

**The Falls Capital Corp., Deercree Construction Fund Inc.,
West Karma Ltd. and Rodney Jack Wharram**

(collectively, the Respondents)

Section 161 of the Securities Act, RSBC 1996, c. 418

**RESPONDENT'S
SUBMISSIONS ON LIABILITY**

C. Paige Leggat

British Columbia Securities Commission
1200 – 701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Telephone: 604-899-6724
Email: pleggat@bcsc.ca

Counsel for the Executive Director

Olubode Fagbamiye

British Columbia Securities Commission
1200 – 701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Telephone: 604-899-6790 (Direct)
Email: ofagbamiye@bcsc.bc.ca

Counsel for the Executive Director

Mr. Rodney Jack Wharram (for ALL the Respondents)

235 – 51075 Falls Court
Chilliwack, British Columbia
V4Z 1K7
Email: rod@westkarma.com

Self Represented

TABLE OF CONTENTS

INTRODUCTION	4
A BRIEF HISTORY OF THE PROCEEDINGS	5
THE ALLEGATIONS	7
A. The Alleged Fraud against FCC and DCF Investors.....	7
B. The Alleged False Statement to an Investigator	8
STAFF’S THEORY – THE MAJORITY OF THE FUNDS WERE NOT ADVANCED TO DEVELOPER	11
OUR POSITION –NOT ADVANCING THE MAJORITY OF THE FCC FUNDS TO DEVELOPER	26
\$75,000 Advance for Home Purchase	34
The Sale of Claims Proceeds	38
OUR POSITION –NOT ADVANCING THE MAJORITY OF THE DCF FUNDS TO DEVELOPER	43
Diamond Ring Purchase	48
Nature’s Fare Loan.....	49
Purchase of Residence	52
OUR POSITION – MAKING A FALSE STATEMENT TO AN INVESTIGATOR	54
ANALYSIS	65
A. The Burden and Standard of Proof	65
B. The Law: There was No Fraud	67
C. The Law: There was No False Statement to an Investigator	72
THE ISSUES	73
NOTICE OF HEARING DATE IS WRONG	73
THE MARTINSEN MISTAKE	75
THE RESPONDENTS DISAGREE WITH MANY SUBMISSIONS OF STAFF	77
CONCLUSION	82

Although Staff must prove the allegations in a Notice of Hearing only on a balance of probabilities, the serious nature of the violations (and severe consequences for a respondent from an adverse finding) require that the proof tendered by Staff be clear and convincing. The proof must be based on cogent evidence, which in turn must be “convincing or compelling”.

Re Hu, 2011BCSECCOM 355, at para 13

INTRODUCTION

1. **Rodney Jack Wharram (“Wharram”)** is a businessman currently living in the City of Chilliwack, British Columbia. In May 2006, he founded **West Karma Ltd. (“WKL”)** in Calgary, Alberta. In June 2007, after living in Calgary for 26 years, he moved to Chilliwack, British Columbia with his young family.
2. In approximately June 2006, he met the principles of **Blackburn Developments Ltd. (“Blackburn”)**, Mr. Rick Wellsby and Mr. Robert Wilson, who were developing a project known as The Falls Resort (“The Falls”) in Chilliwack, British Columbia. West Karma entered into an agreement in July 2006 whereby West Karma would supply capital to Blackburn in the amount of \$52,000,000.
3. The Falls Golf Course was opened in the Spring of 1996 and was owned and operated by Blackburn.
4. **Falls Capital Corp. (“FCC”)** was incorporated in Alberta on October 24, 2006, specifically offering an investment at The Falls. Investors received a \$99.90 bond and .10 shares for every \$100.00 in which they invested. The investment was RSP eligible and was to mature in 2010 with the Issuer having the right to extend this date for an additional 24 months. Investors received 5% per annum interest on the bond and were paid interest quarterly from the inception until February 2011.
5. FCC raised capital from December 2006 until September 28, 2010 from approximately 140 investors. The company stopped raising capital from investors when changes in the Exempt Market came into effect in September 2010.
6. In March 2009, **Deercrest Construction Inc (“DCF”)** was formed with the intent of raising investor dollars in the amount of \$12,000,000 to facilitate the build-out of 70 units along the first hole of the Falls Golf Course and a new clubhouse to be located on another piece of the Blackburn lands. Investors received a 12.5% interest rate on a bond that was paid monthly. The DCF investment was sold to approximately 100 investors from March 2009 until September 2010, when changes in the Exempt Market came into effect in September 2010.
7. In February 2011, Blackburn entered into protection under the Companies' Creditors Arrangement Act (“CCAA”) in an attempt to restructure a large portion of their debt. After approximately 14 months of a Monitor running the company, creditors foreclosed on the golf course portion of the property and it was sold immediately to the **Aquilini Development Group** in April 2012. Other portions of the property were sold to other parties whom in turn, sold their portions to the Aquilini Group as well later in 2012.

8. As a result of the CCAA, Blackburn stopped paying interest to both FCC and DCF in February 2011. This led to interest reserves being depleted and payments to investors stopping in the first quarter of 2011.

A BRIEF HISTORY OF PROCEEDINGS

9. In September of 2010, the Executive Director of the British Columbia Securities Commission (the "Executive Director") sent the Respondents an email indicating they were starting an investigation due to a complaint with the DCF entity.
10. Throughout 2010, 2011, 2012, and even into 2013, the Respondents cooperated diligently with the appointed BCSC investigator(s) and provided all information requested as quickly as possible.
11. On December 12, 2012, Elizabeth Chan ("Chan"), an investigator with the BCSC, indicated she wanted to conduct a compelled interview with respect to her investigation and inquired on December 17 as to my availability to attend. The Respondents indicated that they would want to talk to counsel to ascertain whether they should seek legal representation.
12. On January 9, 2013, the Respondents volunteered to go to the BCSC to receive the Summons with respect to the compelled interview. The dates were set for February 6 and 7th at the Commission's office.
13. Shortly thereafter, the Respondents engaged H. Roderick Anderson of the law firm *Harper Grey LLP* to act on their behalf. Anderson applied and received an extension until March 12 – 13th, 2013 for the interview dates. On March 12 – 13th, 2013, the Respondents, along with counsel, attended the compelled interview.
14. On June 14, 2013, the Respondents received from the Executive Director, a Temporary Order and Notice of Hearing (dated June 14, 2012), under section 161 of the *Act*. In addition, the Respondents also received an Order to Freeze Property under Section 151 of the *Act* for WKL, Rodney Wharram, and 3 non-related entities known as *09668841 BC Ltd.*, *Deercrest Management Ltd.*, and *Edge Advantage Enterprises Ltd.* ("Edge").
15. On June 26, 2013, the Respondents applied to the Commission to adjourn the Executive Directors application and extended the Temporary Order until July 31, 2013. The following ruling was ordered by the Panel on August 6, 2013:

4. *On July 31, 2013, Wharram applied to the Commission (a) to adjourn the Executive Director's application to extend the temporary order, (b) to vary the temporary order to allow him to act as a director and officer of Edge Advantage Enterprises Ltd. (Edge), and (c) to vary the freeze order to allow 09668841 BC Ltd. to pay construction invoices.*

5. *At the hearing, the Commission made the following rulings.*

- 6 *The Commission adjourned generally the Executive Director's application to extend the temporary order, on the basis that the application will be heard at Wharram's request.*
- 7 *The Commission, considering it is not prejudicial to the public interest to do so, ordered, under section 171 of the Act, that:*
1. *paragraph (c) of the temporary order is varied so it reads as follows:*

"(c) 161(1)(d) of the Act, Wharram resign any position he holds, and is prohibited from becoming or acting as, a director or officer of any issuer other than Edge Advantage Enterprises Ltd. (Edge), provided that Edge does not distribute its securities;"
 2. *revoked the freeze order insofar as it applies to assets of Edge.*
- 8 *The Commission considered Wharram's application to vary the freeze order to allow 0966841 BC Ltd. to pay construction invoices, and, considering that to do so would be prejudicial to the public interest, dismissed the application giving Wharram the opportunity to reapply to vary the freeze order.*

Hearing Notice – Ruling and Variation Order, August 6, 2013

16. On August 9, 2013, the Vice Chair set the Hearing for March 10 to 14 and March 24 to 28, 2014.

Hearing Notice – Hearing Dates, August 9, 2013

17. In mid-August, counsel from Harper Grey indicated they would no longer represent the Respondents due to non-payment on the Respondents account. The Respondents indicated they had no ability to pay their legal fees due to the Asset Freeze Order and would be representing themselves in the ongoing matter.
18. At the October 30, 2013 Hearing Management Meeting, Staff indicated their key witness was not available during the dates the hearing was scheduled. The Respondents agreed to adjourn the hearing to April 7 to 11 (except April 10) and April 14 to 17, 2014.

Hearing Notice – Adjournment, October 30, 2013

19. On January 31, 2014, Staff sent an email to the Respondents with many attachments including Will Say Statements for the nine witnesses they intended to call during the Hearing.
20. The parties attended the hearing on April 7 – 9, 11, 14-16, 2014 at the Commission offices in downtown Vancouver in front of Chair Nigel Cave, Commissionaires Judith Downes, George C. Glover, and Don Rowlett.
21. Submissions on Liability were due from the Executive Director on May 16, 2014 with the Respondents submission due on June 6, 2014 and the Oral Submissions were to occur on June 25 & 27, 2014.

22. On May 22, 2014, the Respondents applied for an extension until July 6, 2014 to forward their submissions to the relevant parties. On May 26, 2014, the Commission Secretary replied and indicated the Panel agreed to the July 6, 2014 date. Due to Staff Litigators not being available in July or August and the Panel not be available in September, the oral submissions were put over until October 27 & 28, 2014.

THE ALLEGATIONS

A. THE ALLEGED FRAUD AGAINST FCC AND DCF INVESTORS

23. Contrary to section 57(b), the Executive Director has alleged that:

[9]... Wharram used at least \$75,000 of the Falls Investments towards the purchase of his residence.

...

[13]...Wharram used at least \$47,500 of the Sale of Claims proceeds for personal expenses, including restoring his father's Jeep and paying his mortgage.

...

[14]...The Falls, West Karma and Wharram perpetrated fraud on the Falls investors by:

- (a) raising \$5,442,400 from investors for investment with the Developer, and only advancing \$2,300,000 to the Developer; and*
- (b) using most of the Sale of Claims proceeds for Wharram's personal expenses.*

...

[19]...Wharram from the Deercrest Investments, used:

- (a) at least \$130,000 towards the purchase of his residence;*
- (b) \$240,000 to lend his wife to invest in a grocery store;*
- (c) \$24,000 to purchase a diamond ring for his wife.*

...

