and
 - used \$8.5 million of \$9.9 million raised from 331 investors in FIC Foreclosure to make loans to related companies instead of investing the funds in foreclosures of residential properties in the United States, the purpose for which the funds were raised.
- ¶ 4 The executive director's only witness was a Commission staff investigator. The respondents' witnesses included Pasquill and Graham Woods, the chief financial officer of the corporate respondents. Lathigee attended portions of the hearing but did not testify.

2 Background

2.1 The Respondents and related parties

- ¶ 5 Lathigee and Pasquill jointly directed and controlled a group of companies, which included the corporate respondents, called Freedom Investment Club (FIC Group).
- ¶ 6 FIC Group was Lathigee's concept. According to Pasquill, the idea was that it would provide investors the opportunity to learn and develop investment skills, and would offer them the opportunity to participate in investments offered by FIC Group. FIC Group had regular meetings of members. The meetings typically had a so-called educational component accompanied by a presentation, typically made by Lathigee, about the current investment opportunities that FIC Group had on offer.
- ¶ 7 FIC Group also held events called "InvestFest" which, according to Pasquill, were "kind of investment seminars, where outside speakers would come, products were sold, and we would receive some commissions on those."
- ¶ 8 Lathigee and Pasquill were directors and officers of all of the companies in FIC Group, including the corporate respondents FIC Foreclosure, FIC Projects and WBIC. Lathigee and Pasquill were, respectively, the CEO and president of FIC Projects and WBIC, and the president and secretary of FIC Foreclosure.
- ¶ 9 It is not disputed that Lathigee and Pasquill were the acting and directing minds of FIC Group, including the corporate respondents, and were the sole individuals directing the affairs of FIC Group.
- ¶ 10 At all relevant times Lathigee and Pasquill were residents of Vancouver, British Columbia, also the location of FIC Group's head office.

- ¶ 11 FIC Group’s primary business was real estate development, mostly in Alberta. Several different FIC Group companies were involved in various development projects.
- ¶ 12 FIC Group’s largest development project was Genesis on the Lakes, a residential development near Edmonton, Alberta. Genesis was being developed in two phases. The first phase was divided into two sub-phases, 1A and 1B. Phase 1A was being financed by The Toronto-Dominion Bank through loans and other credit facilities to an FIC Group company called Genesis On The Lakes Ltd. As discussed below, the status of this project during the relevant period, and the associated financing, are highly significant to the issues in this hearing.
- ¶ 13 These are individuals who, during the relevant period, were members of FIC Group’s management whose roles were relevant to the allegations in the notice of hearing:
- Graham Woods was a chartered accountant and FIC Group’s chief financial officer.
 - John Tansowny had overall responsibility for the acquisition, development and marketing of FIC Group’s Alberta real estate projects.
 - Steve Rea held the title Managing Director at FIC Group and during the relevant period, his responsibilities included managing the relationships with FIC Group’s lenders.
- ¶ 14 FIC Group, Lathigee and Pasquill have a regulatory history. In December 2005, Commission staff issued cease trade orders against FIC Group companies FIC Investments Ltd. and WBIC because the forms of offering memoranda those companies used in distributions did not comply with the form required by the Act. Commission staff required both companies to refile their forms and offer rescission to investors who purchased under the earlier form. Both did so. Commission staff rescinded the FIC Investments order in March 2006 and the WBIC order in November 2006.
- ¶ 15 In June 2007 Lathigee, Pasquill, WBIC, FIC Foreclosure, and another FIC Group company, China Dragon Fund Ltd., entered into a settlement agreement with the executive director in which they admitted these contraventions of the Act (as described by FIC Foreclosure in an offering memorandum):
- “ . . . illegal distribution during the period preceding the cease trade orders, making unwarranted claims about no management expense ratio, and improperly exercising and cashing out options.”
- ¶ 16 China Dragon undertook to refile its offering memorandum and offer rescission to its investors. Lathigee and Pasquill undertook to pay fines of \$60,000 and \$30,000 respectively, and paid them.

2.2 The Distributions

- ¶ 17 From February 1 through August 21, 2008, the corporate respondents raised \$21.7 million from 698 investors by distributing securities as follows:

- Between February and August 2008 FIC Foreclosure issued Class A shares to 331 investors for proceeds of \$9.9 million. There were two offerings. The first, under the accredited investor exemption, was for \$1.5 million to 39 investors in February through April. The second, under the offering memorandum exemption, was for \$8.4 million to 292 investors in April through August.
- In March, April and July 2008 FIC Projects issued promissory notes to 267 investors for proceeds of \$9.8 million, \$9.6 million of which was invested in March and April from 253 investors. The notes were to pay annual interest of 12% to 15% to investors in quarterly instalments.
- In April and May 2008 WBIC issued Class A shares to 100 investors for proceeds of \$2 million.

3 Law and Issues

3.1 Standard of Proof

¶ 18 The standard of proof is proof on a balance of probabilities. In *F. H. v. McDougall* 2008 SCC 53, the Supreme Court of Canada held:

“49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.”

¶ 19 The Court also held (at paragraph 46) that the evidence must be “sufficiently clear, convincing and cogent” to satisfy the balance of probabilities test.

3.2 Meaning of Fraud

¶ 20 Section 57(b) of the Act says:

“A person must not, directly or indirectly, engage in or participate in conduct relating to securities or exchange contracts if the person knows, or reasonably should know, that the conduct
 . . .
 (b) perpetrates a fraud on any person.”

¶ 21 The British Columbia Court of Appeal in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 set out the elements that must be proved to establish a finding of fraud under the Act, citing *R. v Théroux*, [1993] 2 SCR 5 (at p. 20):

“ . . . the *actus reus* of the offence of fraud will be established by proof of:
 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim’s pecuniary interests at risk.

Correspondingly, the *mens rea* of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and
2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk)."

¶ 22 In *R. v. Cuerrier* [1998] 2 SCR 371, the court stated (at para. 116) that the element of dishonesty in fraud "can include non-disclosure of important facts." *Cuerrier* seems at first to be a case of little application to securities regulation: it was a sexual assault case. The accused was HIV-positive and failed to disclose that fact to individuals with whom he had consensual sex. It was necessary for the court to consider whether the non-disclosure was fraud, within the meaning of the *Criminal Code*, and thus vitiated the consent.

¶ 23 However, the Court noted (at para. 117) "The principles which have been developed to address the problem of fraud in the commercial context can, with appropriate modifications, serve as a useful starting point"

¶ 24 That brings us back to familiar territory. That non-disclosure can constitute dishonesty is fundamental to the public interest purposes of the Act. It is consistent with the disclosure obligations imposed by credible securities regulation regimes everywhere. The requirement for complete and accurate disclosure so that investors can make well-informed investment decisions is fundamental to the fostering of confidence in our capital markets.

¶ 25 It follows that, in the context of fraud under the Act, an "important fact" would include one that would affect a reasonable investor's investment decision.

¶ 26 In *R v. Zlatic* [1993] 2 SCR 29 the Supreme Court of Canada stated:

"The fundamental question in determining the *actus reus* of fraud is whether the means to the alleged fraud can properly be stigmatized as dishonest In determining this, one applies a standard of the reasonable person. Would the reasonable person stigmatize what was done as dishonest?"

¶ 27 In *Zlatic*, the Court cited with approval the decision of the Ontario Court of Appeal in *R v. Currie* (1984), 5 OAC 280. Describing that decision, the Court in *Zlatic* said (at page 47):

"The accused were in the business of investing funds in a certain company . . . but diverted these funds without notice to the investors to [another] company There was no question of any misrepresentations. Nor was there any question as to what the accused were authorized to do with the funds given to them. The court . . . found that the fact that the accused used the funds in a manner which was not authorized was sufficient grounds for finding that the accused acted dishonestly."

3.3 Issues

- ¶ 28 The executive director alleges two separate frauds.
- ¶ 29 The prohibited act associated with the first alleged fraud is that, in selling the securities of FIC Foreclosure, FIC Projects and WBIC, the respondents failed to disclose FIC Group’s financial condition. Because, as described below, the financial condition of the corporate respondents was dependent upon the financial condition of FIC Group as a whole, it is not disputed that it is the financial condition of FIC Group that is relevant.
- ¶ 30 The notice of hearing describes FIC Group’s financial condition in various ways. Paragraph 7 says that “by early March, 2008, Lathigee and Pasquill were aware” that FIC Group “was . . . ‘in a very bad situation’, had ‘no cash flow’, was ‘close to insolvency’, and that there was a real possibility [a major loan] would be called and that FIC Group was ‘doomed.’”
- ¶ 31 Paragraph 10 repeats the allegation that FIC Group was “close to insolvency”, and alleges that the investments in the distributions “were therefore extremely risky.”
- ¶ 32 Both parties focused our attention on whether or not the evidence established that FIC Group was “close to insolvency”.
- ¶ 33 The state of insolvency is a well-understood concept. There are many definitions, but most of them define a person as insolvent if either of two tests are met (see, for example, *Bankruptcy and Insolvency Act* RSC 1985 c.B-3.):
- the person is unable to meet his obligations as they become due (often labelled the “cash flow test”), or
 - the person’s liabilities exceed the realizable value of the person’s assets (often labelled the “balance sheet test”).
- ¶ 34 In our opinion, the reasonable approach for the purposes of this case is to interpret the phrase “close to insolvency” in the context of the notice of hearing as a whole; that is, was FIC Group’s financial condition an important fact? A reasonable possibility that FIC Group could become insolvent would, of course, be an important fact, but so could other factors relevant to its financial condition.
- ¶ 35 This approach is consistent with the respondents’ position on the issue. At the oral hearing on liability, the respondents said this at the outset of their submissions, in response to an earlier question from the panel about the nature of the executive director’s allegation relating to FIC Group’s financial condition:

“Just as a starting point, dealing with this issue of insolvency or close to insolvency, I do think you’re going to have to make some findings of fact with respect to the financial state of this group of companies . . . [in accordance]

with the evidence that you've heard. I think, though, it matters not so much whether you're to find not insolvent, close to insolvency, or insolvent.

Whatever finding of fact you make, I think you then would have to take – and I'm going to flesh this out more in terms of what the argument is concerning the correct tests for fraud – is whether or not, based on the facts you find, if you're to look at *Anderson*, *Zlatic*, and *Theroux*, when you put yourself in the position of the reasonable person who objectively looks at the conduct to decide whether it's dishonest, it will be within that factual matrix that your finding will get its import.”

- ¶ 36 These are the issues relating to the prohibited act associated with the first alleged fraud:
- Whether FIC Group's financial condition was an important fact under the test in *Cuerrier*.
 - If FIC Group's financial condition was an important fact, whether the respondents disclosed it to the investors.
 - If the respondents failed to disclose it to the investors, whether that was dishonest, and therefore a prohibited act.
- ¶ 37 The prohibited act associated with the second alleged fraud is that Lathigee, Pasquill, and FIC Foreclosure used the majority of FIC Foreclosure's funds, not to invest in foreclosures of US residential properties, as investors were told, but to make loans to other FIC Group companies. The issues relating to the prohibited act associated with this fraud are:
- What the investors were told about FIC Foreclosure's intended use of the proceeds of the distribution.
 - How the proceeds were actually used.
 - If the proceeds were used differently than as disclosed to investors, whether that was a prohibited act.
- ¶ 38 The issues relating to both alleged frauds, if we find a prohibited act, are:
- Whether the prohibited act caused deprivation to the investors.
 - Whether the respondents had subjective knowledge of the prohibited act and had subjective knowledge that the prohibited act could have as a consequence the deprivation of the investors.

4 Analysis and Findings

4.1 First Alleged Fraud: Failure to Disclose FIC Group's Financial Condition

4.1.1 Prohibited act

- ¶ 39 The issue is whether the respondents acted dishonestly because they knew important facts about FIC Group's financial condition and did not disclose them to the investors.

4.1.1.1 Relevant indicators of FIC Group's financial condition

- ¶ 40 We considered the following factors as relevant indicators of FIC Group's financial condition during the relevant period:

- FIC Group’s financial records,
- the status of a credit facility (described below) that FIC Group had with TD Bank,
- significant unfunded liabilities related to the Genesis project, and
- FIC Groups’ cash flow position.

4.1.1.2 FIC Group’s financial records

- ¶ 41 Evidence of FIC Group’s cash flow situation during the relevant period is not well-documented by financial records.
- ¶ 42 The FIC Group financial statements entered as evidence include only balance sheets and accompanying notes. They do not include statements of income or cash flow.
- ¶ 43 Woods prepared a cash report every day listing the closing cash balances in the accounts of the FIC Group companies. Some of those reports are in the evidence. They include notes about which balances were restricted – that is, pre-committed, held for security, or otherwise not available to meet cash requirements generally.
- ¶ 44 What is missing are documents showing FIC Group’s actual cash position during the relevant period – the amounts, nature and timing of expected cash requirements, and the amounts, source and timing of expected cash inflows.
- ¶ 45 The lack of this type of evidence significantly hampers submissions made by both parties about FIC Group’s financial condition.
- ¶ 46 For example, the executive director says that important facts about FIC Group’s financial condition were that it was “deeply in debt” and “owed millions of dollars”. For their part, the respondents admit that FIC Group had “short term” cash flow problems, but maintain that FIC Group had sufficient cash to meet its obligations. Both parties point to the balance sheets and the cash reports to support their positions.
- ¶ 47 However, these documents provide no help to either of them. A cash balance at a point in time, without further information, tells the reader nothing about the cash flow position of the company. Without any evidence of the amount and timing of cash demands and expected inflows, there is no context in which to determine the adequacy of FIC Group’s cash position at any point in time.
- ¶ 48 On one issue, the balance sheets do provide some useful information, when considered together with other evidence. That issue is whether FIC Group would have been considered insolvent under the balance sheet test described above.
- ¶ 49 We have made no finding on this issue, for two reasons. First, although we did not undertake a full analysis of the evidence relevant to this issue, we reviewed it sufficiently to conclude

that it does not establish that FIC Group would have been considered insolvent, or close to insolvent, on the balance sheet test.

¶ 50 Second, and more important, we found that the executive director proved the allegations about FIC Group's financial condition on other grounds, so it was not necessary to consider this issue.

4.1.1.3 Status of the TD credit facility

¶ 51 FIC Group entered into a \$22.1 million credit facility with TD Bank on May 31, 2007 for the acquisition and development of Phase 1A of the Genesis project. The TD facility was FIC Group's largest debt by far (its two other development mortgages were for \$4 million and \$8.9 million).

¶ 52 The TD facility consisted of three demand loans: a \$5.5 million land loan, a \$13.6 million servicing loan, and a \$3 million line of credit. Although demand loans, the commercial arrangement was that they would remain outstanding for a period of 18 months, and were to be repaid through the sale of lots in the Genesis project. The facility was to expire on November 30, 2008 and the loans would then be called, unless renewed by TD.

¶ 53 Security for the TD facility included:

- a \$22.1 million first mortgage against the Genesis project lands,
- an assignment of an investment portfolio held by 0760838 BC Ltd. (an FIC Group company we refer to as 076), and
- an assignment of \$3 million of FIC Group term deposits and credit balances.

¶ 54 WBIC and 076 were also guarantors of the TD facility.

¶ 55 FIC Group was required to maintain the market value of the 076 investment portfolio at a minimum value of \$9 million for the life of the Genesis project.

¶ 56 It was a term of the TD facility that no subsequent encumbrances be filed on the Genesis lands subject to the mortgage.