[20]...Deercrest, West Karma and Wharram perpetrated a fraud on Deercrest investors by:

- (a) raising \$3,953,000 from them for investment with the Developer and only advancing \$1,636,000 to the Developer; and*
- (b) using at least \$394,000 of the Deercrest Investments for Wharram personal expenses.*

Notice of Hearing, dated June 14, 2012
Staff Submissions, para 1
Hearing Transcript, April 7, 2014, p. 30 Lines 14-18

24. In order to find that the Respondents breached section 57(b) of the Securities Act, RSBC 1996, c. 418 (the "Act"), as alleged, the Panel must find all of the following:

- (a) that the Respondents perpetrated fraud on the investors in FCC and DCF with respect to the day to day operations of the Respondents (the alleged fraud) and, if the alleged fraud did in fact occur, that:
 - (b) the Respondents conduct resulted in or contributed to the alleged fraud; and
 - (c) the Respondents knew or reasonably should have known that his conduct would result in or contribute to the alleged fraud.
25. The Executive Director has made only 5 assertions of fact that are specific to the Respondents and could possibly relate to the alleged fraud:
- (a) that Wharram used Wharram used at least \$75,000 of the Falls Investments towards the purchase of his residence;
Notice of Hearing, dated June 14, 2012, para 9
 - (b) that the Respondents FCC, WKL, and Rodney Wharram raised \$5,443,400 from investors for investment with the Developer, and only advancing \$2,300,000 to the Developer;
Notice of Hearing, dated June 14, 2012, para 14(a)
 - (c) that the Respondents FCC, WKL and Rod Wharram used most of the Sale of Claims Proceeds for Wharram’s personal expenses;
Notice of Hearing, dated June 14, 2012, para 14(b)
 - (d) that the Respondents DCF, WKL, and Rod Wharram raised \$3,953,000 from investors for investment with the Developer and only advancing \$1,636,000 to the Developer; and
Notice of Hearing, dated June 14, 2012, para 20(a)
 - (e) that the Respondents used at least \$394,000 of the Deercrest Investments for Wharram’s personal expenses.
Notice of Hearing, dated June 14, 2012, para 20(b)
26. It is submitted that even if the Executive Director were able to prove these five assertions of fraudulent activity - there is NO cogent evidence as it would not follow that the Respondents knew or reasonably should have known (had Subjective Knowledge) that they were contributing to fraudulent activity in or surrounding the running of the businesses.

B. THE ALLEGED FALSE STATEMENT TO AN INVESTIGATOR

27. The Executive Director has also alleged that the Respondents made a false statement to an investigator at his compelled interview conducted in March 12 – 13, 2013 in breach of section 168.1 of the *Act*. The relevant portion of the Notice of Hearing states that the Respondent:

[22]...During the interview, Wharram stated that he:

- (a) *had not raised any funds from investors in 2013; and*
- (b) *was not currently trying to raise any funds from investors.*

[23]...After the interview, Commission staff learned that Wharram:

- (a) *contacted an investor in February 2013 and asked him to invest in the Deercreech property;*
- (b) *raised approximately:*
 - (i) *\$50,000 from one person on March 8, 2013; and*
 - (ii) *\$400,000 from additional people later in March and April 2013.*

Notice of Hearing, dated June 14, 2012

Staff Submissions, para 2

Hearing Transcript, April 7, 2014, p.30 Lines 18-25, p.31 Lines 1-4

28. In order to find that the Respondents breached section 168.1 of the Securities Act, RSBC 1996, c. 418 (the "Act"), as alleged, the Panel must find all of the following:

- (a) that the Respondents made a false statement to an investigator appointed by the Commission and, if the alleged wrongdoing did in fact occur, that:
- (b) the Respondents conduct resulted in or contributed to making a false statement to an Investigator; and
- (c) the Respondents knew or reasonably should have known that his conduct would result in or contribute to the allegation of making a false statement to an investigator.

29. The Executive Director has made only 2 assertions of fact that are specific to the Respondents and could possibly relate to the alleged making a false statement to an investigator:

- (a) Wharram stated, "he had not raised any funds from investors in 2013"; and

Notice of Hearing, June 14, 2012, para 22(a)

- (b) Wharram stated, "he was not currently trying to raise any funds from investors."

Notice of Hearing, June 14, 2012, para 22(b)

30. It is submitted that even if the Executive Director were able to prove these 2 assertions, of which, as explained in these submissions, there is NO cogent evidence as it would not follow that the Respondents knew or reasonably should have known that they were contributing to making a false statement to an investigator.

Extra! Extra! Read All About It!

31. On June 14, 2013, the BCSC issued a press release that states, “*staff alleged that only \$2.3 million of the \$5.4 million raised under the two October OM’s was advanced to the developer...*” in FCC and “*...Staff allege that only \$1.6 million of the \$3.95 million raised under the two March OM’s was advanced to the developer...*” in DCF.

Exh. 00256

32. Simple math, tells the readers of the press release, the amount alleged not advanced to the developer in FCC is equal to \$3.1 million and the amount alleged not advanced to the developer in DCF is \$2.35 million. The total of these two numbers is \$5.45 million which is in line with Staff’s summary pages that were relied upon by Staff.

BCSC01115/EXH00233 (total in grey box at bottom of page)

33. Staff has alleged the Respondents DCF and FCC committed fraud by not advancing the majority of the money raised in the FCC and DCF Offerings – some \$5.45 million dollars.

34. According to the “*Comparison of Amounts Transferred to West Karma Ltd.*” summary that Staff has relied on, the amounts loaned to Blackburn are \$2,302,333 (for FCC) and \$1,636,000 (for DCF). According to this same document, the amount raised from investors in FCC was \$5,442,400 and in DCF was \$3,953,000 which totals \$9,395,400 as outlined in the box at the bottom of the page.

BCSC01115/EXH00233

35. According to the numbers in this exhibit, when we subtract the total advanced to the Developer (\$3,938,333) from the total amount raised (\$9,395,400) we get \$5,457,067 - or the \$5.45 million the Executive Director has alleged not to have been advanced to the Developer. This \$5.45 million number forms part of the alleged fraud as outlined in the Notice of Hearing and the summary page contains the same numbers the writer of the press release relied upon which was ultimately picked up by the media in Chilliwack, Vancouver, and across the internet.

Notice of Hearing, dates June 14, 2012

BCSC01115/EXH00233

EXH 256

36. It is the opinion of the Respondents; this alleged \$5.45 million fraud is not factual, as it did not consider legitimate expenses as permitted in the respective Offering Memorandums of each of the FCC and DCF Respondents. In addition, the summary prepared by Chan did not include expenses paid by the Respondents on behalf of the Developer which dramatically skewed the numbers. Despite the investigator knowing about several of the expenses (including the investor interest) paid by the Respondents – the Executive Director relied upon the partial evidence gathered by the investigation leader to form the basis of the allegations in the Notice of Hearing.

BCSC01115/EXH00233

Staff Submissions, para 118

37. The Executive Director, along with Commission Staff, failed to bring accurate, compelling and convincing numbers into both the Notice of Hearing and/or the hearing before the Panel. As mentioned, Chan DID NOT include relevant numbers in her summary of the books and records which dramatically skewed numbers and unfortunately sensationalized the case brought forward by the Executive Director of the BCSC.
38. It is submitted that allegations as serious as fraud cannot be made without first understanding or knowing (in an accurate manner) where each dollar of investor funds were spent and for what purpose. Staff has provided no evidence, let alone cogent evidence, of where all the investor funds were spent, because the Executive Director did not deem it necessary to have a factual accounting completed in order to bring forward the allegations.
39. Wharram, although was in day-to-day control of the companies, is not a lawyer or an accountant and did not write the Offering Memorandums or prepare any of the accounting with respect to the Respondents. Staff has not brought forward evidence showing the Respondents *intentionally (with Subjective Knowledge)* knew they were contributing to the fraud based on the balance of probabilities or for any other reason.
40. The amounts alleged not advanced to the Developer by the Respondents are in dispute and was touched on during Chan's cross examination during the hearing. The onus is on the Staff to prove these amounts are accurate in order to prove their case. The Respondents submit the amounts are possibly not accurate. Staff has not brought forward evidence proving their allegation other than Wharram's Investor list, Creditor Claim amounts submitted by Wharram to Streetwise, Wharram's testimony at the compelled interview, and partial bank statements. Not one of these items have been certified accurate by the Respondents, an Independent Third Party, or the Commission themselves. If one of these items was inaccurate, it would cause the other 3 to be inaccurate as well. This is not cogent evidence and is subject to mistakes, yet we have Staff relying on this as the main stay of their case.

Staff Submissions, para 14 and 33;
Staff Submissions 19 and 35;
Staff Submissions, para 59

41. As stated above, Staff has relied on Wharram's testimony during his compelled interview in determining the amounts raised from Investors, The Respondents when asked about the amounts during the Interview were looking at spreadsheets placed in front of him by the investigator – and agreed to the amount in those documents. Wharram has always disputed the amount in the Notice of Hearing to be inaccurate.

STAFF'S THEORY – THE MAJORITY OF THE FUNDS WERE NOT ADVANCED TO DEVELOPER

42. As mentioned, the main theory surrounding Staff's allegations of fraud is that the Respondents did not advance the majority of the funds to the Developer in both the FCC and DCF Offerings. It is the basis of their allegations of fraud in the Notice of Hearing, Press Release, and a key part

of their submissions, where they repeatedly state *“the majority of the funds were not advanced to the Developer.”*

Notice of Hearing, dated June 14, 2012, between para 5-6 (Less than half the funds invested)

EXH00256

Staff Submissions, para 10(a), 53, 59(b), 69, 91, 96, 119, 155, 168

43. If Staff’s theory is one to be used, it must come with cogent evidence that is clear and compelling in nature. Although it must be proven on only the balance of probabilities, due to the seriousness nature of the violations and consequences from an adverse finding it is required that proof tendered by Staff be *“clear and convincing”*.

Re Hu, 2011BCSECCOM 355, at para. 13

44. The Respondents question the theory of Staff and submit it lacks cogent evidence and is not one that meets the requirements in a case with the seriousness of the consequences of an adverse finding. Although their case, at a glance appears to be strong, there are several items that are NOT cogent and go directly against logic and the facts regarding the actions of the Respondents.

45. Again, the onus is on the Executive Director to make their case on the balance of probabilities with cogent evidence. Despite having what amounts to essentially unlimited resources and a carte blanche ability to investigate the Respondents, Staff have not brought forward cogent evidence that proves the Respondents did not make mistakes in any of the information provided to the investigators. Staff relied on the evidence Wharram provided during the investigation and *“admissions Wharram made in his interview.”* Commission investigators did not investigate or confirm the accuracy of this information or cause this information to be audited by any independent party. This evidence may or may not be accurate and Staff have not proven that it is accurate, only that they relied on it.

Staff Submissions, para 178

Staff’s Summary Evidence is Not Cogent

46. Again, Staff submit they did not have to do a full tracing of the investor funds because *“it was unnecessary given the admissions Wharram made in his interview.”* The Respondents fully disagree with this statement by Staff considering the seriousness of the allegation and the magnitude of the possible punishment. Many of the admissions made by Wharram (as alleged by Staff during his interview) were answering direct questions regarding documents placed directly in front of him. Whether they were accurate or not has never been proven by Staff before this Panel. Wharram answered questions in a stressful situation, under duress, and during two full days of interviews. With no time to reflect or review the entire situation, the Respondents simply answered pointed questions about specific documents and the Executive Director has hand selected portions of the interviews in an attempt to piece together a story that fits their theory.

Staff Submissions, para 178

47. The evidence submitted by Staff does not provide clear and convincing proof that the Respondents, in fact, perpetrated a fraud on the FCC and DCF investors (by not advancing the majority of the funds to the Developer) as the Executive Director did not provide any evidence that a full, detailed accounting of Investors Funds was ever completed. Mistakes were made in the collection of evidence by the investigator or mysteriously omitted altogether depending on whether it suited Staff's theory of the events. A small example, that instantly skews the numbers in the DCF allegations by \$10,000, is brought forward during the cross examination of Chan:

Q I forget your answer. Is this \$10,000 written to these four entities included in these numbers?

A I don't believe it's in that \$5.4 million figure, I don't think it was part of the claim that you filed.

Q As leader of this investigation, would it be your testimony that the review by your department was accurate?

A Yes. I would say that the evidence that I obtained and the summaries I prepared are accurate.

Q And, again, besides this \$10,000, are you confident that there is not other expenses that were not included in the accounting by the respondents?

A I didn't do an accounting of the respondents.

Q Why not?

A I didn't think it was necessary. I mean it wasn't part of the investigation or the evidence gathering that I prepared.

Q So is it as simple as grabbing a couple of receipts and --

A No, it's not.

Q How can you say you don't need to do an accounting when you're using numbers that are directly in the Executive Director's Notice of Hearing?

A As I stated, I obtained evidence which included the bank statements, okay, as well as other sources of documents to prepare these tables, as well as the other tables that I prepared.

Q Without doing an accounting, and I hate to use the word, but is it like cherry picking certain information?

A No.

Q How do you justify what you're doing at this juncture of the investigation?

A Again, I'm sorry, you have a couple of questions in there, but there is no cherry picking.

Q You select certain items?

A No.

Q Okay. It's not considering items like these four cheques give you a correct total in the 5.457067 in the summary page?

A That is a correct total based on the evidence that I obtained.

Hearing Transcript, April 14, 2014, p.30 Lines 3-25 and p.31 Lines 1-22 [Emphasis Added]

48. Chan, again during her cross examination, had this to say:

Q Is it possible that the number alleged to have not been funded to the developer by the two respondents in this matter is the 5.45 million that you determined through your accounting and summary of all actions of the two respondents?

A Well, the numbers in the Notice of Hearing, which I think were carried on to the news release, would have been based on my evidence, yes.

Hearing Transcript, April 11, 2014, p. 165 L 15-22

49. In the last 2 paragraphs, we have Chan, the Lead Investigator with conduct on this file, stating her findings were used in both the Notice of Hearing and News Release while admitting there are (valid) numbers not included in her summary evidence. This is not cogent evidence at any level.

50. In the transcripts above, Chan indicates she does not select (or cherry pick) certain items yet we have just that occurring in different places. The Respondents maintain that in order for a multi-million dollar fraud to be proven, there should have been a detailed accounting with accurate numbers brought before the Panel but instead, we have an investigator who:

- admits that she did not do an accounting:

Hearing Transcript, April 14, 2014, p. 30 Line 18

- admits she did not obtain all of the documentation from banking institutes;

Hearing Transcript, April 9, 2014, p. 86 Lines 19-21

- admits she did not review credit card statements or even ask for them at any time during her investigation;

Hearing Transcript, April 11, 2014, p. 50 Line 20-23

- admits to not asking me about ANY shareholder loans placed into West Karma;

Hearing Transcript, April 11, 2014, p. 23 Lines 4-6

51. Despite the fact that the lead investigator was a trained accountant, the Executive Director unfortunately accepted this summary evidence from the investigator and subsequently used this information to issue the Notice of Hearing which alleges a multi-million dollar fraud by implying the Respondents did not forward the majority of the funds raised from investors. Again, nowhere in the Commission's investigation did Chan, or any other Staff member, complete a detailed accounting of where investor funds went and nowhere is an accounting presented that would give clear, convincing proof to back up the claims of the Executive Director.
52. Staff submits the investigator only spoke to 16 Falls Investors (approximately 9% of the total) and 6 Deercrest Investors (approximately 6% of the total) during their entire investigation. Speaking to a very small portion of the entire investor in the Respondents would not give definitive proof of "anything" and is not cogent evidence as it does not compare a large enough demographic to support their theories.

Staff Submissions, para 176 (b)

53. It is the Respondents submission that sections in the Offering Memorandum(s) allowed for business expenses associated with both FCC and DCF but even though many of them were acknowledged and known by Chan, were not even considered in the Executive Director's allegation of a \$5.45 million fraud.
54. Some, not all of these expenses, should have been included in the monies deemed to have been advanced to the Developer. Staff did not break down any of these expenses to determine whose responsibility they would be – the Developer, WKL, or the FCC/DCF entities themselves. When ANY of the Respondents allocated funds on behalf of the Developer (as with the 4 cheques written by DCF to tradespeople that Chan included in her spreadsheets), they should have been added to the total of funds advanced to the Developer. But, Chan seems to omit some pretty large outlays of investor money but allows others depending on who told her about it or where she received her information from.

EXH00257

55. It is baffling why Chan would include some expenses, or payments made on behalf of the Developer and not others. She indicates in the following :

Q Were these items included in the claim amount sent to the monitor in the CCAA proceedings in 2011?

A Yes. They are included in the Deercrest Construction Fund claim.

Q Were these payments, three out of four of them, because I know you know who Blackburn is, but these three out of four payments taken at face value, because they were included in the claim amount in the hearing with the CCAA?

A I'm not sure what you mean by "taken at face value", but I did recognize that they weren't included in the claim, but they were provided as support for that claim.

Q Did you determine whether these business expenses were incurred by the respondents?

A Well, I asked you about them, and you indicated that you made those payments to Bancorp, Borden Ladner Gervais and Landus on behalf of Blackburn, because Blackburn, I think more specifically Mr. Wellsby, asked you to.

Q Are you certain that these were valid claim amounts?

A Am I certain that they're valid claim amounts?

Q Yes?

A I know they were included in the claim and I did question about them, but am I certain about it? They were part of the claim, but I don't know –

Hearing Transcripts, April 14, 2014, p. 26 Lines 19-25 and p.27 Lines 1-20
[Emphasis Added]

56. Again, taking some expenses into consideration while preparing her summary work and not others in not cogent and quite frankly places bias on the defence of the Respondents. Wharram made a mistake in the preparation of the information provided to Price Waterhouse Coopers, a mistake in the information provided to Streetwise (for the Claim amount) and a mistake in the information provided to the BCSC. The mistake was not including all valid outlays of cash spent by the Respondents on behalf of the Developer, in any of the accounting supplied to these companies or government agencies.

57. The Executive Director relied on Chan's summary pages while producing the Notice of Hearing and subsequent allegations of a \$5.45 million fraud. During the cross examination of Chan, questions were specifically asked with respect to the summary pages she prepared and whether or not these permitted expenses were included in the work she submitted to the Executive Director. These are all expenses incurred by the FCC and DCF entities bearing in mind that most were paid by WKL. These included:

i. Office Expenses

Q Did you ever ask during your course of your investigation, about my office expenses?

A Umm, your office expenses, I asked about your office but I don't recall asking specifically about your expenses for the office.

Q So they are not calculated as part of your numbers?

A No, that wasn't part of my calculations.

Hearing Transcript, April 11, 2014, p.39 Lines 14-21

SUBMISSION: It is the position of the Respondents that office expenses incurred by the FCC and DCF entities were legitimate expenses yet was not considered in the summary work prepared by the investigator during the course of the investigation.

ii. Marketing

- Q During your investigation, did you ever ask me about additional funds needed for marketing?
- A Uhm, I don't know if I asked you about the additional funds needed for marketing, but you did speak about marketing expenses.
- Q And what did I tell you about that?
- A That there were some, that there were marketing expenses.
- Q Did you ask me if I had reason to use more funds than I anticipated in my projections for marketing?
- A I don't think I asked that specific question.

Hearing Transcript, April 11, 2014, p.40 Lines 24-25 & p.41 Lines 1-10

SUBMISSION: The investigator distinctly remembers asking the Respondent about marketing expenses but failed to ask additional questions as to whether additional funds were needed to attract investors to the project. Considering the timing (2007 – 2010 fell into a time frame when the “economic crisis” was occurring) the Respondents were actively raising capital, one could reasonably consider that attracting investors would be harder and may take additional efforts in order to attract investors – but the Commission’s investigator(s) neglect(s) to ask the simplest of questions.

iii. Accounting

- Q Did you ever ask the Respondents about their accounting charges?
- A Uhm, no. I did not.
- ...
- Q Did you determine any accounting charges and include any of those figures into your spreadsheets?
- A I don't think that I encountered any accounting charges, and no, they're not in the spreadsheet...

Hearing Transcript, April 11, 2014, p. 42 Lines 16-18 & 21-25

SUBMISSION: It is the Respondents view that ALL companies incur accounting charges in the daily running of their businesses yet the Commission’s investigator neglects to add this into her summary spreadsheets as a legitimate business expense. Each of the Respondents did have accounting charges and to not inquire and include them in any review would not make that review accurate.

iv. Bank Charges

Q Did you ask me about bank fees and charges incurred from the bank accounts at the Scotiabank during your investigation of the respondents, or at any time during our interview?

A I don't think so. No, I don't.

Hearing Transcript, April 11, 2014, p.43 Lines 9-13

SUBMISSION: As with the Accounting noted above, the Respondents feel that the investigator should have known in advance that ALL companies incur bank charges monthly and yet these too, are not included in any of the work she completed on this file despite her seeing them while looking at the bank statements.

v. Olympia Trust Fees

Q Thank you. The professional fees that were charged by Olympia Truest to act as my trustee, were they ever included in any of your financial spreadsheets and specifically in a summary page?

A In this specific summary page, no. I did, I did see that there were payments coming in from Olympia Trust, and I also saw documents where it looked like you were claiming fees that had been paid to Olympia Trust, backed by Blackburn, but it's not specifically in the spreadsheet.

Hearing Transcript, April 11, 2014, p.44 Lines 6-15

SUBMISSION: It is the Respondents view that the investigator acknowledges that she saw "documents where it looked like you were claiming fees that had been paid to Olympia Trust" but yet once again fails to include any of these expenses in any of her work completed on this file. The Commission investigator neglected to include the hundreds of thousands of dollars that she knew were paid to Olympia Trust in the operation of the FCC business.

vi. Professional Fees

Q During your investigation, did you ever determine any other professional fees, the amounts of such, even fees to the British Columbia Securities Commission that I paid, or the Alberta Securities Commission? Did you include those in your financials?

A Uhm, I did not include them in the spreadsheet, no.

Hearing Transcript, April 11, 2014, p.44 Lines 16-23

SUBMISSION: In the view of the Respondents, the investigator certainly knew of the fees paid to the BCSC by the Respondents as she testified to this in her direct YET fails to include them in any of the work she provides to the Executive Director.

Hearing Transcript, April 7, 2014, p.45 Lines 12-16

vii. Scotiabank Visas

Q Did you obtain any credit card statements for any of the respondents?

A Yeah, I believe I got some Visa statements from Scotiabank.

Q Your testimony is only the Visas from Scotiabank?

A I believe so, yes. I don't think I got anything else. I don't think I received anything else.

Q Did you ever complete an accounting on the Scotiabank Visa cards to determine whether they were business or personal?

A Uhm, I reviewed them but I didn't do an accounting of them.

Q No accounting?

A No.

Q And I'm sorry, for the record from what banking institute did you review the credit card statements?

A Scotiabank.

Q How many Scotiabank credit cards did you receive statements for?

A It's hard for me to tell because they provided me statements with a couple of different account numbers, and it appeared that maybe one of the, one or two of the account numbers were changed over to your account numbers. Uhm, so it might have been the same account, but just the number changed. So, I received a number of different account numbers.

Q During your investigation, did you determine how many credit cards I had with Scotiabank?

A I think, according to their statement, there were two, possibly three. If you take me to the document, I can give you a more definitive answer, but that's my recollection.

Q Did the respondents hold any other credit cards from other entities other than Scotiabank?

A I think so. I think there might have been Amex and possibly others.