4.1.1.3.1 Requirement to maintain 076 portfolio at \$9 million

¶ 57 According to FIC Group's combined financial statements, as at January 31, 2008 the market value of the 076 investment portfolio was \$7.1 million, a deficiency of nearly \$2 million.

¶ 58 By the end of February 2008, the portfolio's market value was down to \$6.8 million, and by the end of March, to \$5.9 million.

¶ 59 At the end of April the value was \$7.9 million, but by the end of May had fallen to just over half of the required threshold: \$4.9 million – a deficiency of \$4 million.

¶ 60 In fact, there is no evidence that the portfolio’s market value was, at any time during the relevant period, higher than \$7.9 million, other than on one day – April 17, when the market value was just under \$9 million – a day on which TD’s representative was inquiring as to the balance.

4.1.1.3.2 Term prohibiting subsequent encumbrances

¶ 61 On February 7, 2008 contractors on the Genesis project registered builders’ liens totalling \$5 million against Phase 1 of the Genesis project.

¶ 62 Under an agreement effective on May 13, 2008, the contractors agreed to discharge the liens against Phase 1A upon the payment of \$2 million, and to undertake to discharge liens against Phase 1B “upon registration of the plan”, which we take to be a reference to the subdivision plan for Phase 1B of the development.

4.1.1.3.3 Status generally

¶ 63 The evidence shows that FIC Group management also had concerns about the status of the TD facility generally.

¶ 64 Apparently FIC Group owed a Craig Nelson a sum of money. On January 28 Pasquill emailed Lathigee about paying it back:

“John [Tansowny] and I have discussed cash and we’ve decided to use the money that Malcolm is holding (supplemented with a bit from here) in order to pay off Craig Nelson’s loan.

I’ve told John, and he has agreed that we need to replace the Malcolm money asap (within a week) so that TD doesn’t get upset.” [“Malcolm” was an Edmonton lawyer who held deposits that were part of the \$3 million in deposits and balance assigned as security under the TD facility.]

¶ 65 The next day, Pasquill sent a follow-up email, “Wire transfers went out today repaying \$1,008,040.20. John: we must now replenish funds with Malcolm asap before TD finds out.”

¶ 66 During his testimony, Pasquill was asked what his concern was about TD finding out. Pasquill testified, “It wasn’t so much a matter of them finding out because they knew from time to time that the money in the account would dip below what they wanted in it”

¶ 67 The questioning continued:

“Q So again you’ve got the money out of the account and you want to quickly put it back in before the TD finds out?

A Yeah, finds out is probably overstating the thing.”

Q That's your words, sir?

A Yes, I know. Sometimes you don't always say what you – it's just what pops into your head at the time, but clearly we didn't want to annoy the TD Bank and so clearly we wanted to get – get the account back to where it should be.”

¶ 68 Asked what he meant by TD getting “upset”, Pasquill testified, “Well, clearly they had set an amount that was supposed to be in the account, and that was part of their security. Any lender would want the security to be what they thought it would be.”

¶ 69 The questioning continued:

“Q So it was your understanding that you were in breach of the loan if . . . the amount in that account got below that amount?”

A No, I wouldn't have called it a breach of the loan.”

¶ 70 In a March 2, 2008, email to FIC Group management (discussed more fully below), Lathigee said, “If Genesis loan is to be called by TD which is a real possibility we have to factor then we are ‘doomed’”. On March, he added, “TD loan is a serious concern and the dominoes that would fall.”

¶ 71 At an FIC Group management retreat held on March 5 and 6, the TD facility was the second item on the agenda. These are the relevant excerpts from the minutes:

“A back up plan needs to be ready in case TD fails. 19M. 30 days.
Foreclosure process”

...

“2. Scenario: If TD Called the Loan/Mortgage

- 4 M already sitting as equity. 7M is first equity. 3M did not go into Phase 1.
Net cost on construction is 6-7M. They hold a mortgage on the loan. We need to show that we are moving progress on the property (close on presales).

- 5.4M in presales

- 25% of proceeds will go to us; 75% to TD. Genesis is the only security.

- Conversation with Wayne Sims shows that our fears were not inflated.

What number do we need to get rid of TD? [italics in the original]

- 35M (Phase 1 and Phase 2 funded)

- 10.5% interest rate, 3.5M in fees (secured only by Genesis)

Mike interested in 3 bid options for the \$35M

Instafund is connected with lower cost non-shark money.

From a lenders perspective the land belongs to our members. We are not as secure as we think we are. TD was willing to do a deal so long as everything was locked up.

Timeframe on Instafund – working toward end of March for ending date.”

¶ 72 Instafund was a lender with whom FIC Group was negotiating credit arrangements that could replace the TD facility.

¶ 73 On April 17, 2008 Wayne Sims, FIC Group’s TD account manager, emailed Woods, asking for FIC Group to sign documents:

“Graham: can you give me documentation showing the deposit being in place as I have to verify the margining is in line. We have given Steve the required Control Agreement and Power of Attorney for 0760838 BC Ltd. Due to changes in legislation these documents are not optional and are required. Please forward the docs asap.”

¶ 74 Woods replied to Sims, copying Rea:

“Unfortunately, today I have wired another \$300,000 to CIBC Wood Gundy as the amount per their spreadsheet is just under \$9,000,000.

In regards to the Control Agreement and Power of Attorney, I will talk to Steve when I see him but whose legislation changed? TD, government, etc.”

¶ 75 Rea emailed Woods:

“I have the document here. NO MORE MONEY IS TO BE SENT INTO A TD ACCOUNT OF ANY KIND – THEY ARE OBVIOUSLY NERVOUS AND GRABBING EVERYTHING” [*emphasis in the original*]

¶ 76 Woods responded:

“If we sign these documents, TD will take the \$9M that is in 0760838. That would be terrible. It is even worse considering that we owe \$2M in tax from 0760838.

Steve, how much time would we have to take out the TD with other financing or a repayment? Any idea?

Personally, I would feel as a complete failure if I sign over a \$9M portfolio. I just don’t know how all of this works if they call the loan. I wish I understood better.”

¶ 77 Pasquill, copied on these emails, responded:

“Guys. Let's not panic. In the next couple of days, let's sit down and revisit the cash flow projections in light of this. I really think we can find a way to take out TD.”

¶ 78 In cross-examination, Pasquill said that “panic” was just a form of expression, and not too much should be read into it. “Clearly everyone was getting upset about it so I’m just calming things down a bit. Putting things back into perspective,” he said.

¶ 79 On April 20, Pasquill emailed Lathigee on the subject of how to allocate individuals in the management group to deal with current issues facing FIC Group:

“Here are some thoughts on roles:

1. Plan for TD:

Primary: Steve with consulting help from Matthew. Because of the financial input required, Graham will have to play an important role and Earle will assist as needed.

Also, this is a big job. Steve & Graham need a high level assistant We need to find a candidate fast. . . . Obviously this is urgent.

2. To extent possible, manage the relations with TD: Steve and Graham.

3. Take out TD

a. Build a cash flow plan that defines how we can take out TD and when. . .”

¶ 80 Pasquill was asked in his testimony about his use of the word “urgent”:

“Q Obviously this is urgent?

A Those are the words, yes.

Q So getting a plan for TD at that time was urgent?

A Yeah, I mean it wasn’t life or death urgent, but clearly the sooner we could do it the more flexibility we would have the better off we’d be. And as I said, we weren’t all that happy with the way TD was treating us, so the sooner the better.”

¶ 81 On May 25, Woods emailed Pasquill about the status of the TD facility and the possible replacement funding from Instafund. This is an excerpt:

“I spoke with Kevin of TD on Friday and we had a good conversation. I feel I can work with TD, however, the biggest problem with TD now, in my opinion, is that there is only 6 months left on the loan . . . and little chance of renewal with them which is the biggest problem.”

¶ 82 During Woods’ testimony, counsel for the executive director drew Woods’ attention to these words, asking, “It looks to me like you thought there wasn’t much chance TD was going to renew the loan. Is that a fair reading of that?” Woods answered, “I think that’s a fair reading from that, that by November of, of ’08, we – it would be difficult to.”

¶ 83 Woods testified that FIC Group’s relationship with TD “was good” and “seemed fine.”

¶ 84 In his testimony, Pasquill described FIC Group’s relationship with TD as “cordial” and said that FIC Group had no expectation that TD would call the loan “and in fact . . . would offer an extension.”

¶ 85 Clearly, however, the relationship was not all that FIC Group could have wished. Pasquill said,

“ . . . we certainly had, you know, our feelings about TD. We weren’t particularly happy.

. . .

Most of the dissatisfaction I think was on our side. We were looking for ways to take out the TD. Clearly they had plenty of security there. And in fact removal of some of that security would give us more flexibility.

. . .

We didn’t particularly like some of the demands that they put on us, the restriction on the trading account and the money that had to be set aside and held.

. . . the TD was being tardy with their payments. . . . And there was some problems with the speed at which the quantity surveyor, the surveyor, who was under their direction, was processing things.”

¶ 86 In the end, FIC Group chose not to pursue the funding arrangements with Instafund. Pasquill testified that FIC Group management did not pursue it because they thought they would be able to find better terms with another lender. He testified that they did not feel any urgency to find replacement financing.

¶ 87 During the relevant period, FIC Group had no other source of funding to replace the TD facility.

4.1.1.3.4 Conclusions and findings

¶ 88 The evidence is that the market value of the 076 investment portfolio was continuously well under the required \$9 million level at least until the end of May 2008.

¶ 89 In our opinion, the assignment of the 076 investment portfolio, and the requirement to maintain its market value at \$9 million, were material components of the total security given by FIC Group for the \$22.1 million TD facility. It represented a substantial portion of the amount outstanding under the facility. Equally important, from the perspective of security realization, the 076 investment portfolio of cash and publicly-traded securities was highly liquid, especially compared to the lands subject to the mortgage.

¶ 90 We find that the sustained material shortfall in the market value of the 076 investment portfolio was a material default by FIC Group of the requirement under the TD facility to maintain at a minimum of \$9 million the market value of the 076 investment portfolio.

¶ 91 As for the builders' liens, the respondents say that, in FIC Group management's opinion at the time, the liens were "irrelevant to cash flow". This was because the liens related to unauthorized work, the contractors agreed to discharge the liens, and there were no advances made under the TD facility after the liens were filed.

¶ 92 The liens may not have had an immediate impact on FIC Group's cash flow, but that was not the only issue. Whether or not the liens directly affected cash flow, FIC Group was in default of the term of the TD facility that prohibited subsequent encumbrances.

¶ 93 A term prohibiting the filing of subsequent encumbrances is a common provision imposed by lenders to protect their security for advances made after the date the subsequent security is filed. The provision also gives a lender the flexibility, should the loan get into trouble, to make further advances in the course of managing the situation, without having to negotiate with subsequent encumbrance holders. We find this term of the TD facility was a material term of the facility.

¶ 94 We find that the filed liens were a material default by FIC Group of the term of the TD facility that no subsequent encumbrances be filed on the Genesis project. The default existed from the date the liens were filed until, in the case of the lien relating to Phase 1A, May 31, 2008 at the earliest and, in the case of the lien relating to Phase 1B, until an unknown later point in time.

¶ 95 In his testimony, Pasquill shrugged off the suggestion that FIC Group's default of the two conditions was a breach of the TD facility and denied that there was any question of TD

calling the loan before it came due in November. In our opinion, the communications among FIC Group management at the time show otherwise.

- ¶ 96 When Pasquill wrote Lathigee about using funds from TD’s security to pay back Nelson, he speaks of the need to replace the funds “asap (within a week)” so that “TD doesn’t get upset” and to do so “before TD finds out.” In his testimony, he attempted to explain away this language, saying that it was not really a matter of TD finding out because “they knew from time to time that the money in the account would dip”, and suggesting they were words that just popped into his head.
- ¶ 97 This is a common theme in Pasquill’s testimony. As we note elsewhere in these Findings, Pasquill, faced with clear and unambiguous language from emails contemporaneous with the relevant events, offered weak and vague alternative interpretations of the emails, sometimes supported by assertions for which there is no evidence. We generally found these explanations to be unpersuasive. More often we found they lacked any credibility at all.
- ¶ 98 His testimony does show he understood the importance of keeping the market value of the 076 investment portfolio at the required level: he said the bank had set the amount at that level and it was part of its security. He also admitted that “[a]ny lender would want the security to be what they thought it would be”. Inexplicably, however, he said he “wouldn’t have called it a breach of the loan” although he did admit that “we didn’t want to annoy the TD Bank.”
- ¶ 99 In our opinion, it is not credible that a business executive of Pasquill’s experience (he had many years’ experience as an executive in a large retail business corporation before joining FIC Group as its chief operating officer) would be so blasé about keeping the market value of the 076 investment portfolio at the required level and about the possible consequences of failing to do so.
- ¶ 100 When TD representative Sims asked FIC Group to sign a “control agreement and power of attorney”, Rea told Woods emphatically not to send any more money into a TD account “of any kind” because TD was “obviously nervous and grabbing everything”. Woods agreed, saying that if FIC Group signed the documents, “TD will take” the \$9 million 076 investment portfolio, which “would be terrible” especially in light of \$2 million in income taxes that 076 owed, but did not have.
- ¶ 101 Pasquill urged calm upon Rea and Woods. “Let’s not panic,” he said. The next day he emailed Lathigee about developing a plan to take out TD, a matter on FIC Group’s agenda since the March management retreat. In that email, he described it as “urgent”.
- ¶ 102 Despite Pasquill’s attempts in his testimony to downplay the urgency, FIC Group’s management was clearly seriously concerned about the status of the TD facility:

- In early March, Lathigee described TD’s calling of the loan a “real possibility that we have to factor”.
- The TD facility was the second item on the agenda for the March management retreat.
- The minutes of that retreat noted that FIC Group’s conversations with the TD representative show that “our fears are not groundless”. No further details are provided, but clearly, despite what was apparently a cordial relationship with the individuals from TD managing the account, FIC Group had concerns about the relationship.
- The prospect of TD taking control of the 076 investment portfolio would have meant that the cash in that account would no longer have been available to pay 076’s taxes or to meet other FIC Group cash requirements. That situation would, according to Woods, have been “terrible”.
- TD was “tardy” with its funding payments.
- The plan to take out TD was necessary for FIC Group to “‘contain’ the risk” and avoid “the threat of its balance sheet being ‘seized’ by the TD”.
- There was “only 6 months left on the TD loan and little chance of renewal with them which is the biggest problem.” Woods confirmed that fact in his testimony (he tried to tie it to the November 2008 time frame, but clearly his words speak from the date of the email in April). Pasquill testified that FIC Group believed TD would offer an extension, but there is no evidence of that, nor to refute Woods’ statement in the email, and corroborating testimony, that there would be no extension.

¶ 103 FIC Group was in negotiations with another lender, who ultimately offered replacement financing for the TD facility, but FIC Group turned it down. Both Woods and Pasquill testified that they believed they would be able to find better terms.

¶ 104 In our opinion, this evidence of FIC Group’s relationship with TD and management’s communications about that relationship, show that TD could well have decided to call the loan, especially in light of the material defaults we have identified.

¶ 105 We find that during the period that the TD facility was subject to these material defaults, FIC Group was exposed to the significant risk that TD might decide to call the loans immediately. We find that had TD done so, FIC Group would indeed have been “doomed” – having no funds to repay the loans, it would have immediately become insolvent.

4.1.1.4 Significant unfunded liabilities related to the Genesis project

4.1.1.4.1 Description

¶ 106 The FIC Group combined financial statements for the period ended January 31, 2008 show that Genesis contractors were owed \$9.6 million for work completed to that date.

¶ 107 By the end of February, the Genesis contractor had billed at least \$8 million for work done ahead of the project budget schedule. Pasquill testified that this was work relating to Phase 2 of the Genesis project. The TD funding was only for Phase 1. There was no funding for Phase 2, and the contractor was looking for payment.

¶ 108 In his testimony, Woods agreed, when it was put to him, that the \$8 million in overruns was “obviously a cash problem”.

¶ 109 On March 1 Woods emailed Lathigee, Pasquill [and Rea] about using FIC Foreclosure funds to pay Genesis trades:

“You have indicated the fact that Genesis is the priority. I would like to use the \$700,000 on Monday to pay down or off some of the Genesis trades that are owed money. My plan is to make the mid- to small-trades happy. . . .

Anyway, what I am asking is if I can use the \$700,000 in Foreclosure (leaving \$0 balance) and then the next \$350,000 that is collected . . . will go into the Foreclosure account”

¶ 110 Lathigee replied that he was in agreement, saying, “. . . after we raise 10m then we can pay back the foreclosure fund.” Pasquill also approved, noting that he expected \$900,000 in FIC Foreclosure’s account, so Woods’ proposal would still leave \$200,000 for investment in foreclosure properties.

¶ 111 Hearing that more money than the \$700,000 might be available, Woods replied:

“Could we talk a bigger payment to Gentech?”

Steve and I will be calling Gentech early Monday AM to determine how much to them this week will keep the trades under them from putting liens on Genesis.

I think we can make everyone happy for the time being”

¶ 112 Woods testified that these emails were about “finding some funds to alleviate the trades.” He explained what he was trying to achieve with the unpaid Genesis trades:

“Basically this related to the, the trades being unhappy that they were owed money, and obviously wanted to be paid And so we . . . were attempting to work out . . . an amount that, that kept things moving along on the project.

. . .

And then the term ‘time being’ meaning, get them moving along now, you know, knowing that there obviously would still be a balance owing to them, and that, at some point, you know, we would have to, you know, face that with them at that time.”

¶ 113 Asked if FIC Group had the cash just to pay off all of the trades, Woods testified, “I can’t say specifically. It may have been, it would have certainly been a challenge at that point in time to just outright pay them.”

¶ 114 About the time the cost overruns came to light, Woods was also concerned about the accuracy of the valuations of Genesis on which FIC Group was assessing the profitability of that project. On February 23, he emailed Lathigee. He was responding to a long email Lathigee sent to him, Pasquill and Rea about Tansowny’s compensation and performance. Woods said:

“Mike,

Personally from me to you at this time, your timing on this ties right in with a high degree of uncertainty that I am feeling in regards to the real estate projects. As you are aware, we base our selling prices almost entirely on the future profits of the real estate projects. I think there is a chance that they are way off and this will really make me looking like a chump. Something like this could impact my Chartered Accountant designation. As such, it is personal to me. I can’t tell you over the past week or so how many of the items you have outlined I have been thinking about.

Please do not talk or confront John prior to talking to myself, Steve and Earle.
...”

¶ 115 Lathigee replied, asking if he could share Woods’ email with Pasquill and Rea. Woods consented, and Lathigee forwarded it to them with the note, “Graham is very concerned.”

¶ 116 Woods testified about this email:

“Q Were you concerned on February 23 when you sent that email . . . ?

A My concern was that I believed some information had come to us that perhaps some of the, the figures related to the Genesis project were not as originally projected, and that would have been my concern at that time. And then, going forward, we have to look at that, and I always have to consider we want, we want to operate on the best information available to us in projecting figures out and profits and that sort of thing. And so this is just sort of an indication that, you know, we have got, we have got to be as tight as we can on such projections.

Q Mr. Woods, if we go to your email though, you say – the email says [counsel then refers to the paragraph about his professional designation].

A Yes, that's right. And this, this actually related I believe to the Genesis project itself. But also my comment there was just an indication to them that it's important that we're – when new information becomes available, we assess that and determine the impact on our, on our future estimations. You know, I like to be accurate”

¶ 117 On April 16, Lathigee emailed Pasquill, Woods and Rea, proposing an offering to FIC Group members for equity participation in Genesis. The next day, all three responded with strongly negative reactions. Woods replied:

“No way I am having anything to do with getting our members into FIC’s Vietnam!

I can see the lawsuits coming now.

...

No more good money at troubled money!”

¶ 118 During his testimony, Woods was asked about this response:

“Q And so what did, what did your comment mean when you said, ‘no more good money at troubled money’?

A Well, at this point, we’ve obviously been having – we’ve had challenges with the trades, keeping them moving along. We were having uncertainty as to – we still believe the project to be overly – overall profitable, but we may not know what that figure actually is. And so I don’t think it’s the best time, for, for that reason, to – for members to take a direct investment in a very subordinate position.

...

Q [in reference to Woods’ ‘Vietnam’ metaphor] What were you making reference to here? What are you talking about?

A . . . Bringing them in as – with a direct equity interest in Genesis. Um, putting them at the lowest ranking. There’s, there’s so many issues surrounding that, that it’s not – no go.

And my comment about that, um, I am meaning there that the project is obviously partway completed, and the most – the option we always were pursuing was obviously bringing the project to completion. We did explore other alternatives as we went along. So, that’s sort of my, my comment there.”

¶ 119 Rea’s response was this:

“I APPRECIATE THE IMPORTANCE OF SOLVING OUR CHALLENGES!!!!

AND – I ALSO AM AWARE OF THE HUGE RISKS ASSOCIATED WITH THIS PLAN.

...

1. We cannot market “Profit Participation” because THERE IS NO PROFIT in Phase 1A/1B. Our profit will not be realized for 3 to 4 years from now; and at this time our best return is maybe 10M (excluding financing charges etc.).

2. Unless we TELL THE WHOLE STORY to members; I don’t support ‘selling’ them on the idea of investing...how can they invest in a ship taking on water right now w/o knowing the risks?” [*emphasis in the original*]

¶ 120 Pasquill added, “. . . attracting capital to a project that, at best, would have a rate of return under 10% – and maybe zero – is very difficult.”

¶ 121 In his testimony, Pasquill was asked about the comments in Rea’s email about the profitability of the Genesis project:

“Q So Mr. Rea was aware obviously by that point in time there could be no profit whatsoever on Genesis?

A No, that’s not true, he said no profit on phase 1A and B, which is the issue. . . . There’s still profit on the entire project.

Q So possibly \$10 million three to four years from now?

A Yeah, and that’s consistent with John’s comments. Around this time he was predicting 10 to \$20 million of profit, perhaps more . . .

Q . . . So you were obviously aware -- alive to the fact that at that point in time there could be no profit potentially?

A No, we’re talking about the phase 1A, 1B. There was profit in the larger picture.”

¶ 122 The equity idea was not pursued.

¶ 123 We did not find Woods’ explanation of his concerns at the time credible. At the relevant time, he emails Lathigee, the CEO, directly, that he feels “a high degree of uncertainty” about FIC Group’s real estate projects. He thinks there is a chance that FIC Group’s profit projections are “way off”. He worries it could make him “look like a chump” – so much so that it could possibly affect his professional designation. Now, he suggests that his concern was simply that he likes having the “best information” and likes “to be accurate”, a remarkably benign view of events and a view completely inconsistent with the serious language he used at the relevant time.

¶ 124 Similarly, given the opportunity to explain his reaction to Lathigee’s equity proposal, his testimony was vague and non-responsive. In our opinion, his use of “Vietnam” as a metaphor for the project was intentional, as was his use of the phrase “No more good money at troubled money!”

¶ 125 Like Pasquill’s testimony, Woods’ explanations about the language he used in emails at the time in general does not withstand scrutiny. His testimony about the clear and apparently straightforward language in emails he composed and sent at the time was generally hesitant, vague, and not persuasive.

¶ 126 On April 16, the day the email about the equity idea were exchanged, was the same day on which Pasquill asked Rea and Woods not to panic about the TD’s request for control over the 076 investment portfolio. In that email, he was also thinking about Genesis. He said:

“One of the biggest unknowns to me is Genesis sales - namely a) to date & where the money is and b) how quickly we could sell and get payment for \$8-10 million in lot sales.”

¶ 127 On May 5, Pasquill sent an email to Lathigee that he testified was a draft of an email for Lathigee to send to Tansowny. It included this sentence: “Genesis has turned out to be a financial disaster.” Lathigee returned the email with some suggested changes. His version left that sentence unchanged. Pasquill testified he thought that Lathigee’s version was the one ultimately sent to Tansowny, but could not “categorically” say so.

¶ 128 In his testimony, Pasquill said it was necessary to “clarify” what he meant when he said Genesis had turned out to be a “financial disaster”:

“What we knew about Genesis was that we were – we were promised and, you know, right up until the beginning of March, that the profit in Genesis would be in the 20 to 30 million dollar range. It was now looking like it was going to be more like \$10 million. To my mind, that constituted in itself a disaster. That doesn’t mean that couldn’t still make profit. . . . Nobody should allow that on their watch. . . .

The reporting we got from John was not good enough and one could reasonably argue that in the context of what had happened that was a disaster.

So those are the kind of things that I am talking about by disaster. I don’t mean this is a wipeout, we’re going to lose money on it, that kind of disaster. But any time you can’t account for over spending by \$10 million and cut your profits lower in half, that to my mind is a disaster.”

4.1.1.4.2 Conclusions and findings

¶ 129 The Genesis project was FIC Group’s biggest. It represented its largest expenditures and secured its largest debt. The evidence is clear that Genesis was in serious trouble during the relevant period, and so, as a result, was FIC Group.

¶ 130 We find that:

- Genesis incurred \$10 million in cost overruns that Pasquill said FIC Group could not account for, including \$8 million in outstanding contractor invoices that did not qualify for funding under the TD facility.
- There was no other source to fund the \$8 million. Woods was happy to get \$700,000 from the proceeds of the FIC Foreclosure offering to try to make the smaller contractors “happy”, albeit only “for the time being.”
- The profit expectations for Genesis were dashed. There was no longer any profit expectations for Phase 1, meaning any profits could not be realized for three or four years out, when Phase 2 would pay out. The profit projections for Phase 2 were at least cut in half, and could have been “zero”, according to Pasquill in the email exchange about Lathigee’s equity offering idea.

¶ 131 Pasquill’s description of Genesis as a “financial disaster”, Rea’s as “a ship taking on water”, and its comparison by Woods to the war in Vietnam, were apt.

4.1.1.5 FIC Group’s cash flow position

4.1.1.5.1 Management communications about cash flow

¶ 132 In January 2008, FIC Group owed its brokerage firm \$210,000 for investments FIC Group had made in private placements. On January 24 Woods emailed Pasquill:

“We have to ensure that Mike and the brokers are fully aware that we are not presently in a position to get into private placements. In fact, even with funds already in the brokerage accounts, we may find ourselves in a position where we need to collapse some of the positions. The private placements are impossible to collapse and we may need the cash over the next couple of months.

This \$210,000 has to be the last.

You or Mike need to speak with each and every broker ensuring that liquidity is available if needed. I fully concur that this reality stinks but I have to be 100% honest with the situation. Any private placements are horrible for cash flow right now.”

¶ 133 Pasquill forwarded Woods' email to Lathigee, adding:

“We've told Rick that we can only give him \$150,000 and to re-deploy the stock elsewhere. But, it means that \$150,000 of the 0760838 cash will have to go to Canaccord.

Mike: Graham's point about private placement cash calls is an important one going forward – at least until we get enough real estate proceeds to breath [*sic*] easy.”

¶ 134 Pasquill testified that his statement that FIC Group needed to wait until there were “enough real estate proceeds to breathe easy” was accurate, but “requires some explanation of the context.” He went on to provide that explanation:

“That's what it says, but when I talked about breathing easy, as I mentioned before there are – we have to pay close attention to the day-to-day kind of cash flows and their ups and downs. Not that we didn't have the ability to cover them but we just had to be cognizant of them, and to go heavily into private placements would reduce our flexibility.”

¶ 135 This is an excerpt from a document headed “Executive Management Minutes” and dated February 5, 2008:

“2. Cash Flow / Calmar

Mike will try to raise cash at upcoming meetings.

Operating side – amounts are there

Big numbers in real estate – John reports that we are still in struggling mode.

Solutions to cash sits in Calmar – well over 30 sold lots (\$6m). Money flowing in should solve our short term issues.

John anticipates several million collected by end of February.

1 M vendor take back mortgage which was differed. Still behind on cash flow.

1. Closing Calmar (Solves short term)

2. Financing letter (\$2M)

3. TD Financing approval (taken a long time to complete)

4. Leduc & Willow Park money flowing in as well. John to have firm date with a few million dollars.

Bottom line – no emergencies at this moment. For larger payments we will need an inflow of cash.

20 new subscription agreements came in from Jan 29th Econ Call and WBIC subscriptions to be sold tonight in Vancouver will ease short term cash flow.”

¶ 136 By February 27, FIC Foreclosure had raised \$845,000. The next day Woods transferred \$700,000 of the funds to FIC Group's Crossroads project.

¶ 137 Pasquill replaced most of the \$700,000 with proceeds from the FIC Projects distribution.

¶ 138 As described earlier, Woods emailed Lathigee, Pasquill and Rea on March 1, asking about using FIC Foreclosure funds to pay Genesis contractors. Lathigee replied that he was in agreement. On March 2, Lathigee sent a second reply, this time copying Tansowny. Lathigee said:

“Our first priority is to save the company. If Genesis loan is to be called by TD which is a real possibility we have to factor then we are “doomed”. Given the extreme circumstances that we have only fully known this week the plan below suggests all our conversations this week will only relate to sales and bringing in cash everything else is secondary.”

¶ 139 On March 3, Tansowny sent Pasquill invoices for meeting fees and his March retainer. In his reply, Pasquill told Tansowny that Lathigee was looking for some other information. Tansowny responded. In his response to Tansowny, Lathigee said:

“Other than monthly retainers there is no other outgoing funds at this point due to the very difficult situation FIC is in. You will receive \$21000 until FIC has caught up on its payments to suppliers, contractors, etc in Edmonton.”

¶ 140 When Tansowny questioned Lathigee’s email, Lathigee responded forcefully, copying Pasquill:

“Earle,
I am on overload trying to get cash into FIC. I don’t have time for this to address until Wed.

John,
ORGANIZATION IS SUCKED DRY OF CASH!”
[emphasis in the original]

¶ 141 The exchange continued between Tansowny and Lathigee, with Pasquill copied:

Tansowny:
“I have brought to your attention many times that the cash needs were reported and known for many months.

In the last two months, I have sold well over \$7M in Calmar lots, over \$2.5M in Blackhawk and Willow Park transactions as well as facilitated over \$7M in loans through my contacts.

That's well over \$16M in total.

How much more do we need?"

Lathigee:

"These issues and many others will be addressed at the management retreat. I will speak with you then. In the meantime I have instructed Earle to hold all cash. Your 21K is released and that is it. We are in a very bad situation and I can't waste my time other than focusing on saving FIC for the next 30 days. You are to keep this email confidential as an internal email only. Focus on sales and bringing in cash and nothing else. If it relates to that I am happy to chat anything else I do not have the time or interest."