Hearing Transcript, April 11, 2014, p. 45 Lines 2-25 & p.46 Lines 1-14

SUBMISSION: The Respondents respectfully submit that over 3 years of Scotia Bank visa transactions, most of which were directly related to construction costs and business expenses were not reviewed, or included in the investigators calculations. In addition to the one Visa card known to the investigator, she states she knew of two, possibly three cards with Scotia Bank. No construction cost or business expenses on any of the Respondents Visa cards formed part of any calculation on the Executive Directors spreadsheets.

viii. Amex

- Q Before the break, I had asked if -- do you know if the respondents held any other credit cards from any other entities other than Scotiabank and you replied you think so; is that correct?
- A I think so, yeah. I think there's at least an Amex, and there might be others as well, but I can't recall exactly.
- Q Did you review the respondents' American Express cards during your investigation?
- A No, I didn't have those statements.

Hearing Transcript, April 11, 2014, p. 48 Lines 21-25 & p.49 Lines 1-5

SUBMISSION: It is the Respondents view that the investigator knew about the American Express cards but DID NOT review these statements to ascertain which contained construction costs or business expenses. The Respondents respectfully submit that over 3 years of American Express Credit card transactions, most of which were directly related to the running of the businesses were not reviewed, or included in the Investigators calculations that formed the allegation of fraud in the Notice of Hearing.

ix. MasterCard

- Q About 13 lines down, there's a, it says "PC bill payment Capital One MasterCard for \$2,500." Do you see that there?
- A Yes.
- Q Can we go to BCSC 00178? And on this one, could we go to page 3, about halfway down. Again, there's another PC bill payment Capital One MasterCard for \$2,500. Do you see that?
- A Yes.
- ...
- Q During your investigation, did you review this payment?
- A No.
- Q Is it reflective in any of your accounting that you have produced?
- A Uhm, it's not reflected in any of my spreadsheets I don't believe.
- Q At any time, did you determine whether payments like this going onto a MasterCard were for business or for pleasure?
- A Uhm, no.
- Q You did not break down the credit card statements?

A I didn't have these credit card statements.

Q Did you ask for them at any time?

A Uhm, I don't think so.

Hearing Transcript, April 11, 2014, p.49 Lines 15-23 & p.50 Lines 9-23

SUBMISSION: Again, as with the other credit cards noted above, the Respondents opinion is that the Lead Investigator knew about the MasterCard credit card, but never reviewed the statements. The Respondents respectfully submit that over 3 years of MasterCard transactions, most of which were directly related to construction costs or business expenses were not reviewed, or included in the Investigators calculations that formed the allegation of fraud in the Notice of Hearing.

x. Cash Withdrawals

Q Ms. Chan, were there any large cash withdrawals from any of the respondents' bank accounts?

A Uhm, there were cash withdrawals, yes. Uhm, I can't remember how large they were, whether they were large or not.

Q Are you familiar with real estate development?

A Am I familiar with it?

Q Yes.

A You mean –

Q Have you ever worked directly with real estate tradespeople?

A Uh, with real estate tradespeople? Uhm, not in the business fashion, no.

Q With the economy down and many tradespeople having issues with getting paid, is it possible tradespeople were asking to be paid cash as opposed to receiving cheques or money orders?

...

A Uhm, is it possible? Yes, I suppose so.

Q Did you ever ask me, during your course of your investigation, if I paid cash for expenses that were not on any bank, banking documents that you reviewed?

A Uhm, no, I didn't ask you if you were paying cash to any expenses.

Q During your investigation, did you find the respondents incurred legitimate business expenses – I will strike that. During your investigation, did you find the respondents incurred payments to entities that were – that were not cheque, money order or credit cards?

A Yes.

Q And what were they?

A Uhm, like, to what entities were they –

Q Yes.

A Well, I noted that there were payments made to Blackburn, and there were numerous entities, and we are talking over a very long period of time that we covered.

Q Was payments to Blackburn allowed?

A Allowed. Uhm, I did – I noted that there were payments to Blackburn.

Q Okay. And that was – that’s in your accounting?

A In my review, yes.

Q Okay. Do you know if there were any payments made to entities other than Blackburn that were not cheque, money order or credit cards?

A I’m sorry, are you asking me if there were cash payments?

Q Uhm –

A I’m not sure, like, what you are asking me. Are you asking me if I noted any cash payments made to entities?

Q Any other forms of payment whether – different than cheque, money order or credit cards?

A Can you give me an example?

Q Uhm, cash.

A Okay. So then I want to, I want to answer the question just previous to this one again. I’m sorry, I was confused with your question. I didn’t note that there were any cash payments to Blackburn, so I just wanted to make that clear. Did I note any other cash payments to any other entities? I noted that there were cash withdrawals, but I don’t know who those cash withdrawals – what happened to that cash.

Q And did you ever ask the respondents during their interview or at any time during your investigation?

A What happened to those cash withdrawals?

Q That’s correct.

A No, I didn’t.

Hearing Transcript, April 11, 2014, p. 67 Lines 12-25, p. 68 Lines 1-3, 8-25, p.69 Lines 1-25, p.70 Lines 1-3

SUBMISSION: The Respondents respectfully submit that over 3 years of cash withdrawal transactions, most of which were directly related to construction costs and business expenses

were not reviewed, or included in the investigators calculations, despite the fact Chan knew about cash withdrawals. Expenses paid by cash to tradespeople were not determined by the investigator because she did not ask any questions about this or determine the amount.

xi. Investor Interest

Q Okay. Did you review the respondents bank accounts and determine the total amount of interest that went to investors in 2009, 2010, and 2011?

A I did review the bank statements that I obtained from the respondents, and I did note there were cheques paid as - - that were noted as being deposited interest, but I did not calculate the total interest paid? **No, I don't think I did.**

...

A ...The interest reserve amount is not shown on that table, no.

Q It's not in your calculation - - it's not in your calculations, is that correct?

A **No, it's not in that calculation, no.**

Q Can you tell us why not?

A That wasn't that purpose of that calculation, was to show the difference between funds raised and funds advanced.

Q Was the purpose of your summary to give to the Executive Director an amount that he could allege what was fraud?

A No of it was to show the difference between the funds raised and the funds advanced..

Q Do you understand that the number though that you gave him has been put into the Notice of Hearing?

A I'm not sure if I - -[dp] you could show me where that number is in the Notice of Hearing.

Q Guess we'll do it this way, can you pull up 1115. Down at the bottom there is a number that's in grey labelled difference.

A Yep, I see that.

Q Can you please [tell] us again what [that] number is?

A That [\$5.457] million, yes, that is a figure that I calculated as being the difference between the total funds raised by The Falls Capital Corp and Deercrest Construction Fund to the funds that were advanced to Blackburn.

Q When we look at the Notice of Hearing there is a number that is \$5.45 million taken from both respondents that was not sent to the developer, that's the wording in it, can you please explain to us if these two numbers are the exact same?

...

Q Do you know the number? I don't know if we need to take the time to sit here and add this all up, but when you add up the numbers that were in I believe it's 14 and 20, points 14 and 20, it totals \$5.4 million you're alleging was not advanced to the developer. My question to Ms. Chan is are those numbers what we directly sent over to which the Executive Director is alleging the fraud, these are your findings?

A I know, Mr. Wharram, I'm sorry, I don't see that number in the Notice of Hearing. I will say that it was my evidence that I provided -- or that I obtained that do support the allegations in the Notice of Hearing.

Q Can we go to page 2. In 14(a) it says \$2.3 million to the developer; is that correct?

A I do see that there, yes.

Q If we look on the top of the page ending on 1115 on the right-hand side, in your top box there, about half-way down it says, "Funds loaned to Blackburn Developments and Fall Capital Corp. of \$2.3 million." Can you see that?

A I'm looking at 14(a) of the Notice of Hearing?

Q No.

A I just refer back, so you're saying that in 14(a), that 2.3 million is back to the developer.

Q That's correct?

A Now we're looking at Exhibit 1115.

Q The top box there is a yellow line and then two white lines?

A Yes. I see that.

Q Okay. The second white line down, can you tell us the amount?

A It's if you can enlarge it I think it says \$2,302,033.

Q Is that the same amount that's in 14(a) on the left-hand side of the document?

A Yes. I believe so.

MR. WHARRAM:

Thank you. Can we go to 20 -- sorry, next page on the left-hand side document, page 3. Okay. Here in 20(a) --

...

MR. WHARRAM:

If we look at 20(a), there is an amount there of \$1.6 million?

A Yes.

Q Okay. Over on the right-hand document there is a number there, in the blue, Rod Wharram blue box now, there is a blue box, there is two white boxes and then a grey one. The second box down there is a number there, can you please tell it to us?

A Yes, 1,636,000.

Q The exact amount that's in the Notice of Hearing under 20(a)?

A Yes.

Hearing Transcript, April 14, 2014, p. 17 L 11-19, p. 19 L 5-25, p. 20 L 1-14, 24-25, p.21 L 1-25, p.22 L 1-14, p. 24 L 22-25, p.25 L 1-8
Hearing Transcript, April 11, 2014, p.165 Lines 20-22

SUBMISSION: The Respondents respectfully submit that the Executive Director has not considered the interest paid to investors in the calculations that were used to allege fraud. It is the view of the Respondents that the ability to use investors dollars as a short term interest reserve was clearly outlined to all investors in DCF in the Offering Memorandum under Section 2.7. The testimony above from the Lead Investigator again shows she did not include valid business expenses despite knowing about them and did not familiarize herself with the contents of the DCF Offering Memorandums. And what's worse is the Executive Director has alleged fraud while having relied on the numbers prepared from Chan's summary pages.

BCSC00185/EXH00155, p.8 Section 2.7
BCSC00186/EXH00155, p.8 Section 2.7

The Numbers Are Too Close to Rely On

58. The problem Staff have with proving their case is that the numbers (whether the majority of the available funds were advanced to the Developer or not) are too close to rely on, especially on the balance of probabilities. Staff has provided proof that funds DID get advanced to the Developer. There is NOT a situation here were the Issuer(s) absconded with investor monies or raised funds for a project that did not exist. The project was real, the Developer was real and the Respondents did advance funds to or on behalf of the Developer throughout the duration of the project.

Staff Submissions, para 13(a)
Staff Submissions, para 32(b)

59. Staff did not have an open and shut case and should have completed a thorough accounting of the books and records of the Respondents. But they did not, instead they brought forward summary evidence in an attempt to see if it would pass the balance of probabilities test. It does not before this Panel, nor would it at any level of court in Canada.

60. Staff's summary evidence indicates that only 42.30% of the FCC funds and 41.39% of the DCF were advanced to the Developer. The Respondents submit that even a small miscalculation (or a mistake) by any of the four Respondents involved (whom provided the information Staff have relied upon) may have skewed the numbers one way or another.

Staff Submissions 71 and 121

Would a Different Interpretation of the OM's Change the Numbers?

61. Or, even if Staff and the Respondents had a different interpretation of the Offering Memorandum(s) used for both FCC and DCF, this too, would have caused the numbers alleged to not have been advanced to the Developer (that form the basis of the Notice of Hearing) to be different.

62. During the cross examination of Chan, she indicated she reviewed the FCC and DCF Offering Memorandum(s) and these are items she (and the Executive Director) relied on during the investigation. To rely on a document like an Offering Memorandum, the onus would be on the investigator and Executive Director to familiarize themselves with the contents of each of the Offering Memorandums – define any issues/mistakes within them and analyze (or cause an analysis) of any discrepancies within the Offering Memorandum(s).