Tansowny:

"I was serious and am out of the loop.

How much more do we need?"

Lathigee:

"John there was much cash that was said to be coming in from you and it has not or it has been delayed by months. We need about 10m to stay solvent. I am all over this right now and don't have any time to focus on anything except this. The TD loan is a serious concern and the dominoes that would fall. Just create pressure to buyers to get funds in where you can and you come to the man meeting on Wed.

Please allow me to go back to getting money in for FIC. This is the worst situation we have ever been in. Earle will be your point of contact as I don't have any time to tie up if it is not bringing in cash."

¶ 142 Later that afternoon, Pasquill sent an email to Lathigee, Woods, Tansowny and Rea, detailing the terms of the FIC Projects promissory note offering.

¶ 143 Another series of emails between Lathigee and Tansowny culminated in this email from Lathigee at midnight on March 5, the day of the management retreat:

"John the seriousness is that the company is close to insolvency with a TD loan that could be called. We have no cash flow. There was much talk from yourself about delivery of cash but the results are not there. We are suffering from no cashflow [sic] and now in desperation we are doing a promissory note offering that will encompass the entire staff for one month to save the company. As stated the best thing you can do is focus on sales, rezoning and get in money that is owed to us in the fastest manner possible. Call on favors,

pressure those who owe us money and do your best to stave off those we owe money. I am expecting everyone to burn the midnight oil until results are attained. The last week while you were on vacation has been very hard on the entire management team to deal with the reality of what is going on but they have worked diligently on a plan to save FIC. I am going to bed now and will see you tomorrow.”

¶ 144 Pasquill testified that FIC management, including Lathigee and him, had become frustrated with Tansowny over management issues, the Genesis cost overruns, and expense claims. These are excerpts from his testimony about his interpretation of Lathigee’s emails:

“Q Now, Mr. Lathigee in his email . . . says . . . ‘If Genesis loan is to be called by TD which is a real possibility we have to factor then we are “doomed”.’ . . . Did you understand the . . . FIC Group of companies . . . were ‘doomed’?”

A No . . . I didn’t take that word very seriously we actually had some pretty good hope of some good sales. We had the prospect of revenue coming. When we get to the financial statements, you will see that our equity and our cash and our assets were in a reasonably healthy state. I knew the facts.

And I also knew that Mike here was responding emotionally. He was addressing it to John Tansowny. I knew that he was preparing for negotiations with John coming up on the 5th of March. And in fact he called me on or around, I don’t know whether it was the 2nd or 3rd or 4th of that month, to tell me basically, don’t worry, don’t take this too literally, this is targeted to John to light a fire under John.

. . . And I had absolutely no sense of doom or gloom during this period of time.

. . .

Q Now, the email I would like to focus on – [Lathigee is] talking about needing 10 million to stay solvent ‘This is the worst situation we have ever been in.’ . . . Did you agree with that assessment?

A No . . . this falls into the same category as the previous email. . . . what we see here is this kind of emotional response . . . and then him kind of saying, well, I am going to be negotiating with John and I am going to paint a bad picture here to soften up that negotiation. That’s the way I read it.

Now he mentions . . . concerns about TD calling the loan. Again, to my mind, that’s a tactical ploy in his dealings with John.

. . .

We had ongoing interactions with [TD]. They were an annoyance to us. We didn’t like them particularly. . . . But I didn’t believe for a minute they were going to call the loan.”

¶ 145 Woods also testified that his reaction to Lathigee’s reference to potential doom was that “we were not doomed”. He said, “. . . this was one of the ways for Mike to attempt to motivate our real estate consultant to basically do his job.” “We had cash flow to meet our short-term requirements, um, among other things,” he said.

¶ 146 Woods was questioned further on Lathigee’s email’s to Tansowny:

“Q . . . do you have any thoughts on this sentence here, “We need about 10 million to stay solvent”?”

A Yeah, I don’t exactly know where that figure came from.

Q But based on your recollection that this financial situation of the company was at the time, do you have any comment on the suggestion that some money was required to stay solvent?

A Yeah. Well, further to my previous, previous documents, we had assets, we had unleveraged assets. We had cash for short term, short term requirements. So, I don’t really agree that we were near, like, insolvency or, or need 10 million to avoid – to stay solvent at this point in time.”

Q What about the comment, “This is the worst situation we have ever been in?”

A Again, further to motivating him to generate sales.

. . .

Q . . . Did you – do you agree that there was no cash flow at the time?

A No, I do not.

Q Well, why do you say that?

A Because there was cash flow.

Q What about the statement, the use of the word desperation?

A I don’t agree with that either. Again, and just further to that, um, this is the day before that, that, that management meeting that I mentioned previously. Um, again, more of a, of a, motivational factor is really the gist of this email, in my opinion.”

¶ 147 The management retreat followed, on March 5 and 6. Present were Lathigee, Pasquill, Woods, Rea and Tansowny.

¶ 148 The minutes of the retreat are in the evidence. In his testimony, Pasquill testified about how they were prepared and their accuracy:

“Q Do you know who prepared [the minutes]?
A [LG], who was one of our assistants, sat in on the meetings and typed up minutes.

Q Okay. And you’ve had a chance to review these minutes prior to testifying today?

A Yes, I have.

Q And to the best of your recollection, do they accurately reflect the gist of what was discussed?

A Yes, they do.”

¶ 149 FIC Group’s financial condition, in particular its cash flow, was the first item on the agenda. These are excerpts:

“1. Overview
- 244K in interest payments alone for Genesis
- Steve, Graham and Earle [Rea, Woods and Pasquill] assembled a 4 month plan which outlines that we can get through the next 4 months without any new revenue. They have assembled an operating plan and financing plan that will sustain us in the next 4 months (conservative plan).
- They believe the next 4 months is pivotal in the course of FIC’s lifespan
- Clean up problem issues ie: liens to be removed

- Four main areas:
1. Cash flow (generating sales)
...
3. General Management . . . in the next 4 months all new projects need to be monitored and approved (any non-liquid investment)
4. Workload. Exec team operating at maximum capacity.”

¶ 150 By early March, FIC Group’s management knew that 076 had a \$2.2 million tax bill coming due that it could not pay in full. This was reflected in the minutes from the retreat:

“2.2M – need to file by the end of March 08
Question is how we spread the payments out. If you don’t file by end of March we will incur 10% interest that is not tax deductible.
ACTION: Graham to speak to Gov’t and see when we can pay the minimum amount with an attached action plan as we are in a cash crunch.” [*bold face in the original*]

¶ 151 At the hearing, Pasquill was asked if it was true that FIC Group did not have the cash to pay the full \$2.2 million, given that it was “in a cash crunch”. He said:

“I assume so, although I can’t be absolutely sure about the way you stated it. Clearly we would like to have a payment plan, and that – I guess maybe what I should do is just pause for a second to back up a little bit and say we really need to make a distinction here between the pressures of the day-to-day cash which we had every confidence we could meet . . . [a]nd the larger picture of whether or not we were solvent”

¶ 152 Counsel for the executive director pressed Pasquill on the phrase “as we are in a cash crunch”:

“Q . . . That minute says that because FIC was in a cash crunch at the time, wasn’t it?

A There was a need to manage the short term cash, yes.

Q That was a cash crunch?

A You call it whatever you want. Obviously somebody there called it, I didn’t make the minutes, but, yeah, there was an upcoming payment due and like any upcoming payments, we had to manage it and make sure do it in the best way . . .

. . .

Q What was the cash crunch at the time?

A I don’t recall off the top, except that – no, I’m not going to speculate . . .

Q So from this executive committee retreat meeting the reference to cash crunch, you don’t recall what that relates to? There was a cash crunch, you just don’t recall what that relates to? There was a cash crunch, you just don’t know what it was?

A Yeah, we keep coming back to the term cash crunch. I’ll come back to the term of cash management.”

¶ 153 When Woods testified, he was also asked about the use of the phrase “cash crunch”. He said, “I think I’m more – I’m not really – nobody liked the use of that term there. I didn’t type it up.” Asked, “Were there no cash problems?”, Woods replied, “Well, there’s cash – there was all – you know, cash problems throughout, but we’ve always, we viewed them as short term in nature, as I mentioned previously.”

¶ 154 The operating plan and financing plan that the minutes describe as having been “assembled” by Rea, Woods and Pasquill was not entered into evidence. In any event, FIC Group’s cash flow problems continued.

¶ 155 On March 14, Rea emailed Pasquill, noting, “As of 12pm today we have \$611,879 in promissory note money in hand” and asking if he can use the funds to pay off Genesis trade

creditors in order to remove liens. Pasquill replies, “Sorry Steve” and explains that the funds must be held until a closing on April 1.

¶ 156 A few days later, on March 28, Woods is juggling cash to pay 076’s taxes. In an email with the subject line “Cash calls . . . are killing us”, he writes:

“Earle,

Please ensure from Mike [Lathigee] that the recent request for \$200,000 has not been delayed as I must see that amount in [076’s account] by the end of Wednesday. I have printed the tax return and the balance owing exactly matches the figure that I had accrued within the accounts of 0760838. . . .

Going forward, I envision funds being loaned from FIC Real Estate Projects Ltd. to 0760838 to pay the remaining taxes. HOWEVER, ultimately, within a reasonable time, 0760838 must pay back the amount to FIC Real Estate Projects Ltd. What has to happen to accomplish this within 0760838 is, first and foremost, no private placements which is what we have been saying for several months. As (a) private placements become publicly traded and (b) hopefully other holdings rise again then (c) the positions are sold and FIC Real Estate Projects Ltd. is repaid. Ideally, all is repaid by 30-Sep-2008.”

¶ 157 On March 15, in reference to the FIC Projects distribution, Woods emailed Lathigee and Pasquill:

“ . . . we are in a tight cash situation. People cannot view this promissory note money as ‘free money’ as it is ‘desperation money’. In effect, this money is already spent.”

¶ 158 During Woods’ testimony, respondents’ counsel referred him to this email, asking, “what are you saying here?” The following exchange took place:

“A I’m – it is obviously a poor choice of terminology, but as I indicated, I was quite upset when I put this email together. What I’m saying, what I – the gist of it is, this money is earmarked for the real estate projects, and I want to, you know, move as much of that as I can to that, and not have it eroded by other, by other parties taking some of it. . . .

Q Well, at the time, Mr. Woods, did you think FIC was in . . . desperation?

A No, not at this time. Still, we obviously still, we had cash. We had short term issues. But as we mentioned previously, um, and the item is

of a long term nature. We could refinance. We had assets. We had assets to leverage.”

¶ 159 Pasquill also testified about Woods’ March 15 email:

“Q Mr. Pasquill, the \$10 million raised for the promissory notes – that was desperation money, wasn’t it.

A I wouldn’t use the term desperation, no. It was certainly advantageous to have it, there’s no question.

...

Q Mr. Tansowny is not on this email, is he?

A No, he’s not.

...

Q [After quoting the email] . . . Mr. Woods was correct, wasn’t he?

A Mr. Woods was correct that it was already spoken for or spent. He’s correct that it’s free money [*sic*]. I don’t agree it was desperation money.

Q This email wasn’t part of some secret plot to trick Mr. Tansowny about how the company was doing, was it?

A No, not this one. The other ones were intended to influence Mr. Tansowny. I wouldn’t use the word trick, but they were different emails. I just want to make sure that we’re clear about the intent of the other ones.

...

Q Mr. Woods is telling yourself and Mr. Rea, reminding you that the promissory note money was not free money, it was desperation money?

A You will also note the term desperation money is in quotation marks. He could very well have been quoting Mr. Lathigee’s term.”

¶ 160 On April 15, Pasquill emails Lathigee to tell him the disposition of the proceeds of the FIC Projects offering, as follows:

\$ 3,000,000	To top up the 076 account to TD minimums
\$ 2,000,000	To Genesis trade payable to remove liens
\$ 1,695,000	As a reserve “for interest payments and operations”
\$ 1,675,000	To FIC Foreclosure
\$ 660,000	To operations
\$ 230,000	To payment on Crossroads
<u>\$ 240,000</u>	To “CD and WBIC for Rick Langer”

\$10,000,000

¶ 161 On the same day, Lathigee emailed Pasquill and Woods:

“I need as much money as possible to buy foreclosures. I believe I can make 100% on the money I receive no matter what the amount in less than a year. This is the best use of proceeds and I don’t want to put all our money in things that are not generating income. Let me know all our assets and what I can get cash immediately or soon. How much of the 10m can I have?”

¶ 162 Woods replied:

“The \$1M that I moved to Prospera foreclosure yesterday. That is it!”

¶ 163 Lathigee responded:

“sorry guys not good enough. putting the 10m into something that is going to generate less profit makes no sense. I want a meeting . . . to discuss where I can get funds. My responsibility is to maximize gains for shareholders and so we have to take out cash on underperforming assets.”

¶ 164 Pasquill then joined the conversation:

“Just a reminder Mike that we raised the \$10 million to solve our cash flow pressures related to the real estate – not for new investments. . . .”

¶ 165 Woods emailed Pasquill, saying, “Call him and indicate that we have a plan and cannot use any more money. As CFO, I am keeping a reserve for promissory note financing and financing interest and it will not be touched.”

¶ 166 In this testimony, Pasquill was asked about his statement to Lathigee that the \$10 million was raised to “solve our cash flow problems.” He answered:

“A As I said there was cash flow pressures in the short run related to the real estate, and that was – and we stated that that was the purpose for the real estate investment and that’s what enabled us to do.

Q Neither yourself nor Mr. Lathigee mentioned on that call that the \$10 million being raised was to solve FIC’s cash flow pressures related to the real estate, did you?

A That was a consequence.”

¶ 167 On April 15, funds started to flow in from the WBIC distribution. Pasquill emailed Lathigee and Woods that “we will have some WBIC funds flowing soon.” On April 17, he emails

them again, saying: “. . . if we have to along the way, we could use the \$1 million coming to WBIC”

¶ 168 In Pasquill’s April 20 email to Lathigee about “roles” (referred to earlier), concluded, “This real estate crisis needs to be #1 priority”. This is what he said about that language in his testimony:

“Q The real estate crisis you were talking about of course was FIC’s real estate crisis?

A Well, again, crisis may be an overstatement. But FIC’s real estate challenges relative to making the payments on some purchases, and moving forward, which is part of the day-to-day, week to week, month to month cash management that I spoke about.

. . .

Q The word you put in there this real estate crisis needs to be number one priority.

A Those are the words. I don’t want to overstate the word crisis because I think some of these words have been overused, but that’s what the words say.

Q That’s because it was true, correct?

A Well, depends, crisis is very subjective term. You obviously attach more to it than I do.

Q That’s a term you just throw around?

A No, but there is some range of interpretation of it.”

¶ 169 On May 6, Lathigee was looking for cash to invest in foreclosures. He emailed Pasquill and Woods under the caption “all funds must participate in the foreclosure opportunity:

“The foreclosure deal is the most profitable I have ever seen. We are letting cash sit idle and not proactive enough to earn profits for our members.

. . .

“By the end of tomorrow I would like to know how much available cash we have in other funds that can be used for the foreclosure opportunity.”

¶ 170 Woods replied, predictably:

“There is no cash available from any of the other funds at present.

All amounts are presently spoken for with various required payments.

As bulks of funds become available, I will indicate so and we can consider the foreclosure deal accordingly.

Mike, please remember that despite the good feeling around the sale of foreclosure fund right now, there are many moving parts and payment requirements that Steve, Earle, and myself monitor on a daily basis. I like the foreclosure deal and would certainly tell you if we have money available to invest.”

¶ 171 Lathigee responded:

“Gents,
I need your help to get funds. Edmonton is not going well and better we plug into something that makes money. I trust your judgement and need to be kept updated.”

¶ 172 The next day, May 7, Pasquill emailed Woods. The caption was “Foreclosure Fund”:

“Smile! We got \$1 million in cheques today.

FYI: Mike is wanting to do some foreclosure ‘short’ sales to the tune of about \$2 million as funds are available.”

¶ 173 Woods replied along the same lines as he did the day before:

“ . . . I am willing to commit the \$1,400,000 to Mohawk next week and the amount that Rogue needs in the Bank of America account but that is it until the week after next.

We are still in serious dire straights [*sic*] here with Genesis and other payments that need to be made before any ‘short’ sales. Unfortunately, we cannot forget about Genesis and must still consider that we may need to use foreclosure funds. Also, on the horizon is the June 1st interest payments to the first promissory note round.

I don’t mean to be the one peeing in the pool but I am firm on this until we have clarity around Genesis, in particular.”

¶ 174 This was Woods’ testimony about his statement that FIC Group was in dire straits:

“ . . . at this point . . . with Genesis still, you know, believed to be profitable. But again, with what’s happening with the trades and, and the work that’s been done and hasn’t been done yet, you know, there’s not an absolute certainty

regarding the outcome of the project. So, I'm just sort of being, being, I would say conservative, in that I want to preserve as much, have as much cash available to meet those requirements as I, as I possibly can, or as we possibly can."

¶ 175 Pasquill forwarded Woods' reply to Lathigee and added:

"Graham is correct. We need to be sure about the real estate situation before more funds are released."

¶ 176 Lathigee responded:

"I understand the situation and have frustration that with [InvestFest] coming I have a great way to generate at least another \$1 million in profit and cannot as we have to use elsewhere. I need to be kept closely updated what funds are available and when."

¶ 177 Two months later, cash was still the concern. On July 28, Woods is bothered that Lathigee has him working on things that do not deal with cash flow. He emails Pasquill:

"You and I are both aware that priorities right now are as follows:

- Cash balances (bank accounts);
- Cash liquidity;
- SB1 filing w/ FIC USA 30-Apr-2008 audited financial statements; and
- FIC Canada audit.

Overall, any piece of workload that helps us with either (a) cash balances or (b) cash liquidity are priorities. The above four all fall into this area. . . ."

¶ 178 Pasquill forwards Woods' email to Lathigee in an attempt (ultimately unsuccessful) to intercede on Woods behalf, saying, "Graham is right. There is far too much urgent stuff that can impact cash and profits."

4.1.1.5.2 Cash management practices

¶ 179 The evidence, including the communications among FIC Group's management described in the previous section, shows that FIC Group was run, from a financial point of view, as one entity. Cash obtained through financings or otherwise by individual FIC Group companies was distributed among other FIC Group companies on the basis of where cash was needed. FIC Group distributed cash among the companies through a web of inter-company loan arrangements.

¶ 180 Woods described in his testimony about how FIC Group allocated cash among the companies in the group:

“Q . . . we have heard earlier evidence at this hearing describing . . . ‘intercompany loans’?”

A Yes.

Q Is that a term you are familiar with?

A Yes, it is.

Q Can you explain to me how that worked?

A Sure. There would be funds available in the various companies. And as part of our decision, we would use those funds for the various real estate projects. And it would, in effect, be a, a movement of cash down from the, um, different – from the top companies down to the different real estate projects.

Q And what would be the terms of those loans?

A Uh, I believe they, during this period, would have been one per cent per month
...

Q Yes. And would there have been a, a length of time, a term on these loans?

A The term, we, obviously as the projects were realized, then, then the repayment would have happened. So, there wasn’t really no – wasn’t really a term attached to them, a set, like, three months or six months. We just envisioned that, obviously, when, when the projects realize the profits, and the funds come in, it would be, you know, the loans would be repaid.”

¶ 181 Woods testified that he prepared a cash report that listed the cash balances in all of the FIC Group companies’ bank account every morning:

“ . . . I did them every day. In fact, I believe I started doing them, as one of my first duties, I wanted to, when I first started there, get a sense of obviously what your different cash balances are. To me, it was very important to know that. And so I believe I began this in May of, of 2007, and would, would, would do it as a daily exercise at the start of each day.”

¶ 182 An examination of these reports reveals information that may have motivated Woods to keep such a close eye on cash flow.

- ¶ 183 The first report in evidence is that for February 3, 2008. It shows a total of \$2.6 million in cash balances in 32 accounts for 12 FIC Group companies. Of this, only \$800,000 is free cash (our term, not Woods’), that is, cash available to meet general cash flow requirements. The balance, \$1.7 million, was held in the accounts for the Genesis project and carried the notation, “Use is restricted”.
- ¶ 184 The report for February 21 shows free cash unchanged at \$800,000; the report for February 24 shows free cash at \$900,000; and the reports for February 28, March 9, and 16 show free cash at \$1 million.
- ¶ 185 In the report for April 6, free cash rises to \$8.6 million, the improvement almost entirely attributable to \$7.6 million raised from the FIC Projects distribution.
- ¶ 186 The report for April 10 shows free cash of \$8.9 million, \$5 million of which was the FIC Projects proceeds.
- ¶ 187 Although all of these cash reports had notations indicating the cash balances that were restricted, the notations in the April 14 report were much more detailed. Woods testified that this was because this report “was a special one where I wanted to reiterate what was available and what wasn’t for different purposes.”
- ¶ 188 The April 14 report showed total cash balances of \$12.7 million, less:
- \$0.3 million in FIC Management, labelled “Operations”
 - \$3 million in 076 “gone to Wood Gundy for TD security”
 - \$3.3 million Genesis on the Lakes, labelled “CAN’T TOUCH”
 - \$1.3 million in FIC Foreclosure, labelled “YES”
 - \$4 million in FIC Projects, labelled “\$2.5 million of this to Genesis, the rest is interest reserve”
- ¶ 189 In determining the free cash identified in this report, we have excluded the \$1.3 million in FIC Foreclosure that Woods labelled “YES”. As we have found in the analysis of the second alleged fraud, those funds were not available to FIC Group for general cash flow requirements. On that basis, the free cash shown on the April 14 report was \$800,000 – where it was on February 3.
- ¶ 190 On April 15 Woods emailed this report to Pasquill and Rea with the notation, “To reiterate my position.” Pasquill forwarded the email to Lathigee the same day. During his testimony, Woods was asked about this email:

“Q . . . I take it, your position was that there was not a lot of cash available at that point in time?

A I don’t, I don’t know what I was saying there when I am saying that. Obviously, the, that cash debt cash flow was attached and I, I think I

am more saying, here's the situation. I don't recall my, my thinking at the time on that, on that issue.

Q Well, maybe this will help refresh your memory. . . . The bottom of the page shows an amount . . . roughly 12.652 million? Do you see that there?

A Yes, I do.

Q And the only non-minimal amounts which are available or where you have a "yes" next to, are the \$1.3 million approximately raised in FIC Foreclosure Fund.

A Yes.

. . .

Q So does that help perhaps refresh your memory about what you were reiterating, as far as your position goes in the email, by setting this and by adding those notations?

A I'm, I'm not sure. I'm just – I think I am reiterating whether there's cash available or whether there's not cash available, yeah."

¶ 191 The last cash report in evidence, the one for May 1, showed free cash of \$1.4 million; only \$400,000 was left of the FIC Projects money.

4.1.1.5.3 Conclusions and findings

¶ 192 Pasquill and Woods testified that FIC Group was experiencing what they described as "short term cash flow problems" and the respondents concede that in their submissions.

¶ 193 In their testimony, both Pasquill and Woods attempted to play down the severity of FIC Group's cash flow problems.

¶ 194 At the relevant time, Pasquill told Lathigee that FIC Group had to avoid investment in private placements until FIC Group had "enough real estate proceeds to breathe easy". In his testimony, he said by "breathing easy" he meant that "we had to pay close attention to the day-to-day kind of cash flows" and "[n]ot that we didn't have the ability to cover them."

¶ 195 Pasquill and Woods testified that they didn't take Lathigee's use of the word "doomed" seriously. Nor did they agree with his statements that FIC Group needed \$10 million "to stay solvent", that it had "no cash flow" and that "it was the worst situation [FIC Group] have ever been in." Pasquill said that was because the financial statements showed that FIC Group's cash (among other things) was "in a reasonably healthy state." Woods said it was because FIC Group had enough cash flow to meet short term requirements.

¶ 196 Pasquill and Woods also testified that Lathigee, in the emails he sent to Tansowny in early March, deliberately exaggerated FIC Group's financial problems. This they say, was part of a

strategy to address performance issues with Tansowny, although their theories about the details of that strategy differ. Pasquill testified it was to soften up Tansowny in anticipation of negotiations he and Lathigee would be having about his compensation. Woods testified it was to motivate Tansowny to perform better.

- ¶ 197 The minutes of the March management retreat say, in the context of 076's \$2.2 million income tax liability, that FIC Group "was in a cash crunch." When these words were put to Pasquill and Woods in their testimony, both prevaricated. Pasquill, when pressed about whether that statement was true, said, "You call it whatever you want. Obviously somebody there called it, I didn't make the minutes, but yeah, there was an upcoming payment we keep coming back to the term cash crunch. I'll come back to the term of cash management."
- ¶ 198 Woods testified that "nobody liked the use of that term there" and that "there was . . . cash problems throughout . . . but . . . we viewed them as short term in nature"
- ¶ 199 At the time, Woods emailed Lathigee and Pasquill that FIC Group was "in a tight cash situation" and that the FIC Projects money was "desperation money". In his testimony, he described this as a "poor choice of terminology", and what he really meant was that the FIC Projects money was "earmarked for the real estate projects".
- ¶ 200 Pasquill testified that he would not use the term "desperation" money to describe the proceeds from the FIC Projects distribution, although allowed that it was "certainly advantageous to have it." He suggested that maybe Woods was quoting Lathigee when he used the term "desperation" in one of the Lathigee emails.
- ¶ 201 At the time, Pasquill emailed Lathigee. "Just a reminder Mike that we raised the \$10 million to solve our cash flow pressures related to the real estate" In his testimony he admitted that was the purpose of the FIC Projects funds raised.
- ¶ 202 Pasquill emailed Lathigee that "This real estate crisis needs to be #1 priority." In his testimony, he said, Well, again, crisis may be an overstatement I don't want to overstate the word crisis because I think some of those words have been overused . . . crisis is a very subjective term."
- ¶ 203 Woods emailed Lathigee that FIC Group was in dire straits. Asked in his testimony what he was talking about, he said " . . . I'm just sort of being . . . conservative, in that I want to preserve as much, and have as much cash available to meet . . . requirements."
- ¶ 204 In several instances, Pasquill and Woods testified that they believed FIC Group's cash flow problems would be solved by Investfest events and lot sale revenue from projects under development supplemented, if necessary, by other asset sales or borrowings secured by unencumbered assets.

- ¶ 205 We did not find Pasquill’s and Woods’ evidence credible. It contradicts the record of all that was said and done by them and other members of FIC Group management during the relevant period. In our opinion, the interpretations in their testimony of the events during the relevant period can best be described as revisionist.
- ¶ 206 Their evidence boils down to explanations that the language used in the correspondence among FIC Group’s management was a poor choice of words, was not what they really meant to say, or was capable of an interpretation at odds with the plain meaning of the words used. Those kinds of explanation could perhaps be credible had all of that correspondence included only occasional overstatements but appeared otherwise to be consistent with the facts generally, but that is not the case.
- ¶ 207 In our opinion, the evidence is clear and unambiguous that FIC Group was experiencing severe cash flow problems during the relevant period.
- ¶ 208 The evidence includes a steady stream of emails from January through July 2008, among Lathigee, Pasquill, Woods, Rea (and, sometimes, Tansowny) about FIC Group’s cash flow position.
- ¶ 209 The emails start in January, with Woods warning Lathigee and Pasquill that private placement investments are “horrible for cash flow.” Pasquill agrees that cash must be preserved until revenue flows in from the real estate projects. Then they can “breathe easy”.
- ¶ 210 The executive management minutes from February 5, referred to earlier, show cash flow is being given close attention. Management’s conclusion? “Bottom line – no emergencies *at this moment. For large payments we will need an inflow of cash.*” [our emphasis]
- ¶ 211 In February, Genesis contractors file \$5 million in builders’ liens against the Genesis project. FIC Group management learns of \$10 million in cost overruns on the project, and is facing invoices of \$8 million with no source of funding in sight. Meanwhile, 076 owes income taxes totalling \$2.2 million. According to Woods’ daily cash reports, free cash balances during February and March range from \$800,000 to \$1 million.
- ¶ 212 In early March, cash flow concerns are acute. Woods wants to use FIC Foreclosure money to pay Genesis creditors. Lathigee authorizes \$700,000, saying they can repay FIC Foreclosure “after we raise 10m.”
- ¶ 213 In a later response, Lathigee frames the issue around the salvation of the company. He worries that TD may call the loan. He says FIC Group has “no cash flow”, is “sucked dry of cash” and in a “very bad situation”. He says, in fact, that FIC Group is “close to insolvency” and needs \$10 million to stay solvent. “[I]n desperation,” he says, FIC Group is doing a promissory note offering.

- ¶ 214 At the March management retreat, cash flow issues dominate the first item on the agenda, “Overview”. The minutes speak of a plan to “get through the next four months” which time period is described as “pivotal”. At the top of the list in “Four main areas” is “Cash flow (generating sales).” In the section dealing with 076’s \$2.2 million income tax liability, the minutes state that FIC Group is “in a cash crunch.”
- ¶ 215 A few days after the retreat, Woods describes FIC Group as being “in a tight cash situation”. He says the FIC Projects money is “desperation money” and “is already spent”.
- ¶ 216 In April, funds from the FIC Projects distribution flow in. Lathigee wants to use it to buy foreclosures (the FIC Foreclosure funds, as noted later in these Findings, having been dissipated on other things). Woods and Pasquill both remind Lathigee that the FIC Projects money was raised to solve FIC Group’s cash flow problems. On April 14 Woods prepares a special cash flow report because he “wanted to reiterate what was available and what wasn’t”
- ¶ 217 Also in April, Pasquill emails Lathigee that “This real estate crisis needs to be #1 priority.”
- ¶ 218 In May, Lathigee is looking for cash for foreclosure investment. Woods tells him there is none available. Lathigee responds, noting that “Edmonton is not going well.” Wood says that FIC Group is “still in serious dire straits”. He reminds Lathigee that FIC Foreclosure funds may be needed to make Genesis payments. Pasquill agrees.
- ¶ 219 By July, little has changed. Woods and Pasquill remind Lathigee that the priorities are “cash balances” and “cash liquidity”.
- ¶ 220 The respondents would have us believe that all of this evidence grossly overstates FIC Group’s cash flow problems, yet have entered no evidence to support that position.
- ¶ 221 They say that FIC Group’s cash flow problems were short term, and that it had sources of cash to address them but, as we noted near the beginning of these Findings, there are no detailed cash flow statements to show how they could be confident at the time that the amount and timing of cash inflows would match those of cash requirements. All we have is Pasquill’s and Woods’ bald assertions, years after the fact, that FIC Group had sufficient cash flow.
- ¶ 222 The respondents say that FIC Group had plans to manage its cash flow. None was in evidence.
- ¶ 223 The respondents say that FIC Group could have covered cash requirements through revenues from lot sales, other asset sales, and borrowings secured by unencumbered assets.