Hearing Transcript, April 11, 2014, p.39 L 5-13

OUR POSITION – NOT ADVANCING THE MAJORITY OF THE FCC FUNDS TO DEVELOPER

63. It is submitted that the Respondents Wharram, FCC, or WKL, did not participate in or direct, an intentional fraud against the FCC investors by not advancing the majority of the funds to the Developer or using most of the Sale of Claims proceeds for Wharram's personal expenses.

64. As outline above, the allegation in the Notice of Hearing states, *"The Falls, West Karma and Wharram perpetrated fraud on the Falls investors by: (a) raising \$5,442,400 from investors for investment with the Developer, and only advancing \$2,300,000 to the Developer; and (b) using most of the Sale of Claims proceeds for Wharram's personal expenses."*

Notice of Hearing, dated June 14, 2012, para 14

65. Staff have submitted that the FCC Offering Memorandum(s) stipulate that, *"(a) all fees and commissions from the sale of units sold pursuant to the Falls OM's will be paid on the Falls' behalf by West Karma; and (b) West Karma was entitled to receive 13.4615% from any funds advanced to the Joint Ventures as reimbursement for "any and all costs and expenses WKL incurs as a result of this Offering".*

Staff Submissions, para 16 [Emphasis Added]

66. In keeping with their theory, Staff has submitted on numerous occasions the Respondents failed to advance the majority of *"The Falls Investments to the Developer"*.

Staff Submissions, para 10(a), 53, 59(b), 69, 91, 96, 168
Notice of Hearing, dated June 14, 2012, between para 5-6 (Less than half the funds invested)

67. While the Submission by Staff is acknowledged and understood by the Respondents, the Respondents will respectfully submit their interpretation of the FCC Offering Memorandum(s) which varies significantly from one submitted by Staff and instantly shows the Panel the

significance of the need to have prepared a proper accounting and the consequences of relying on summary evidence. The Respondents interpretation clearly relied upon at all relevant times and the way they perceive and calculate the numbers with respect to the Offering Memorandum(s).

68. Section 1.1 and 1.2 of the FCC Offering Memorandum(s) indicate:

1.1 Net Proceeds

The net proceeds of this Offering of Units (the "Offering") and the funds that will be available to the Corporation after this Offering are as follows:

		Assuming Minimum Offering	Assuming Maximum Offering
A	Amount to be raised by issuance of this Offering	\$50,000	\$52,000,000
B	Selling commissions (10%) ⁽¹⁾	\$0	\$0
C	Working Capital Deficiency due to Offering costs	\$62,985	\$62,985
D	Net proceeds: D = A – (B + C)	\$11,015	\$51,961,015

Notes:

⁽¹⁾Selling commissions, if any, shall be paid by West Karma Ltd ("WKL").

⁽²⁾Offering costs includes legal fees, accounting fees, printing expenses, and other third party costs. The Issuer has a working capital deficiency of \$62,985 as at October 15, 2007. The working capital has been advanced by WKL, a related company, to the Corporation and will be repaid from the proceeds of this Offering.

As of the date of this Memorandum, WKL owns 40% of the issued and outstanding Class A shares of the Corporation. The Officers and Directors of the Issuer are also Officers, Directors and Shareholders of West Karma Ltd. **See Item 3.1 - Compensation Paid and Securities Held.**

1.2 Use of Net Proceeds

The available funds will be used as follows:

Description of intended use of available funds listed in order or priority	Assuming Minimum Offering	Assuming Maximum Offering
1. The <u>majority</u> of the proceeds of this Offering will be loaned to meet its financial contribution obligations pursuant to 4 joint venture agreements to facilitate funding of The Falls: Road to 2010 Development. See Items 2.2.1 – The Joint Ventures and 2.2.3 – The Joint Venture Agreements; and	\$1,015	\$50,200,000
2. To pay for all management, administration, marketing and operating expenses incurred by the Issuer in the conduct of its business. See Item 2.9 - Material Agreements.	\$10,000	\$1,761,015
Total	\$11,015	\$51,961,015

BCSC00163/EXH00133 (the Falls 2007 OM) P4 Section 1.1 – 1.2
BCSC00164/EXH00134 (the Falls 2008 OM) P4 Section 1.1 – 1.2 [Emphasis Added]

69. The Respondents hereby submit the FCC Offering Memorandum(s) clearly state the Respondents would advance the majority of *Available Funds* in the *Net Proceeds/Use of Net Proceeds* sections as noted above.

70. During all relevant times, the Respondents were of the opinion that the majority of the **available funds** were what was to be relied upon and the majority of the available funds were what was required to be sent to the Developer.

71. It is clear there are two distinct interpretations in the FCC Offering Memorandums and Staff and the Respondents have taken the opposite interpretations.

72. Additionally, Staff had a different interpretation with respect to the Commission WKL earned in raising capital from the FCC investors. They submit that \$469,806 in commission WKL was paid and this is the number that forms part of Chan's summary report and forms part of Chan's affidavit in BCSC00158.

73. The FCC Offering Memorandums clearly state the following:

- (i) From the funds advance to the Joint Ventures, the Joint Venture that receives such funds agrees to transfer 13.4615% of each Loan to WKL as reimbursement for any and all costs and expenses WKL incurs as a result of this Offering and, notwithstanding the amount of its actual costs, WKL shall not be required to repay, refund or rebate any portion of this amount to any of the Joint Venture. In addition to this reimbursement, Falls Ventures agrees to compensate WKL from their share of the profit contingent on the actual Loan provided to the Bare Trustees. WKL could earn a maximum of 5% of the total actual profit earned if WKL raises the full \$ 52,000,000. This additional compensation will be deducted from Falls Ventures share of the Joint Ventures and paid to WKL pro rated on the amount raised and at the time of distribution of the balance of the Revenues under the Eighth Priority as per Section 8.1 (viii) and Section 20.1 (viii) to the Joint Ventures. This compensation carries no rights to voting or any other corporate rights or responsibilities;

BCSC00163/EXH00133 (the Falls 2007 OM) P7 Section 2.2.3 (i)
BCSC00164/EXH00134 (the Falls 2008 OM) P7 Section 2.2.3 (i) [Emphasis Added]

74. Looking at the table (shown in paragraph #68 above) in the respective Offering Memorandum(s) *Net Proceeds* are clearly defined as:

$$\text{Net Proceeds} = \text{Amount to be Raised} - (\text{Selling Commission} + \text{Working Capital Deficiency})$$

BCSC00163/EXH00133 (the Falls 2007 OM) P4 Section 1.1
BCSC00164/EXH00134 (the Falls 2008 OM) P4 Section 1.1

75. In both the 2007 and 2008 FCC Offering Memorandums, the *Working Capital Deficiency due to Operating Costs* (“WCD”) is set at \$62,985.

BCSC00163/EXH00133 (the Falls 2007 OM) P4 Section 1.1
BCSC00164/EXH00134 (the Falls 2008 OM) P4 Section 1.1

76. The total amount raised under the FCC offering was \$5,442,400.

Staff Submissions, para 14

77. Non-refundable commission and marketing amounts (13.4615% of total amount raised) is equal to \$732,628.68.

78. The Respondents submit that the numbers they relied on were as follows:

$$\begin{array}{rccccccc} \$4,646,786.32 & = & \$5,442,400 & - & (\$732,628.68 & + & \$62,985) \\ \text{Net Proceeds} & & \text{Amount to be Raised} & & \text{Selling Commission} & & \text{WCD} \end{array}$$

79. Oxford Dictionaries simply defines MAJORITY as:
“The greater number”

Source: <http://www.oxforddictionaries.com/definition/english/majority>

80. Now, looking at the Respondents interpretation, half of the available Net Proceeds amount of \$4,646,786.32 is equal to \$2,323,393.16. The majority would be any number greater than \$2,323,393.16.

81. According to the Falls Cheques Summary which Staff have relied on, FCC made payments totaling \$2,189,301.42 to Blackburn and payments totaling \$113,031.33 to the Bare Trustees for a total of \$2,302,332.75 forwarded to the Developer.

BCSC00158/EXH00128 P4 para.23
BCSC00175/EXH00145
BCSC01114/EXH00232 (Chan table)

82. Staff submits that \$2,136,153.21 was transferred from the Falls Account to the West Karma Account. WKL is a Respondent in these proceedings. Staff never provided an accounting of these funds and whether or not they were used in a fraudulent manner. The Respondents indicate most FCC bills were paid from these funds including commission, additional marketing expenses, business expenses, etc. and were the responsibility of the FCC issuer.

Staff Submissions, para 62

83. Using the balance of probabilities and subsequent timing of funds being sent to Blackburn from WKL's bank account, it would make sense that the \$30,000 in funds advanced to Blackburn from WKL would be FCC Investor funds.

BCSC00197/EXH00167, p. 1-5

84. The total investor funds advanced to the Developer from the Respondents equals \$2,302,332.75 plus the \$30,000 advanced by WKL for a total of \$2,332,332.75.

85. The total funds advanced to the Developer from FCC Investors capital are \$2,332,332.75 which represents 50.19% of the Available Funds via the Net Proceeds. \$2,332,332.75 is a greater number than \$2,323,393.16. The MAJORITY of the Available Net Proceeds were advanced to the Developer and is in line with the disclosure in the FCC Offering Memorandum(s) thus making the allegation in the Notice of Hearing and throughout their submissions inaccurate based on fact, not just the balance of probabilities.

Notice of Hearing, dated June 14, 2012, between para 5-6 (Less than half the funds invested)
Notice of Hearing, para 14 (a)

86. In addition to the majority of available funds being advanced directly to the developer, Staff have not investigated, or inquired into the possibility of significant investor funds being spent directly on construction costs or expenses paid on behalf of the Developer. The Respondents respectfully submit there were occasions where they used investor funds and paid expenses directly on behalf of the Developer as opposed to forwarding funds to Blackburn and having Blackburn pay the expenses. Many expenses are outlined in paragraph 57 of this document. This does not amount to fraud.

Respondent's Submissions, para 57

87. In determining the Respondents did not advance the majority of the Falls Investment to the Developer, the Executive Director submit they have relied on the:

- Investor List (provided by Wharram);
- Wharram's Interview Statements;
- the Falls Cheque Summary; and
- the Falls Claims Amounts.

Staff Submissions, para 59

88. The problem with relying on the 3 of the 4 items above is they originated with one source – the Respondents themselves. The 4th item (the banking statements) was only provided in partial form to the investigator by Scotiabank. The Respondent Wharram has shown in both the compelled interview and hearing that he has made mistakes and the possibility of Wharram (or any of the other Respondents he was representing) based on the balance of probabilities, is more than likely. One mistake in the preparation of the very first document provided to Staff would have resulted in the other 2 items being inaccurate as well. A trickle-down effect if you will.

89. Contacting Price Waterhouse Coopers/Ernst & Young and Streetwise to determine the amount of the Claim was another step that the investigator took to verify the amount of the FCC Claim. But this Claim Amount was the one submitted by the Respondents which may have contained mistakes. Again, there was no cogent evidence brought forward by Staff that confirms items like this were checked for accuracy, audited, or signed off by a third party. Chan testifies she did not cross reference any of the claim amounts to accounting records or financial statements.

Hearing Transcript, April 11, 2014, p.73 L 21-25 and p. 74 L 1-3
Staff Submissions, para 176 (x & xi)

90. Relying only on information supplied by the Respondents (or supplied to other entities that originated with the Respondents) is not clear and compelling in nature. Nor is only having partial bank records in which to rely on during an investigation as significant as this one.