- ¶ 224 The evidence shows that revenue from lot sales was not likely to begin flowing until the summer of 2008. As far as Genesis goes, the cost overruns cast considerable doubt about how much revenue would be available to fund other cash demands.
- ¶ 225 There is evidence that FIC Group had unencumbered assets that could have been sold or used for security, but little reliable evidence about the realizable value of those assets at the time. Nor is there any evidence about the time it would have taken to liquidate them or, in the case of assets to be used for security, the level of borrowing they would have supported or the time frame that would have been necessary to conclude financing transactions. In short, there is considerable doubt about whether strategies dependent on asset sales or asset-backed financings could realistically have been implemented in a time frame short enough to stave off collapse.
- ¶ 226 In the event, none of those items proved to be sources for cash during the relevant period.
- ¶ 227 The evidence is clear that FIC Group was facing severe cash flow problems. The first thing the CFO did every day was count the cash and juggle it around to cover immediate needs. The language used by FIC Group management during the relevant period was redolent with concern and crisis, and is consistent with the objective facts of FIC Group’s critical cash situation at the time.
- ¶ 228 Finally, we do not find remotely convincing the testimony that Pasquill and Woods gave about a purported scheme related to Tansowny, in an attempt to explain away what Lathigee wrote in his emails.
- ¶ 229 There are only three sources of evidence about Lathigee’s motivations in writing the emails.
- ¶ 230 The first is Pasquill’s testimony. He testified that Lathigee called him to tell him “don’t worry” and not to take what he was writing to Tansowny “too literally”. He testified that Lathigee told him it was to “light a fire under John”, although he also testified that the object of Lathigee’s emails were “an emotional response” to soften Tansowny up for negotiations.
- ¶ 231 None of this testimony makes sense. Pasquill knew all about FIC Group’s financial condition, and Lathigee knew that. Why would Lathigee think he needed to reassure Pasquill that he was exaggerating the problems? Would Pasquill think Lathigee knew something Pasquill did not? Did Lathigee want to “light a fire” under Tansowny, or did he want to soften him up for negotiations? If the latter, wouldn’t Lathigee’s motivation be a considered strategy, not an “emotional response”? And in any event, how does any of that prove that Lathigee did not believe what he was saying?
- ¶ 232 The second source is the email, in which Pasquill described Genesis as a financial disaster, that he drafted for Lathigee to send to Tansowny. This proves, at most, that Pasquill was

helping Lathigee prime Tansowny for negotiations. It does not prove that the content of the email was not true.

- ¶ 233 The third source is Woods' testimony. There is no evidence that Woods had any direct knowledge of Lathigee's motivations. His testimony was pure speculation. Even if believable, it would not prove that Lathigee believed what he said was untrue.
- ¶ 234 Only Lathigee knows what he believed at the time, and why he wrote what he did in the emails, but he did not testify. What we do know is that what he wrote was consistent with objective facts at the time: TD was in a position to call the Genesis loan, and FIC Group was facing \$8 million in unbudgeted invoices from Genesis and a \$2.2 million income tax liability in 076 when its available cash was down to about \$1 million, according to Woods' February 28, 2008 cash report.
- ¶ 235 Taken on their face, these emails reflect Lathigee's opinion about FIC Group's financial condition on the dates they were written. The language they contain is clear and unambiguous. There is nothing on their face to suggest they should be interpreted any differently than the ordinary meaning of the words suggest, nor is there any cogent evidence to support a different interpretation.
- ¶ 236 We find that FIC Group was experiencing severe cash flow problems during the relevant period.

4.1.1.6 Finding – important fact

- ¶ 237 We have found that FIC Group was in material default of two material provisions of the TD facility. There was a reasonable possibility that TD might call the loan, for that and other reasons. Had TD done so, FIC Group would have immediately become insolvent.
- ¶ 238 We have found that the Genesis project was overspent by \$10 million dollars. FIC Group was facing \$8 million in invoices with no available cash to meet them. The cost overruns were so severe that the first phase of the project was no longer profitable and FIC Group's projected profit for the project as a whole was at least cut in half, and could have been nothing.
- ¶ 239 We have found that FIC Group experienced severe cash flow problems during the entire relevant period. Assessing the cash position was the first thing Woods did every day. It was a subject of constant discussion and concern among Lathigee, Pasquill, Woods and Rea. The plans described in the evidence to stabilize cash flow were not in the evidence. The strategies that Woods and Pasquill testified were available to address cash flow were, in the end, either not implemented or, if so, not successfully.
- ¶ 240 The only ways FIC Group was ultimately able to meet its cash demands was by:
- raising money from new and existing investors in the FIC Foreclosure, FIC Projects and WBIC,

- defaulting on the TD facility by constantly dipping into the 076 investment portfolio, and
- improperly diverting cash from FIC Foreclosure.

¶ 241 Lathigee was speaking the truth when he said FIC Group was “in a very bad situation”, had no cash flow”, and was “close to insolvency”.

¶ 242 It is trite that the financial condition of an issuer is of paramount importance to a reasonable investor. In general, there is no factor on which the value of a security is more dependent.

¶ 243 In our opinion, the defaults under the TD facility, the status of the Genesis project, and the severity of FIC Group’s cash flow problems, were each important facts because they would have affected a reasonable investor’s decision whether to invest in the FIC Foreclosure, FIC Projects, or the WBIC distributions. The financial condition of an issuer is of paramount importance to a reasonable investor’s decision to invest in that issuer: in general there is no factor on which an investment decision is more dependent.

¶ 244 In combination, we find that these facts revealed an important fact about FIC Group’s financial condition: the reasonable possibility that FIC Group could have become insolvent during the relevant period. A relatively small number of potential events could have triggered insolvency in a very short time frame.

4.1.1.7 Dishonest conduct

4.1.1.7.1 Disclosure

¶ 245 FIC Group’s cash management practices, described above, were inconsistent with how FIC Group described itself to its members. This is an excerpt from its website:

“Each fund that we operate has specific guidelines that dictate the investment decisions made by that fund. Our investments are intended primarily to be for no more than a term of 24-36 months, ensuring reasonable liquidity and ability to respond to changing market conditions. For certain funds, such as those targeting long-term returns in foreign markets (such as the China Dragon Fund), investment horizons may be longer than 24-36 months.

We are very conscious of the need for diligent risk management. That is why there is such a good due diligence process in place, designed to protect our Members and minimize any risk that may exist on any particular investment.”

¶ 246 On March 7, 2008, Lathigee held a conference call and webcast to promote the FIC Projects distribution, which he described as a “cash flow opportunity.” FIC Group’s website advertisement for the call stated:

“The FIC Group of Companies has over \$100 million in Real Estate Assets. With spring nearly upon us, we wish to quickly develop a few projects and

reap huge profits from the clubs. The \$10 million we are raising will be used to assist on some of these projects. You read that right, members. We have over \$100 million in Real Estate Assets and the loan amount we are seeking is \$10 million.”

¶ 247 The conference call was recorded, and a transcript, prepared for the purpose of the hearing, was entered into evidence.

¶ 248 Lathigee opened the call by saying “hundreds and hundreds and hundreds and hundreds” of FIC Group members were participating on the call. He set the stage with an explanation of why, considering the state of the markets, “it makes so much sense for the member, on an individual level, to do this opportunity right now. . . .”

¶ 249 Lathigee then noted, “Members, times are very tough if you’re invested in the wrong areas.” He reminded members that “the sectors I’ve guided you is where you would have been and achieved the best returns”, and cited those sectors.

¶ 250 Lathigee then embarked on an overview of the economy, culminating in two conclusions: First, that the Alberta real estate market, where FIC Group “leverage fully to be involved in” was the best real estate market to be in, and second, cash was the right asset class for investment in March 2008: “Members, holding a much higher than normal amount of your portfolio in cash, in this market environment, makes complete sense.”

¶ 251 Complete sense, that is, if the yields were high enough:

“So members, what does all this mean to you? How do we put it all together?

It means that all your money in GICs in Canada and treasury notes in the United States and corporate bonds and dividend stock yields, are actually losing you money, year after year.

...

With inflation running out of control, you are actually losing purchasing power if your cash flow investments do not pay a minimum of 9 per cent per year.

Members, you must invest in higher-yielding vehicles.”

¶ 252 The FIC Projects promissory notes paid interest at 12% for investments up to \$50,000 (the minimum investment was \$10,000), 13% for investments between \$50,000 and \$100,000, 14% between \$100,000 and \$200,000, and 15% for investments of \$200,000 and higher.

¶ 253 Lathigee then repeated the comparison made in the advertisement of FIC Group’s real estate assets compared to the amount being raised in the distribution:

“The FIC group of companies has over \$100 million of real estate projects in Edmonton, Alberta. Once again, this is the best real estate market in North America FIC could have invested in the last few years.

We are raising \$10 million only through a promissory note, with a two-year term, and the ability for FIC to redeem the funds or return the funds after six months.

...

Like the last seven previous cash flow offerings, the note is not secured, but the asset base of FIC real estate alone is ten times bigger than the total amount being raised for the promissory note.”

¶ 254 It is not in dispute that Lathigee’s reference to \$100 million in assets did not take into account encumbrances associated with those assets, which at the time were about \$50 million.

¶ 255 Lathigee told conference call participants this about how the proceeds of the offering would be used:

“The purpose of this promissory note is so that FIC can more quickly develop our Edmonton real estate projects and realize the profits for all members.”

¶ 256 Pasquill spoke as well, mostly about the mechanics of how to invest. In the course of his remarks, he said:

“On this – on this opportunity, this cash flow opportunity, Mike’s done – you did a great job, Mike, in explaining to – to everybody how – how absolutely appropriate it is for right now in these times – a spectacular opportunity to do exactly what you need to do at this time.”

¶ 257 Lathigee then summed up the call. His concluding remarks included the following:

“The final thing, members, is the – I have been – I’ve been working on launching this opportunity for a year. What has occurred is I’ve been waiting in the market for the perfect time.

...

And the – the other super win now, is we’re also coming into spring and summer in the Edmonton real estate market, which is the absolute hub of activity. That’s the time when everything gets bought. And so what we want to do is quickly get our development projects underway and reap huge profits for everyone in the – who’s a shareholder in the FIC group of companies.”

¶ 258 Lathigee made no mention of FIC Group’s financial condition in the conference call. In his testimony, it was put to Pasquill that FIC Group’s “cash crunch” or cash flow problems were

not disclosed. He answered, “I would not have disclosed them because I wasn’t speaking to the topics. But I don’t think there was any mention of cash flow issues within our company.”

¶ 259 In the offering memorandum (OM) for the WBIC distribution, FIC Group also failed to disclose FIC Group’s financial condition. The same is true of the OM and other documentation FIC Group gave investors in FIC Foreclosure (described in more detail below).

4.1.1.7.2 Dishonesty

¶ 260 What Lathigee said in the FIC Projects conference call was untrue and grossly misleading.

¶ 261 He positioned the offering as something that he had been working on for a year, just waiting until market conditions were right for the product. In fact, the offering was coopered together in haste in early March to raise money to solve FIC Group’s cash flow problems. In his March 5 email, Lathigee said, “We are suffering from no cash flow and now in desperation we doing a promissory note offering that will encompass the entire staff for one month to save the company.”

¶ 262 Even the description of the investment as a “cash flow opportunity” was misleading. The evidence, cited above, is clear that FIC Group solicited this investment to solve its cash flow problems, not to make any new investments that would yield cash flow to investors. To FIC Group, the money raised in the distribution was “desperation money”.

¶ 263 This was borne out by how the money was used. None of it was spent on anything that was going to produce cash flow for these investors. Half of it, \$5 million, was used to top up the 076 investment portfolio and to pay the Genesis contractors so the liens could be removed. Another \$3.4 million was split between funds returned to FIC Foreclosure and funds held in reserve to pay interest on the promissory notes themselves. That left \$1.6 million, which went to overhead and third-party payments.

¶ 264 In reference to the juxtaposition of FIC Group’s \$100 million in gross assets and the \$10 million being raised in the distribution, the respondents say that investors in FIC Projects were not misled because it was disclosed that the promissory notes were not secured, and because it was true that FIC Group had real estate assets in excess of \$100 million.

¶ 265 We disagree. Although it is true that it was disclosed to investors that the promissory notes were unsecured, it was misleading to represent that FIC Group had \$100 million in real estate asset value to cover a \$10 million debt. That was not true: after accounting for encumbrances, the net value of those assets was more like \$50 million.

¶ 266 That is secondary, however. The disclosure focused investor attention on asset value, and omitted entirely any mention of the important fact of FIC Group’s financial condition, including its severe cash flow problems. As a result, the FIC Projects investors were misled

about a matter at the heart of any decision to purchase an investment promoted as a “cash flow opportunity”.

- ¶ 267 Finally, the statement that the proceeds of the offering would allow FIC Group to “more quickly develop” its real estate projects in Alberta was an outright lie. Not a penny of it was ever destined for expedited work on real estate development, nor is that where any of it was ultimately spent.
- ¶ 268 The respondents say that disclosure about FIC Group’s financial condition was available on its website if investors wanted more information about its assets and liabilities. This argument is so flawed it is hard to know where to begin to refute it:
- As we noted at the beginning of these findings, it was not possible to know the truth about FIC Group’s financial condition by looking at the financial statements alone.
 - The financial statements were not available on the website until weeks or months after the investments were made.
 - FIC Group did not publish its combined financial statements on its website. An investor would have had to construct the combination from the statements of eight FIC Group companies (remembering to eliminate offsetting entries associated with inter-company loans).
- ¶ 269 The respondents also say that investors could have discovered the encumbrances associated with the FIC Group real estate assets because they were a matter of public record. All investors had to do was to undertake searches of FIC Group’s properties at the Alberta land registry to discover them: a patently ridiculous proposition that needs no further comment.
- ¶ 270 The respondents also say that investors were not misled because they were told, and acknowledged, that their investments were extremely risky.
- ¶ 271 In support of this assertion, the respondents point to boilerplate risk factor language in the WBIC and FIC Foreclosure OMs telling investors that the investment was “highly speculative”, and that they should not invest unless they could afford to “lose the whole of their investment”.
- ¶ 272 These general statements of risk in the offering memoranda afford the respondents no defence to the alleged fraud. The question is whether the respondents disclosed to investors the important fact of FIC Group’s financial condition. They did not – the offering memoranda contained no disclosure about that, and it was not included among the host of risks that the OMs did disclose.
- ¶ 273 Similarly, the risk acknowledgement forms signed by investors offer the respondents’ no defence. It is based on the disclosure the investors’ received, disclosure that failed to include any information about the important fact of FIC Group’s financial condition.

¶ 274 In our opinion, a reasonable person would stigmatize as dishonest the respondents' failure to disclose to investors the important fact of FIC Group's financial condition and we so find.

4.1.1.8 Finding – prohibited act

¶ 275 We have found that FIC Group's financial condition was an important fact. We have found that the respondents failed to disclose that fact to the investors in FIC Foreclosure, FIC Projects, and WBIC, and that their failure to do so was dishonest.