91. It would not be considered abnormal for start-up companies, involved in real estate development, to incur a higher percentage of expenses upfront and less expense towards the end of the project. This slide scale of expenses is very common in business and was the case with FCC which explains why additional funds were needed for items like marketing. Staff NEVER explored the reasons behind a higher amount of funds being spent by FCC (or by WKL on behalf of FCC as FCC did not have a credit card in their name) at any time during their investigation.

92. Additionally, the Respondents submit WKL's commission and marketing expenses were included in the 13.4615%. However, it was the direct FCC project related expenses (funds paid directly on behalf of the Developer such as construction invoices, accounting invoices, legal fees, investor interest, etc.) that were paid by the Respondents that were not included in Staff's

numbers in which they want to rely. This amount was never determined or investigated by Staff at any time during their investigation into the Respondents.

Did Staff Establish Proof of the alleged fraud by the Respondents?

93. As Staff indicate, the *actus reus* of fraud needs to be established by proof of:

- (a) the prohibited act, be in an act of deceit, a falsehood or some other fraudulent means; and
- (b) deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interest at risk.

Staff Submission, para 46
Theroux, supra, at para 20

94. And corresponding, Staff submit the *mens rea* of fraud is established by proof of:

- (a) Subjective knowledge of the prohibited act; and
- (b) 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 interest are put at risk).

Staff Submission, para 47
Theroux, supra at p.20

95. **Subjective Knowledge** is defined as:

"Personal knowledge that is dependent upon and interpreted by our personal experience."

http://www.termwiki.com/EN:subjective_knowledge

96. To find the allegation of fraud as alleged in the Notice of Hearing accurate – the onus on the Staff would be to bring cogent evidence in an attempt to show that the Respondents knowingly and willfully WITH subjective knowledge committed the act of fraud on the Falls Investors by adhering to Staff's interpretation of the FCC Offering Memorandum(s). It is submitted by the Respondents that the Respondent (Wharram) did not interpret the FCC Offering Memorandum(s) in the same manner as the Staff which would eliminate the subjective knowledge of the alleged fraudulent act.

97. Despite testimony of Staff indicating they were relying on the FCC Offering Memorandum(s), the Respondents respectfully submit that the Executive Director failed to bring forward any information, evidence or professional opinion as to why their interpretation should be taken over that of the Respondents. In fact, there was no mention of a second interpretation which would lead one to believe the investigator did NOT familiarize herself with the respective Offering Memorandum(s) as she testified to during her cross.

Hearing Transcript, April 11, 2014, p.39 L 5-13

98. Accordingly, there has been no evidence or opinion brought forward by Staff as to why the Respondents interpretation is false or NOT to be relied upon. Staff had the onus to do so if they wanted to make their case.
99. The Executive Director/Staff have completely ignored the definition/formula of *Net Proceeds* found in the FCC Offering Memorandum(s). The Executive Directors calculations did not consider the definition of Net Proceeds, and available funds which has made their allegation of not funding the majority of the FCC investor's dollars to the Developer inaccurate and thereby false.
100. While Staff have a theory as to how the FCC Offering Memorandum(s) were to be interpreted, the balance of probabilities would indicate that the Respondents firmly believed they were not out of line interpreting the wording in the Offering Memorandum's as they have submitted. Staff has not proven the Respondents *interpretation* was ever not firmly believed by the Respondents and thus relied upon at all times. In actuality, the Respondents calculations and actions, including the amount of commission paid to sales representatives during the relevant years that FCC raised capital, go with the Respondents theory they were to use the formula under Section 1.1 of the FCC Offering Memorandum(s).
101. One can assume the interpretation of the FCC Offering Memorandum(s) by Staff is the main reason they decided to not complete a full accounting. They assumed their interpretation to be accurate and decided not to do a full tracing as "it was unnecessary". The Respondents submit it was VERY necessary.

Staff Submissions, para 178

Cut and paste?

102. Shocked, the Respondents question why Staff litigators have cut and pasted a small, partial portion of Section 1.2 of the FCC Offering Memorandum(s), added another segment from another portion of the FCC OM and submitted this as part of their submissions. Highlighting these two portions of the OM in yellow, while omitting the title of Section 1.2 ("Use of Net Proceeds") seems to reek of Staff trying to bias the reader into adhering to their interpretation. The Respondents sincerely hope they are wrong and this is NOT how cases of this magnitude are argued by Staff.

Staff Submissions, para 10

103. After seeing paragraph #10 in the Executive Director's submission, it is now undeniable Staff did not see the title and terminology "*Use of net proceeds*" or "*Available funds will be used as follows...*" when they were preparing their case and producing their submissions. Yet they still attempted to use their interpretation without showing the Panel why their interpretation should be accepted.

104. The Respondents respectfully submit that the onus was on Staff to complete their investigation and completing a full tracing, accounting, or forensic accounting would have been necessary due to the closeness of the numbers. One could expect “skipping” this step if the amount alleged not to be forwarded to the Developer was far greater than 42.3%. These numbers were far too close to not complete a proper investigation (and accounting) of the FCC books and records.

With Staff wanting to prove their case, why was there no investigation into high commission rates?

105. Staff submits the ‘13.4615% Fee’ WKL was to receive from FCC was “to be calculated on funds loaned”. This would be considered part of their interpretation of the FCC Offering Memorandum(s).

BCSC01115/EXH00233 (second box from top)

106. In this exhibit, Staff submits that the total of the 13.4615% Fee to West Karma was \$309,929 and in the box immediately above it, the “Commissions paid to Sales Agents” is the amount of \$469,806. Staff’s theory would suggest that \$469,806 in commission would be paid from the amount of \$309,929. This is impossible.

107. Yet, this “red flag” was never explored by Chan as no questions regarding this were ever brought forward to the Respondents at any time during the investigation. With Chan being an accountant by trade, this surely would have caused an inquiry into what was going on with the Respondents accounting AND SHOULD HAVE UNCOVERED THE INTERPRETATION THE RESPONDENTS RELIED UPON. Having such a heavy commission on funds advanced would not have made sense at ANY time – Staff should have realized this and questioned the Respondents about it accordingly. It is not realistic to think that WKL would only be paying a sales commission on funds advanced to the Developer and not on all funds raised. Furthermore, Sales and Marketing staff surely would have been paid commission (up to 10%) on funds raised, NOT on what was advanced to the Developer.

108. The Respondents submit the total commission percentage paid to sales staff was 8.63% ($\$469,806 \div \$5,442,400$) which is in line with the Offering Memorandum(s).

109. The subjective knowledge (*or mens rea*) portion of the case against the Respondents must be present for the allegations to be proven. The Respondents submit they did NOT have Subjective Knowledge of the alleged frauds due to the interpretation of the Offering Memorandums in which they relied.

110. Staff submit, “we have exceeded proof on the balance of probabilities of the actus reus of fraud which Wharram, the Falls, and West Karma perpetrated on the Falls Investors” and “we have exceeded proof on the balance of probabilities of the mens rea of the fraud which Wharram, the Falls, and West Karma perpetrated on the Falls Investors.” The Respondents respectfully

submit the opposite in fact occurred. Staff DID NOT exceed proof on the balance of probabilities at any level.

Staff Submissions, para 87 & 101

\$75,000 Advance for Home Purchase

111. Paragraph #9 of the Notice of Hearing alleges, "*Wharram used at least \$75,000 of the Falls Investments towards the purchase of his residence.*" This allegation does not form part of the more formal fraud allegations in paragraph 14 of the Notice of Hearing. That being said, the Respondents will make additional submissions on the \$75,000 transaction.

112. When asked about this allegation during the Hearing, Chan said the following:

Q Was the case the Executive Director made for fraud like seeing cheques and money orders as an example \$75,000 bank draft for home purchases, bank draft for a the ring and a payment to the body shop where I had a vehicle restored?

A What's the question?

Q Was that part of the case the Executive Director has made in the Notice of Hearing?

A I believe those transactions are noted in the Notice of Hearing.

Q At any time during your investigation, did you ascertain what the respondents, specifically Rodney Wharram, intention was in repaying for items like these using the respondents bank accounts?

A With regards to the \$75,000 bank draft, no. I don't think I - - we discussed that. With regards to the ring, again, I don't think we discussed that...

...

Q Let's talk quickly about the \$75,000 cheque or bank draft we saw brought in earlier during your direct. Do you remember that, it was the \$75,000 bank draft to Benstead Woodworks?

A Yes, I do remember that.

Q Did you ever ask me - - or did you ask me my intention of using the \$75,000 from one of the respondents for a short-term loan?

A I don't think so

Q Do you recall asking me the purpose of the \$75,000?

A Yes, I do

Q And was it for?

A You said it was for the purchase of 235, your residence.

Q Did you ever ask me if I thought in my mind I returned the funds into the bank account by securing the \$82,000 second mortgage from Capital Direct?

A No. And I think when you walked us through that, that payment went into West Karma.

Q You didn't know about the \$82,000 from capital direct, that's correct?

A I knew that Capital Direct had provided you with a second mortgage on that home.

Q Did West Karma, after it got the cheque from capital direct, put it over into the Falls Capital Corp.?

A We didn't walk through that, I don't know.

Q You have no idea?

A I don't know

Q Did my putting the money back into these accounts lead you to believe there was an intent to commit fraud?

A I don't know that the moneys were put back into the company.

Q We [should] showed that to you. There is - - that the second mortgage going back into the respondents bank accounts.

A It went into West Karma. That is what you just [showed] me, yes, it went into West Karma.

Q Did you ask me if the money went elsewhere, did you ask me if the money went back into Falls Capital ultimately

A No.

Q You don't know what happened to the \$82,000?

A No.

Hearing Transcript, April 14, 2014, p. 46 Lines 16-25, p.47 Lines 1-9, p.49 Lines 13-25, p. 50 Lines 1-25, p. 51 Lines 1-9

113. Investigators at NO TIME determined, or tried to determine the state of mind of the Respondents to ascertain their thought process as it relates to allegations of fraud.
114. The Respondents view with respect to the \$75,000 used to facilitate the purchase of the home at #235 Falls Court is that it was a short term loan with the return of the funds coming from the second mortgage of approximately \$82,000. The \$82,000 was deposited into the West Karma bank account, which more than paid back the \$75,000.
115. Staff submits this act *"caused actual deprivation: the Falls Investors were deprived of the \$75,000 from the Residential Purchase Payment"*. The Respondents submit this statement is inaccurate as the monies were returned to the Respondents bank account (via the mortgage

proceeds from Capital Direct). There was no actual deprivation as there was no loss of funds with respect to the \$75,000 used in the Residential Purchase Payment (as Staff alleged) because all \$75,000 (plus an additional approximate \$7,000) was returned to the Respondents bank account.

Staff Submissions, para 79

116. Even though the onus was on the Executive Director, there was no evidence brought forward showing these funds were not advanced to the Developer, expenses on behalf of the Developer, returned to the FCC bank account or not used to pay business expenses on behalf of FCC and WKL which were allowed via the FCC Offering Memorandum.
117. The Executive Director never caused the investigator to determine if the funds that went back into the Respondents bank account (from the mortgage proceeds) were used in a fraudulent manner and there has been no evidence tendered by Staff showing the final destination of these funds. Remarkably, she answered, “no” when asked if she knew what happened to the \$82,000.
118. Based on the timing of the mortgage being placed on the home, the amount of the Capital Direct mortgage being very close to \$75,000 (yet more) and the funds being advanced to one of the Respondents companies, the balance of probabilities would indicate this was not a fraudulent act that caused deprivation on the FCC investors. Nor does it show the mental element, intent, and/or subjective knowledge needed for Staff to prove their case.
119. Staff has not provided evidence that proves this statement in their submission caused ANY deprivation to the FCC investors, specifically in the relevant period. The Respondents submit there was NO deprivation in the entire relevant time as the \$75,000 went back into the Respondents bank account and/or went to pay expenses on behalf of the FCC entity. Again, the onus was on Staff, not the Respondent, to prove their case.
120. The evidence brought forward by Staff makes one believe speculation and assumptions were used instead of cogent evidence. Speculating, assuming, and even not knowing where these funds ended up is NOT cogent evidence – and certainly lacks Staff proving any intent of the Respondents to commit the act of fraud.
121. In addition, the Respondents view is that if their intent was to commit a fraud on the FCC investors by fraudulently taking \$75,000 of investor funds to pay for the deposit of the house then they WOULD NOT have turned around immediately and started the process of obtaining the second mortgage in an amount very close, but more, than the original \$75,000. The Capital Direct mortgage was obtained 8 months before the investigation into the Respondents began. This certainly does not show intent to commit fraud or the “*mental element*” required to find the allegations accurate nor the balance of probabilities needed to find the allegations accurate.

Anderson v. British Columbia Securities Commission, 2004 BCCA 7

122. Staff investigator Chan testified that using the first in first out methodology (FIFO), the source of the funds that was used for the \$75,000 was investor funds. In *Re Provincial Drywall Supply Limited v. Toronto-Dominion Bank*, the Court of Queen's Bench of Manitoba had this opinion on the FIFO method:

(14) The Bank had no right as a third party outside of Provincial's creditor/debtor relationship with Geon, to impose the FIFO or any other principle for the purpose of allocating payments obtained on Geon's account and that the Bank's efforts in this regard were, once again, motivated solely by self-interest to the prejudice of the plaintiff. As a result of the Bank's FIFO assertions, certain amounts which Dunwoody collected and other amounts which might have been paid to the plaintiff by third parties were kept out of the reach of the plaintiff to its prejudice. (*Ross Gibson Industries Ltd. v. Greater Vancouver Housing Corp. (1985)*, 16 D.L.R. 136 (B.C.C.A.) at p. 137)

Provincial Drywall Supply Limited v. Toronto-Dominion Bank, 1999 CanLII 14227 (MB QB) [Emphasis Added]
Staff Submissions, para 77

123. Additionally, in *Torudag*, the BCSC Panel had the following to say with respect to the FIFO method:

(18) *In our opinion, there is no apparent rationale for either method or, in Torudag's case, for using an average of the two. Both methods produce arbitrary numbers that are likely to bear no relationship to the actual benefit derived by traders as a result of their illegal insider trading. Furthermore, the 20-day period in the first method, to the extent intended to correspond to the time necessary to achieve general disclosure, is far too long – it does not reflect the speed with which information is disseminated in today's markets, and accordingly may also reflect factors affecting the stock price that are unrelated to the release of the material information.*

(19) As for the first-in-first-out method, it is capable of being applied only where the trader has subsequently sold shares purchased in the course of illegal insider trading. Using this method, the level of enrichment would differ, not only between traders who sell and those who don't, but also between traders who sell, because the formula's result is affected by the prices of the subsequent trades.

(20) To be useful, the measure of enrichment ought to be applicable to all instances of illegal insider trading, not dependent on whether or how the trader subsequently deals with the securities acquired.

2009 BCSECCOM 339 [Emphasis Added]

124. With the amount of funds going in and out of all of the Respondents bank accounts at the relevant times, using the FIFO Method would not be an acceptable practice as it shows bias towards the Respondents and certainly does not prove the intent (or mental aspect) needed for Staff to prove their case.

125. Again, the Respondent Wharram maintains at no time did he feel this \$75,000 loan was a fraudulent activity thus eliminating the subjective knowledge needed in the *mens rea* portion of proving the allegations.

The Sale of Claims Proceeds

126. It is alleged that the Respondent Wharram personally spent “*at least \$47,500 of the Sale of Claims Proceeds for personal expenses*”.

Notice of Hearing, Para 13 & 14(b)
Staff Submissions, para 80

127. With respect to this allegation, the Respondents bring forward testimony from Chan showing some pretty disheartening investigation work completed by the investigation team at the Commission, which “conveniently” (or inconveniently if you are the Respondent) stops approximately 40 days before a bank draft in the amount of \$45,000 (from personal funds) are repaid back into the FCC bank account:

Q Ms. Chan, it has been your evidence that you stopped your calculations on The Falls Capital Corp. Bank account on January 17th, 2012; is that correct?

A For that particular spreadsheet that we're referring to that we were looking at the Streetwise funds, the usable funds, I believe that was the date.

Q Did you continue your accounting or your review after that date?

A Yes. I did review all of the statements that were provided to me, including statements and documents provided after that date, but for that specific spreadsheet I summarized my findings up until January 17th, 2012 or that date about, about that date.

Q Why did you pick that date?

A I used that date because The Falls Capital Corp., the funds that were deposited to it from Streetwise, the \$63,729 roughly, the usable funds had been exhausted by about that date.

Q You did not consider any other deposits made after that date?

A I might have noted that there were deposits made after that date, but they weren't pertaining to the purpose of that spreadsheet, which was to show the purpose of the Streetwise funds.

....

Q Did the respondent pay back any funds after the date of January 17th, 2012?

A When you say "respondent", are you referring to yourself specifically?

Q Did any of the respondents pay back money into the corporate bank accounts after the date of January 17th, 2012?

A I think there were some deposits into the account.

Q But you deem them not to be relevant?

A No. It's not that I didn't think that they were relevant. That wasn't part of my calculation there. There were some deposits possibly, but I don't know if they would have been for payment of any sort.

...

Q You are seeing the claim amount come in from the Streetwise claim?

A The sale of the claims, yes.

Q The reason you stopped your review of the books on January 17th, 2012 was because the funds were depleted, there were no further funds in the account?

A No. I didn't stop my review. It's just the information that is presented in that spreadsheet is to show how those funds were used in the account.

Q Okay.

A I did continue -- I did review all the documents.

MR. WHARRAM:

Is it possible -- I don't know if I was clear. Is it possible after the date of January 17th, 2012 there were funds that came back?

THE CHAIR:

That question has been asked and answered.

MR. WHARRAM:

And I wasn't clear on it, sorry?

THE CHAIR:

She had said that there were deposits after that date.

MR. WHARRAM:

Can we go to page 1 of this document. This is a bank draft issued by CIBC in the amount of \$4[5],000 and placed into The Falls Capital account; is that correct?

A That's what it says on this document.

Q What is the date on this?

A It says 2012-02-28, which I take to be February 28th, 2012.

Q Did you determine the purpose behind this draft?

A No. Again, it is long after the period that the Falls Capital Corp. had stopped raising funds, and it's long after the period that the Falls Capital Corp. had ceased making interest payments.

Q Did you ever ask me if this was a cheque that was coming back into the bank account to pay for some of the funds that were depleted from the settlement, the claim, settlement of the claim?

A You mean the sale of the claims?

Q Sale of the claims?

A No. I did not ask you about this specific document.

Q Have you ever seen this bank draft before?

A I don't know if I have seen this particular document, but I do think I have seen a draft indicating an amount of about \$45,000 being deposited into The Falls account at that time.

Q Do you know if this \$45,000 bank draft or even the one that we just saw previously, the 20,000, is included in any of your spreadsheets, any of your accounting?

A Let's see, I don't think that these amounts are included in any of my spreadsheets, no.

Q We have \$65,000 that were not investor funds going back into the bank accounts and you're not including these in the accounting. Can you explain to the panel why these payments are not included in your accounting?

A They weren't part of -- they weren't part of my spreadsheet, no.

Q Can you explain why?

A **They weren't part of my analysis.**

Q And your analysis is what went over and assisted in preparing the Notice of Hearing?

A Sorry, what's your question?

Q And your analysis is what went over to the Executive Director, which assisted him in preparing the Notice of Hearing; is that correct?

A Well, it was my analysis and the evidence that I obtained that supports the allegations.

Q **Would considering the \$65,000 have made a difference in the allegations against me of the \$5.45 million fraud?**

A **I don't think that these additional documents would have impacted the evidence I prepared, I mean the analysis that I did.**

EXH00268, p. 1
Notice of Hearing, dated June 14, 2012, para 14
Hearing Transcript, April 14, 2014, p. 63 L 1-25, p.64 L 1-2 & L 8-21, p.65 L 10-25, p. 66 L 1-25, p.67 L 1-10,
[Emphasis Added]

128. It is submitted by the Respondents, there is a repayment of \$45,000 going back into the FCC bank account (not investor funds but personal funds from an outside source). Chan, the lead investigator and trained accountant testified she knew about this deposit, yet did not consider it

in her calculations, nor did she investigate the source. The Executive Director has allowed these improper assumptions and the sub-standard investigation completed by Chan to influence some of the contents of the Notice of Hearing. Staff have chosen to ignore key evidence, or failed to obtain key evidence to understand the Respondents intent in replacing the funds – the factual truth if you will. It bears repeating – serious allegations of fraud require cogent evidence and doing a partial review of funds and blatantly ignoring some deposits in calculations falls well short of the test in proving fraud in this matter. These accounting methods will not hold an ounce of weight in the *Appeal Court section of the Supreme Court of Canada*.

129. It is submitted by the Respondents, the \$45,000 payment placed into the FCC bank account on February 28, 2012 PAID back all but \$2,497.78 of the \$47,497.78 alleged to have been used (by the Respondents) from the Sale of Claims received from Streetwise. This submission places doubt on the allegation the Respondents used the Sale of Claims dollars in an illegal fraud, and more specifically, the subjective knowledge of willfully committing fraud.

130. By repaying the \$45,000 to FCC bank account from personal funds, the Respondents submit the following:

(a) they repaid amounts equal to \$11,018.48 for the property taxes on the Wharram residence;

Staff Submissions, para 80(a)
BCSC00184/EXH00153 p.2
BCSC01109/EXH00227

(b) they repaid amounts equal to \$16,000 to restore the vehicle;

Staff Submissions, para 80(b)
BCSC00184/EXH00154 p. 3
BCSC01109/EXH00227

(c) they repaid amounts equal to \$14,260.50 to reinstate the mortgage;

Staff Submissions, para 80(c)
BCSC00184/EXH00154 p. 5
BCSC01109/EXH00227

(d) they repaid amounts equal to \$2,000 to Beck, Robinson & Company not for the Falls,

Staff Submissions, para 80(d)
BCSC00184/EXH00154 p.8-9
BCSC01109/EXH00227

(e) they repaid amounts equal to \$1,637.78 (in grocery, liquor, thrift, pet and sport stores receipts); but

Staff Submissions, para 80(f)
BCSC00183/EXH00153 p.1-9
BCSC01109/EXH00227

(f) they mistakenly overlooked the \$2,581.02 (payment to Scotiabank).