¶ 276 We find that the respondents' dishonesty in failing to disclose the important fact of FIC Group's financial condition was a prohibited act for the purposes of applying the test for fraud in *Théroux*.

4.1.2 Deprivation

¶ 277 We have found that FIC Group's financial condition was an important fact because the financial condition of an issuer is of paramount importance to a reasonable investor's decision to invest.

¶ 278 Investors in the corporate respondents invested without knowing the truth about FIC Group's financial condition. As a result, they assumed substantial risks associated with those investments – risks unknown to them because the respondents dishonestly failed to tell them.

¶ 279 As a consequence of the respondents' dishonesty, the pecuniary interests of the investors in the corporate respondents were clearly put at risk. The 698 investors invested, and have lost, \$21.7 million. It would be difficult to find a more compelling example.

¶ 280 We find that the dishonesty of Lathigee, Pasquill, FIC Foreclosure, FIC Projects and WBIC in failing to disclose FIC Group's financial condition to investors caused deprivation to those investors by putting their pecuniary interests at risk.

4.1.3 Subjective knowledge

¶ 281 Under *Théroux*, the executive director must prove that the respondents had subjective knowledge of the prohibited act – FIC Group's financial condition, and that it was not disclosed.

¶ 282 Based on our findings, the evidence is clear that Lathigee and Pasquill had subjective knowledge of FIC Group's financial condition.

¶ 283 The evidence shows that they knew that the market value of the 076 investment portfolio was almost perpetually below the minimum required under the terms of the TD facility. They knew that because they were aware that FIC Group regularly dipped into that account to fund cash demands for other companies in the group. They knew that FIC Group's failure to keep the market value of the investment portfolio at the required level was a breach of the terms of the facility. When FIC Group used funds from the account in January 2008 to repay a loan,

Pasquill kept Lathigee informed. Pasquill wanted to ensure that the account be re-funded as soon as possible, before TD found out and so that TD didn't "get upset".

- ¶ 284 Lathigee and Pasquill knew that the \$5 million in builders' liens filed against the Genesis project was a breach of the terms of the TD facility and caused FIC Group to take steps to reach an agreement with the contractors to discharge the liens.
- ¶ 285 Lathigee and Pasquill knew that the \$8 million in cost overruns on the Genesis project, in combination with other cash demands, including 076's unfunded \$2.2 million income tax liability, put impossible demands on FIC Group's cash flow. They knew that the only way out of the cash flow problem was to raise \$10 million in new capital through the FIC Projects distribution.
- ¶ 286 Lathigee and Pasquill also knew that all of this had fundamentally undermined the economics of the Genesis project. They knew that there would now be no profit on Phase 1, and that projected profit on Phase 2, three or four years out, was at best cut in half. Woods described Genesis as FIC Group's "Vietnam". Rea described it as "a ship taking on water." Pasquill described it as "financial disaster", a description from which he did not resile in his testimony.
- ¶ 287 Lathigee and Pasquill also knew that cash flow problems were chronically acute. Email correspondence among FIC management, cited above, spans almost the entire relevant period. The language in the emails is rife with words and phrases stressing urgency. The priority of having a plan to deal with the TD was repeatedly described as "urgent". FIC Group management described it as being in a "cash crunch" and in "dire straits". They repeatedly described the maintenance of cash balances and liquidity as priorities.
- ¶ 288 All of this is most clearly demonstrated in Lathigee's emails in early March. It was then that the Genesis cost overruns (and associated liens) came home to roost, coinciding with FIC Group's ongoing failure to maintain the 076 investment portfolio at the required level. He recognized the risk that TD could call the loan. He recognized that without an immediate injection of cash, FIC Group could easily have become insolvent.
- ¶ 289 Lathigee and Pasquill also knew that, if TD were to call the loan, FIC Group had no arrangements in place to fund the call. It would have been at the mercy of TD to gain the time necessary to obtain replacement financing, to sell assets, or to effect asset-backed financing.
- ¶ 290 We find that Lathigee and Pasquill had subjective knowledge of FIC Group's financial condition.
- ¶ 291 The evidence is clear that Lathigee and Pasquill knew that FIC Group's financial condition was not disclosed to the corporate respondents' investors. Lathigee ran the conference calls,

and Pasquill was centrally involved in the drafting of the OMs. Pasquill testified that he knew that nothing was said on the conference call or the OMs about the important fact of FIC Group's financial condition.

¶ 292 We find that Lathigee and Pasquill had subjective knowledge that FIC Group's financial condition was not disclosed to the corporate respondents' investors.

¶ 293 The executive director must also prove that the respondents had subjective knowledge that the prohibited act – the failure to disclose FIC Group's financial condition – could have, as a consequence, deprivation. In *Théroux*, the court said (at pages 18-19):

“The test is not whether a reasonable person would have foreseen the consequences of the prohibited act, but whether the accused subjectively appreciated those consequences at least as a possibility.

...

The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence.”

¶ 294 First, Lathigee. The evidence shows that he fully understood what was at stake. In his emails in early March 2008, he says that the “first priority is to save the company.” He says FIC Group needs about \$10 million “to stay solvent”, and is in the “worst situation [it has] ever been in.” He says that the company is “close to insolvency”.

¶ 295 Lathigee could not have known these things without also knowing that the pecuniary interests of anyone who invested in any FIC Group company would be put at risk, especially if they were not told about FIC Group's financial condition.

¶ 296 As for Pasquill, he was, as we explained above, equally aware of the gravity of FIC Group's financial condition. The essence of his testimony was that he did not believe that FIC Group was close to insolvency or that TD would call the loan. He says he believed that revenues coming in the summer of 2008 would solve FIC Group's cash woes. Even if they did not, he says he believed that FIC Group had assets to sell or to borrow against to raise cash. He also says he believed that there would be opportunities to replace the TD financing if it became necessary to do so.

¶ 297 We have rejected this evidence from Pasquill, but even if it were believable, it would fall into the category of hoping that “deprivation would not take place,” as the Court put it in *Théroux*. In our opinion, a business executive of Pasquill's experience, knowing of FIC Group's financial condition, had to know that there was at least a possibility that investors' pecuniary interests would be put at risk if they invested in an FIC Group company, especially if they were not told about FIC Group's financial condition.

¶ 298 We find that Lathigee and Pasquill had subjective knowledge that the respondents' failure to disclose FIC Group's financial condition could have as a consequence the deprivation of the investors in the corporate respondents.

¶ 299 Lathigee and Pasquill were the acting and directing minds of the corporate respondents, so their state of mind is attributable to those companies. We find that FIC Foreclosure, FIC Projects, and WBIC had subjective knowledge of FIC Group's financial condition and that it was not disclosed to their investors. We find that those companies had subjective knowledge that this dishonesty could result in deprivation to their investors.

4.1.4 Finding – fraud

¶ 300 We have found that FIC Group's financial position was an important fact, that the respondents failed to disclose that fact, that their failure to do so was dishonest and, accordingly, their dishonesty was a prohibited act for the purposes of applying the test for fraud in *Théroux*.

¶ 301 We have found that, as a result of the respondents' prohibited act, the pecuniary interests of the investors in FIC Foreclosure, FIC Projects, and WBIC were put at risk.

¶ 302 We have found that the respondents had subjective knowledge of their prohibited act and had subjective knowledge that the prohibited act could, as a consequence, put the pecuniary interests of those investors at risk.

¶ 303 We find that the respondents perpetrated a fraud on those investors, contrary to section 57(b) of the Act.

4.2 Second Alleged Fraud: Misuse of Funds by FIC Foreclosure

4.2.1 Prohibited act

¶ 304 In February through April 2008 FIC Foreclosure raised \$1.5 million through the distribution of Class A shares to 39 investors under the accredited investor exemption. In April through June 2008 FIC Foreclosure raised another \$8.4 million through the distribution of Class A shares to another 292 investors under the offering memorandum exemption.

¶ 305 The executive director alleges that Lathigee, Pasquill and FIC Foreclosure perpetrated a fraud when they used the funds of investors in FIC Foreclosure to make unsecured loans to other FIC Group companies instead of making investments in foreclosure properties in the US residential housing market.

¶ 306 In this Part of these Findings, "respondents" refers to Lathigee, Pasquill, and FIC Foreclosure.

¶ 307 The respondents say that FIC Foreclosure was entitled to use the funds for loans to other FIC Group companies and that was disclosed to investors.

4.2.1.1 Disclosure

- ¶ 308 The evidence contains three sources about what Lathigee, Pasquill and FIC Foreclosure told investors about FIC Foreclosure. The first source is the subscription agreement for the \$1.5 million distribution under the accredited investor exemption.
- ¶ 309 The second source is an offering memorandum (OM) that FIC Foreclosure filed with the Commission in April 2008 for the \$8.4 million distribution under the offering memorandum exemption.
- ¶ 310 The third source consists of statements made by Lathigee in a conference call with FIC members, also in April 2008. Pasquill testified that he was not in attendance during the call. There is no direct evidence about how many people were on the call, but Lathigee described the turnout as follows:

“Tonight's conference call is the most important educational conference call event the Freedom Investment Club has ever done. Make sure you have a pen in hand. Make sure you take notes and make sure, most importantly, you're an action-taker.

We have over 2,000 attendees registered for tonight's call, which makes this the largest attendance we have seen in the history of the Freedom Investment Club.”

- ¶ 311 The conference call was recorded and a transcript, prepared for the purpose of the hearing, was entered into evidence.
- ¶ 312 The OM contained several statements, and Lathigee made several statements in the conference call, about FIC Foreclosure's formation and purpose, its business, risks, and its intended use of investors' funds.

4.2.1.2 Formation and purpose

- ¶ 313 This is what the OM said about FIC Foreclosure's formation and purpose:

“In March, 2007 the FIC Group decided to incorporate a company solely for the purpose of providing real estate as an investment vehicle for potential investors. More recently, the sub-prime mortgage crisis in the United States has created significant opportunity to acquire foreclosed property at deeply discounted prices. So, on January 24, 2008, the Corporation was incorporated in the province of British Columbia.”

¶ 314 These are excerpts from the conference call that relate to how Lathigee described the purpose behind the formation of FIC Foreclosure:

“For three years, I have been stating for members to sit on the sidelines until the time is right to enter the US housing market. I have said to members that many geographical pockets of the US real estate market still are incurring massive declines, and this trend will continue.

However, I have discovered an opportunity for members where we can all make a fortune and the returns will likely be higher than any other opportunity we have pursued as a club.

In fact, in my entire career I have never seen a better opportunity.

The Club has already been testing this opportunity and the returns are spectacular”.

“Over the last weekend, I was examining the Mid-Quality Sub-Prime Debt Index, and discovered that these debts are now selling for 10 to 20 cents on the dollar. These mortgage debts are being sold as if they are worth nothing.”

“The banks have written tens of thousands of properties completely off their balance sheets, and are happy to recover any capital that they can.”

“The banks are hurting and they are hurting badly. Lenders are overwhelmed by their workloads and bankers are finding it impossible to deal with the massive number of foreclosures. Some banks are now making policies to dump inventory for pennies on the dollar, and the Freedom Investment Club is sitting on the front lines of this happening.”

4.2.1.3 FIC Foreclosure’s business

¶ 315 Both the OM and Lathigee’s statements in the conference call contain extensive descriptions of FIC Foreclosure’s intended business. These are excerpts from the OM:

“Management believes the Corporation has the capacity and has established the necessary relationships and network skills to source and screen foreclosure opportunities and real estate, conduct the due diligence and manage the appropriate exit strategies.”

¶ 316 In the conference call, Lathigee described FIC Foreclosure’s business in considerable detail. Here are excerpts:

“Already, we are buying bundles of homes for pennies on the dollar, and have the homes rented and they are kicking out fantastic cash flow.

Members, the banks are ready to wheel and deal.”

“When we negotiate with the banks, we are negotiating the purchase of several hundred properties. The market niche where I see the greatest opportunity - listen, members - is homes that sold in the 100,000 to the \$150,000 range a few years ago, and are in foreclosure.”

“It is too costly for the banks to maintain these homes, and so they are motivated to deal with the Freedom Investment Club. The Freedom Investment Club is negotiating buying most of these homes for under \$20,000 a home. We are then researching the local market rent and have an excellent system for locating a buyer of the home.”

¶ 317 Lathigee then described in some detail how FIC Foreclosure would attract buyers, grant them mortgages, and sell the mortgages at a discount. Using an example, he described how FIC Foreclosure could earn an annualized rate of return of 132%, “using the most conservative calculations” over a period of six months. “The profits are massive when you repeat this process several hundred times,” he said.

¶ 318 Lathigee went on:

“We've been doing it dozens of times. Now the Freedom Investment Club is going to move into hundreds of times.

And now, obviously, members, that's why I wanted you all on the phone tonight. I want you to get rich with the Club.

Members, this is the perfect storm. Banks are hurting and there is too much inventory for sale and not enough buyers who can manage the process. The Freedom Investment Club must act quickly to be very early to the game.

Legislation could also close down this opportunity. For example, new laws could force banks to offer payment extensions to anyone who owns a home that is appraised at less than \$100,000. This would dry up inventory supply and this opportunity would no longer be available in the near future. So the Freedom Investment Club must be an action-taker now.”

“As stated earlier we are already buying properties in small numbers and making this work but the huge profits will come from bulk buying to get a better price from the bank.”

“Members, the numbers are astounding and I think you can now understand why I’ve never seen a better deal in my entire career. With bulk buying, we will be able to buy the houses cheaper.

Once again, this is not a time to sit on the sidelines.”

“This is absolutely the most important time to be an action-taker.”

4.2.1.4 Risk factors

- ¶ 319 The OM contains an extensive discussion of a broad range of risk factors. This is a summary:
- FIC Foreclosure may not have sufficient funds from the financing “to fund all of the Corporation’s objectives over the next twelve months” and may not be able to do so. Conversely, there may be too few opportunities “to enable the Corporation to invest all of its available capital”
 - Risks associated with investment in real estate generally.
 - Risks associated with FIC Foreclosure’s status as a start-up company. The OM describes the offering as speculative, and states, twice, that investors should not invest if they “cannot afford to lose the whole of their investment”.
 - Potential conflicts of interest because FIC Foreclosure, together other FIC companies, “are ‘sister’ companies with similar business activities and overlapping management and shareholders”

4.2.1.5 Intended use of proceeds

- ¶ 320 Paragraph 6(y) of the FIC Foreclosure subscription agreement states that the proceeds “will be used to purchase tax liens, tax deeds and foreclosure properties in the United States, th[r]ough a joint venture agreement between FIC, Rogue Investor LLC and 0749885 B.C. Ltd.”
- ¶ 321 A chart in the OM entitled “Use of Net Proceeds” describes the use of proceeds as “Foreclosures and other real estate investments.” Below the chart is the statement: “The Corporation intends to spend the net proceeds as stated and will reallocate funds for sound business purposes as market opportunities dictate.”
- ¶ 322 This excerpt from the OM is under the heading “Development of Business”:

“. . . In the mid to longer term, the Corporation intends to invest 100% of the net proceeds in foreclosed properties. In the short run, until such time as enough foreclosure properties can be located to absorb all of the proceeds, the Corporation may apply some of the funds to other real estate investments and/or short term interest bearing vehicles. Management intends to monitor and reassess its investments periodically, and furthermore expects that the investments will be adjusted from time to time to reflect changes in the

investment climate, the dynamics of the real estate market, and the interests of the shareholders.”

¶ 323 This is how Lathigee described the use of proceeds on the conference call.

“The Freedom Investment Club is raising \$10 million for the purchase of approximately 400 homes in the new FIC Foreclosure Fund, with the remaining funds to be used for other real estate deals. The purchase is to occur in just a few weeks, as we are at the final stages of negotiation with a few major banks.

Of any deal I have ever explained to members, this is the best.”

4.2.1.6 Dishonest conduct

4.2.1.6.1 Actual use of proceeds

¶ 324 The evidence shows that of the \$9.9 million raised from investors, FIC Foreclosure spent \$1.4 million to acquire foreclosure properties, and another \$751,000 on rental properties and tax liens.

¶ 325 FIC Foreclosure transferred the rest, about \$7.8 million, to other FIC Group companies to fund, among other things:

- payments due on third-party loans
- payment of outstanding trades invoices on Genesis and other properties owned by other FIC Group companies
- payment towards the 076 tax liability
- payment of salaries and other overhead expenses of the FIC Group

¶ 326 The transfers of FIC Foreclosure funds to other FIC Group companies were booked as intercompany loans through the process described by Woods in his testimony (cited earlier).

¶ 327 FIC Foreclosure bought only 100 foreclosure properties. That it bought no more is curious, because FIC Group, not FIC Foreclosure, had at least 1,200 foreclosure properties that it was selling directly to FIC Group members at investor meetings in early June 2008. FIC Group sold 500 of the properties at one event in June and had available another 700 for sale at events later that same month.

4.2.1.6.2 Dishonesty

¶ 328 Whether the respondents acted dishonestly turns on an assessment of what they told investors about how FIC Foreclosure would spend its funds compared to how the funds were actually spent.

¶ 329 The executive director says that dishonesty (the prohibited act of this allegation of fraud) happened when Lathigee, Pasquill and FIC Foreclosure diverted FIC Foreclosure’s funds to

other FIC Group companies instead of investing them in US foreclosure properties and other real estate investments, as described in the OM and by Lathigee in the conference call.

- ¶ 330 The respondents say there was no dishonesty, and therefore no prohibited act, because the OM “makes it clear that FIC Foreclosure was authorized to invest the money in inter-company loans.” They point to these statements in the OM:
- “The Corporation intends to spend the net proceeds as stated and will reallocate funds for sound business purposes as market opportunities dictate.”
 - “the Corporation may apply some of the funds to other real estate investments and/or short term interest bearing vehicles”
 - Management . . . expects that the investments will be adjusted from time to time to reflect changes in the investment climate, the dynamics of the real estate market, and the interests of shareholders”
 - “There can be no assurance that there will be a sufficient number of suitable investment opportunities that satisfy the Corporation’s investment objectives . . .”
- ¶ 331 The respondents would have us focus on these discrete statements in the OM, without considering the context, but the OM must be read as a whole.
- ¶ 332 The OM must be considered along with what the investors were told from all sources. That includes Lathigee’s statements on the conference call, something the respondents largely ignored in their submissions.
- ¶ 333 Considering the statements in the OM, the statements made by Lathigee on the conference call, and to some extent the language in the subscription agreement, the following is how we would describe what FIC Foreclosure investors would have understood about how FIC Foreclosure funds were to have been spent:

FIC Foreclosure was formed to take advantage of foreclosure property opportunities in the US housing market brought on by the sub-prime mortgage crisis.

- The OM states that in March 2007 the FIC Group decided to form a company “solely for the purpose of providing real estate as an investment” and notes that the US sub-prime mortgage crisis “has created significant opportunity to acquire foreclosed property at deeply discounted prices.” The OM states the “primary emphasis” of the business will be “identifying foreclosure investment opportunities” in the US.
- Lathigee repeated that thought in the conference call, and described it as “an opportunity for members where we can all make a fortune” adding, “In fact, in my entire career I have never seen a better opportunity.”
- It is clear that the primary business of FIC Foreclosure was meant to be investment in US foreclosure properties, and that is just what investors were told, both in the OM and by Lathigee.

There was significant inventory available and plenty of sellers, and an urgency to invest in these opportunities immediately.

- Lathigee told the conference call, “some banks are now making policies to dump inventory for pennies on the dollar, and FIC was “sitting on the front lines of this happening”. “The banks are hurting and they are hurting badly,” he said, and “are happy to recover any capital they can”. He said, “When we negotiate with the banks, we are negotiating the purchase of several hundred properties.” “The banks are ready to wheel and deal,” he said.
- “Members, this is the perfect storm,” Lathigee said. “Banks are hurting and there is too much inventory for sale and not enough buyers who can manage the process,” and so FIC had to “act quickly to be very early to the game.” Lathigee also warned that “Legislation could close down this opportunity . . . new laws could force banks to offer payment extensions – this would dry up inventory supply and this opportunity would no longer be available in the near future.” “So the Freedom Investment Club must be an action taker now,” he said.

The investment program was well underway. Arrangements were in place, some properties had already been acquired, and FIC Foreclosure was on the verge of spending around \$8 million to acquire 400 properties.

- The OM says that FIC Foreclosure Fund had “the capacity and has established the necessary relationships . . . to source . . . foreclosure property opportunities and real estate”
- Lathigee said, “already we are buying bundles of homes for pennies on the dollar” and that FIC had done it “dozens of times”.
- Lathigee told the conference call that FIC was raising “\$10 million for the purchase of approximately 400 homes in the new FIC Foreclosure Fund” and that “the purchase is to occur in just a few weeks, as we are at the final stages of negotiation”.

If some funds were not immediately deployed, they would be spent on other real estate investments or bona fide third-party short-term interest paying vehicles.

- Anyone listening to Lathigee on the conference call would have concluded that FIC was indeed moving quickly. The 400-home deal was to close in a matter of weeks. That, it seems, would have utilized almost all of the funds FIC Foreclosure raised: earlier in the call Lathigee had identified the ideal properties as those that could be acquired for around \$20,000 on average. On that basis, the purchase of the 400 homes would have consumed \$8 million.

- When Lathigee mentioned the goal of raising \$10 million for the purchase of the 400 homes, he said the remaining funds would be used for “other real estate deals”. He made no mention of short term interest bearing vehicles.
- The OM, however, does mention short term interest bearing vehicles. It said that “until such time as enough foreclosure properties can be located” FIC Foreclosure “may apply some of the funds to other real estate investments and/or short term interest bearing vehicles.” It said that the investments would be allocated “to reflect changes in the investment climate, the dynamics of the real estate market, and the interests of shareholders.”
- In our opinion, no one who heard Lathigee on the conference call would likely have had any concerns along those lines. They were told that there was plenty of inventory available (as seems corroborated by the 1,200 properties FIC Group managed to acquire before June 2008). The worry, if any, was whether FIC Foreclosure could move fast enough to snap them up, not whether it would have funds lying dormant while it was searching for investment opportunities.
- In fact, the circumstances described in the OM under which FIC Foreclosure would allocate funds to short term interest bearing vehicles never came to pass. Those were described as the inability to invest in foreclosure properties, changes in the investment climate, the dynamics of the real estate market, or the interests of the shareholders. We have observed above that there was no difficulty in achieving full investment in foreclosure properties, either in timing or quantity. (FIC Group itself was able to acquire 1,200 properties by June 2008.) Nor is there any evidence that there were changes during the relevant period in the investment climate, that the dynamics of the real estate market, or that the interests of the shareholders required the re-allocation of funds that would otherwise have been invested in foreclosure properties.
- Even if the evidence had shown that there was a “sound business reason” to allocate the FIC Foreclosure funds to short term interest bearing vehicles, there is nothing in the OM to suggest the choice of vehicle would be inter-company loans to other FIC Group companies. To start, the prescribed form for offering memoranda requires that if any proceeds of the offering are to be paid to a related party, specific disclosure of that is required. No such disclosure was made.

¶ 334 In summary, investors were told that:

- FIC Foreclosure was formed expressly for the purpose of investing in foreclosure properties in the US residential real estate market;
- There were large inventories available and FIC Foreclosure had to move quickly to invest in them;
- FIC Foreclosure had the necessary preparations in place to do so, and in fact was already engaged in acquisitions; and

- FIC Foreclosure was on the verge of acquiring 400 foreclosure properties (closing was expected in “just a few weeks”) that would absorb essentially all of the funds raised in the OM offering.

¶ 335 Although the OM contained statements about allocating funds to other real estate investments and short term interest bearing vehicles, the circumstances under which it stated that could happen were not the circumstances described to the investors. To the contrary, investors were led to believe that FIC Foreclosure would be investing all of its funds into foreclosure properties as quickly as possible, and in any event, within a few weeks.

¶ 336 Even if some investors did believe that funds would be temporarily allocated to short term interest bearing vehicles, the OM did not disclose that those vehicles would consist exclusively of unsecured loans to other FIC Group companies.

¶ 337 In short, everything investors were told would have led them to believe that their funds would be invested in foreclosure properties, and soon. Instead, FIC Foreclosure used most of the funds to make unsecured loans to other FIC Group companies.

¶ 338 The respondents say that FIC Foreclosure’s use of its funds for intercompany loans was disclosed to investors because it posted on its website financial statements for the periods ended May 31, August 31, and November 30 that disclosed the loans. This argument is no more valid in this context than was the parallel argument the respondents made in the context of the first fraud. Here, the argument also fails because it ignores the fact that the prohibited act is based on FIC Foreclosure’s misuse of the funds, which we have found. This cannot be cured by subsequent disclosure.

¶ 339 Above we noted that *Zlatic* cited, with approval, *Currie*, which held that the use of funds in a manner that was not authorized was sufficient ground for finding dishonesty. Here, the respondents used the proceeds of the FIC Foreclosure distribution to make unsecured loans to other FIC Group companies – a use completely different from what the respondents told investors about how the proceeds would be used. In addition, in our opinion, a reasonable person would stigmatize that conduct as dishonest.

¶ 340 We find that the respondents acted dishonestly when they used the proceeds for that purpose, instead of investing them in foreclosure properties in the US real estate market, as they told investors they would.

4.2.1.7 Finding – prohibited act

¶ 341 We have found that the respondents’ failed to use the proceeds of the FIC Foreclosure distribution as they told investors they would be, and that their failure to do so was dishonest.

¶ 342 We find that the respondents' dishonesty in using the proceeds of the FIC Foreclosure for purposes other than those they disclosed to the investors was a prohibited act for the purposes of applying the test for fraud in *Théroux*.

4.2.2 Deprivation

¶ 343 We have found that Lathigee, Pasquill and FIC Foreclosure dishonestly misused FIC Foreclosure's funds. As a result of that dishonesty, the investors in FIC Foreclosure were denied the investment opportunity in US foreclosure properties that they expected. Lathigee had made it clear in the conference call that FIC Foreclosure had to act quickly to maximize the opportunity. The diversion of its funds was inconsistent with that objective. Lathigee described the risks to FIC Foreclosure, and accordingly the investors' stake in the company, if the investments were not made quickly. By diverting FIC Foreclosure's funds to other companies in the FIC Group, the respondents exposed the investors to those risks, which put their pecuniary interests at risk.

¶ 344 As a result of the respondents' dishonest misuse of the investors' funds to make unsecured loans to other FIC Group companies, those investors were also exposed to business and credit risks of other FIC companies, risks that were not disclosed to them. That put the investors' pecuniary interests at risk.

¶ 345 We find that the dishonesty of Lathigee, Pasquill and FIC Foreclosure in misusing FIC Foreclosure's funds caused deprivation to the investors in FIC Foreclosure by putting their pecuniary interests at risk.

4.2.3 Subjective knowledge

¶ 346 Under *Théroux*, the executive director must prove that the respondents had subjective knowledge of the prohibited act – the respondents' improper use of FIC Foreclosure's funds.

¶ 347 Based on our findings, the evidence is clear that Lathigee and Pasquill had subjective knowledge that the respondents made improper use of FIC Foreclosure's funds.

¶ 348 They knew that they told the investors that the proceeds of the FIC Foreclosure distribution would be invested in foreclosure properties in the US real estate market. They knew that because that is what Lathigee told investors in the conference call, what the OM prepared under Pasquill's supervision told them, and what the subscription agreement stated.

¶ 349 Lathigee and Pasquill knew that was not how the FIC Foreclosure funds were being used. Woods asked them for permission to divert FIC Foreclosure funds to other FIC Group companies and they agreed. They knew that FIC Group used inter-company loans as a standard operating procedure at FIC Group, and the evidence is that they did not treat FIC Foreclosure any differently. To the contrary, the evidence is that they treated FIC Foreclosure as just another source of cash for FIC Group.

¶ 350 Lathigee and Pasquill were the sole directors and officers of FIC Foreclosure and FIC Group. They caused FIC Foreclosure to make the inter-company loans.

¶ 351 Lathigee and Pasquill also knew that they were putting the FIC Foreclosure investors' pecuniary interests at risk, because they knew that the investors were being denied the foreclosure property investment opportunity – an opportunity Lathigee had told investors must be acted on quickly. They also had to have known that, as a result of the investors' funds having been used for unsecured loans to other FIC Group companies, the investors were now exposed to the business and credit risks of the FIC Group as a whole.

¶ 352 We find that Lathigee and Pasquill had subjective knowledge that their dishonesty put the investors' pecuniary interests at risk when they misused the FIC Foreclosure funds.

¶ 353 Lathigee and Pasquill were the acting and directing minds of FIC Foreclosure, so their state of mind is attributable to FIC Foreclosure. We find that FIC Foreclosure had subjective knowledge that its funds were improperly used. We find that FIC Foreclosure had subjective knowledge that this dishonesty could result in deprivation to their investors.

4.2.4 Finding – fraud

¶ 354 We have found that Lathigee, Pasquill and FIC Foreclosure acted dishonestly when they loaned investors' funds to other FIC Group companies instead of investing them in foreclosure properties or other real estate investments and, accordingly their dishonesty was a prohibited act for the purposes of applying the test for fraud in *Théroux*.

¶ 355 We have found that, as a result of the respondents' prohibited act, the pecuniary interests of the investors in FIC Foreclosure were put at risk.

¶ 356 We have found that the respondents had subjective knowledge of their prohibited act and had subjective knowledge that the prohibited act could, as a consequence, put the pecuniary interests of those investors at risk.

¶ 357 We find that the respondents perpetrated a fraud on those investors, contrary to section 57(b) of the Act.

4.3 Summary of Findings

¶ 358 We have found that:

- Lathigee, Pasquill, FIC Foreclosure, FIC Projects and WBIC perpetrated a fraud, contrary to section 57(b), when they raised \$21.7 million from 698 investors without disclosing to those investors the important fact of FIC Group's financial condition; and
- Lathigee, Pasquill and FIC Foreclosure perpetrated a fraud, contrary to section 57(b), when they raised \$9.9 million from 331 investors in FIC Foreclosure for the purpose of

investing in foreclosure properties and instead used most of the funds to make unsecured loans to other FIC Group companies.

5 Submissions on Sanction

¶ 359 We direct the parties to make their submissions on sanctions as follows:

By July 29 The executive director delivers submissions to the respondents and to the secretary to the Commission

By August 12 The respondents deliver response submissions to the executive director, to each other, and to the secretary to the Commission

Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission

By August 19 The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission

¶ 360 July 8, 2014

¶ 361 **For the Commission**

Brent W. Aitken
Vice Chair

Judith Downes
Commissioner

Audrey T. Ho
Commissioner