Staff Submissions, para. 80(e)

131. Overlooking the mortgage payment to Scotiabank was an accounting mistake in which the Respondents acknowledge. The Respondents submit the amount they paid back was \$44,916.76 which is where the amount of \$45,000 in personal funds was derived and personal placed into the FCC bank account.
132. The FACT the Respondents are placing a nearly identical amount back into the same bank account funds were drawn from clearly shows the intent of the Respondent to repay the funds. There is no other reason for the Respondent to be placing this amount back into the FCC bank account during this time frame (February 2012) as the investor interest was stopped in February 2011.
133. Testimony of Chan (indicating she had knowledge of the \$45,000 placed into the FCC bank account in February 2012, but did not think it would impact the evidence she prepared in support of the Executive Director's allegations of fraud) again shows the lack of cogent evidence brought forward. Chan should have (or ought to have) known this bank draft WOULD affect her investigation. Yet we have no questions regarding the \$45,000 in the compelled interview or at no other time during her investigation. Simply, this makes no sense if Staff wanted to bring clear and compelling evidence before the Panel.
134. Chan, whom had conduct on this file, indicating she did not think "*these additional documents would have impacted the evidence I prepared, I mean the analysis that I did.*" is preposterous considering the seriousness of the allegations of fraud. In addition, with Chan's education as an established accountant and her role at the Commission, this comment is troublesome as it clearly shows the level of work completed and attention to detail by the Staff at the Commission.
135. It is the Respondents opinion, if one considered the \$45,000 payment into the FCC bank account, it would, in fact, impact the evidence or analysis the investigator completed. It is absurd Chan knew about the \$45,000 and did not include it in her summary when the Notice of Hearing distinctly brings allegations against the Respondents and mentions the \$47,500 Sale of Claims amount. During the March 2013 compelled interview, a couple of simple questions asked of the Respondents would have cleared this Sale of Claims matter up but again nothing like this occurs then or at any other time.
136. The Respondents maintain that IF the investigator (and ultimately the Executive Director) included the \$45,000 in the summary work they relied upon in the Notice of Hearing, there would not have been the allegation the Respondents spent the Sale of Claims proceeds. Instead, the Executive Director has relied upon incomplete investigation work and only a partial banking analysis of the Respondents. The Executive Director has not brought forward cogent evidence with respect to this allegation.

137. Furthermore, Staff submit that, *“the prohibited act deprived the Falls Investors of the last \$47,500 they could have recouped from the Falls Investments.”* and *“in diverting Falls Investors funds from their intended purpose and instead having them spent on the Residence Purchase Payment and the Personal Use of Sale of Claims Proceeds, Wharram, the Falls and West Karma committed a prohibited act within the first branch of the actus reus of fraud; and actual deprivation flowed from this prohibited act.*

Staff Submissions, para 83
Staff Submissions, para 84(a)

138. The Respondents submit this statement is inaccurate as nearly all of the monies (approximately 95%) were returned to the Respondents bank account. There was no actual deprivation as there was no loss of funds in the Use of Sales Claims Proceeds as staff alleged.

139. The Respondents position is that due to the deposit of \$45,000 to the Respondents bank account from an outside source (not investor funds), the claims of Staff are not valid as they are not true and lack factual evidence. There was no *actus reus*, and more importantly, no *mens rea* of fraud on the FCC Investors as the Respondents mental thoughts were NOT on committing the fraudulent act against his investors. Rather, his mental attitude was that of paying the funds back into the Respondents bank account to be used for FCC business at all relevant times.

140. Staff have chosen to cite a Supreme Court of Canada consideration of a Ontario Court of Appeals decision in *Currie* to be a concrete example of the application of the principles which constitute “other fraudulent means” where the Court confirmed that the use of investors’ funds in a manner which was not authorized was sufficient grounds for finding that the accused acted dishonestly.

Staff Submission, para 50

141. While this point is accepted by the Respondents, the grey area in which Staff has not brought any insight to in their submissions is the word authorized. The Respondents maintain that due to the wording of the FCC Offering Memorandum(s), where it states, *“Decisions regarding the management of the Joint Ventures affairs will be made exclusively by the Operating Committee of the Joint Ventures’ in consultation with the Officers and Directors of the Corporation and the Falls Ventures”* - they were in fact the AUTHORIZING party in control of the funds. Nowhere in the Submissions, or the case law in *Currie*, does it state the definition of the authorizing party. It is the Respondents submission they were in fact the authorizing party.

BCSC00163/EXH00133 (the Falls 2007 OM) P20 (Reliance on Management)
BCSC00164/EXH00134 (the Falls 2008 OM) P20 (Reliance on Management)

OUR POSITION –NOT ADVANCING THE MAJORITY OF THE DCF FUNDS TO DEVELOPER

142. As outline above, the allegation in Point 20 of the Notice of Hearing states, *“Deercrest, West Karma and Wharram perpetrated a fraud on Deercrest investors by: (a) raising \$3,953,000 from them for investment with the Developer and only advancing \$1,636,000 to the Developer; and (b) using at least \$394,000 of the Deercrest Investments for Wharram personal expenses.”*

143. It is submitted that the Respondents Wharram, DCF and WKL, did not participate in or direct, an intentional fraud against the DCF investors. The Respondents argue they did advance the majority of the funds to the Developer or paid items that were the responsibility of the Developer on their behalf.

144. Staff indicate the DCF Offering Memorandum(s) states, *“the majority of the money raised from investors would be loaned to facilitate funding of the ‘Deercrest Resort and Clubhouse Development’*

Staff Submissions, para 104(a)

145. In their submissions, Staff has indicated in several spots the DCF Respondents did not advance the majority of funds to the Developer. It is the foundation of the allegations against the Respondents.

Staff Submissions, para 1(a), 25, 108(a&b), 119, 121, 126, 151, 155, 168

146. As with the FCC Offerings, the Respondents submit that the interpretation of the DCF Offering Memorandum(s), in which they relied, indicated the majority of the *Available Funds* and *Use of Net Proceeds* was as follows:

1.1 Net Proceeds

The net proceeds of this Offering of Bonds (the “Offering”) and the funds that will be available to the Corporation after this Offering are as follows:

	Assuming Minimum Offering	Assuming Maximum Offering
A Amount to be raised by issuance of this Offering	\$500,000	\$12,000,000
B Selling commissions (10%) ⁽¹⁾	\$0	\$0
C Working Capital Deficiency due to Offering costs	\$30,000	\$30,000
D Net proceeds: D = A – (B + C)	\$470,000	\$11,970,000

Notes:

⁽¹⁾ Selling commissions, if any, shall be paid by West Karma Ltd. (“WKL”)

⁽²⁾ Offering costs includes legal fees, accounting fees, printing expenses, and other third party costs. The Issuer has a working capital deficiency of \$30,000 as at March 1, 2009. The working capital has been advanced by WKL, a related company, to the Corporation and will be repaid from the proceeds of this Offering.

As of the date of this Memorandum, WKL owns 100% of the issued and outstanding Class A shares of the Corporation. The Officers and Directors of the Issuer are also Officers, Directors and Shareholders of WKL. **See Item 3.1 - Compensation Paid and Securities Held.**

1.2 Use of Net Proceeds

The available funds will be used as follows:

Description of intended use of available funds listed in order or priority	Assuming Minimum Offering	Assuming Maximum Offering
1. The majority of the proceeds of this Offering will be loaned to the Corporation to meet its financial contribution obligations pursuant to the Mortgage Agreement to facilitate funding of The Deercrest Resort and Clubhouse Development. See Items 2.2.1 – Our Business and 2.2.3 – The Mortgage Agreement, and	\$397,500	\$ 10,230,000
2. To pay for all management, administration, marketing and operating expenses incurred by the Issuer in the conduct of its business. See Item 2.8 - Material Agreements.	\$10,000	\$240,000
3. Interest Reserve	\$62,500	\$ 1,500,000
Total	\$470,000	\$11,970,000

BCSC00185/EXH00155, p.4 Section 1.1 & 1.2

BCSC00186/EXH00155, p.4 Section 1.1 & 1.2

[Emphasis Added]

147. The Respondents hereby submit the DCF Offering Memorandum(s) clearly state the Respondents would advance the majority of the Available Funds in the Net Proceeds/Use of Net Proceeds sections as noted above.

148. During all relevant times, the Respondents were of the opinion that the majority of the available funds were what was to be relied upon and the majority of the available funds were what was required to be advanced to the Developer.

149. As with the FCC Offering Memorandum(s), it is clear there are two distinct interpretations of the DCF Offering memorandum(s) and Staff and the Respondents have taken the opposite interpretations.

150. The DCF Offering Memorandum(s) allowed for a 10% commission and a 2% marketing fee.

Staff Submissions, para 114 & 115

151. Looking at the table (shown in paragraph #146 above) in the respective Offering Memorandum(s) Net Proceeds are clearly defined as:

$$\text{Net Proceeds} = \text{Amount to be Raised} - (\text{Selling Commission} + \text{Working Capital Deficiency})$$

BCSC00185/EXH00133 (the DCF 2009 OM) P4 Section 1.1
BCSC00186/EXH00134 (the DCF 2010 OM) P4 Section 1.1

152. In both the 2009 and 2010 DCF Offering Memorandums, the *Working Capital Deficiency due to Operating Costs* (“WCD”) is set at \$30,000.

BCSC00185/EXH00133 (the DCF 2009 OM) P4 Section 1.1
BCSC00186/EXH00134 (the DCF 2010 OM) P4 Section 1.1

153. The total amount raised under the DCF Offering was \$3,953,000.

Staff Submission, para 106

154. Non-refundable commission and marketing expense amounts of 12% of total amount raised is equal to \$474,360.00.

155. The Respondents submit that the numbers they relied on were as follows:

$$\begin{array}{rccccccc} \$3,448,640.00 & = & \$3,953,000 & - & (\$474,360.00 & + & \$30,000) \\ \text{Net Proceeds} & & \text{Amount to be Raised} & & \text{Selling Commission} & & \text{WCD} \end{array}$$

156. Again, Oxford Dictionaries simply defines MAJORITY as:
“The greater number”

Source: <http://www.oxforddictionaries.com/definition/english/majority>

157. \$10,000.00 was paid to 4 tradespeople not included in the summary pages prepared by the investigator and relied on by the Executive Director.

EXH00257, p. 3-5

NOTE: Exhibit 00257 is not entered as evidence but was referred to in the Hearing Transcript on April 14, 2014 (Page 25 Line 9) by the Respondents with no objection from Staff Council.

158. \$606,128.55 of interest was paid directly to investors, on behalf of the developer and was not included in the numbers the investigator supplied to the Executive Director which formed the Notice of Hearing. Staff knew about this (they made reference to it in their submissions) yet have brought no evidence indicated this was not the responsibility of the Developer.

EXH00273, EXH00274, EXH00275
Hearing Transcript, April 14, 2014, p. 17 Lines 11-25, p. 18 Lines 1-25, p. 19 Lines 1-9
Staff Submission, para 118

159. As stated in the DCF Offering Memorandum(s), paying interest to Deercrest Investors was the responsibility of the Developer:

“12.5 percent per annum payable monthly, due 1st of each month from the interest reserve account will be funded from the principle trust account.”

BCSC00185/EXH00155 (the Deercrest 2009 OM), p. 10, section 2.8.1 (c)
BCSC00186/EXH00156 (the Deercrest 2010 OM) p. 10, section 2.8.1 (c)

160. Additionally, it clearly states in the DCF Offering Memorandum(s) the following:

- (e) **Principal Reserve.** Upon the sale of any condominium units in the Development, the Developer shall pay an amount as prescribed in Item 2.8.1 (f) of this Agreement into a cash account (the “Principal Reserve Account”) in the name of the Corporation. These funds shall be another form of security for the Bonds. The principal reserve will be used for the payment of principal owed on the Bonds and may be transferred to the Interest Reserve Account to payout interest due on the Bonds. The Developer has the right to request that funds be transferred from the Principal Reserve Account to the Interest Reserve Account as required to pay the monthly interest as per the Administration Agreement. Prior to the maturity date of the Bonds, the funds in the Principal Reserve Account shall be paid out to subscribe in accordance with the terms and conditions of the Administration Agreement.

BCSC00185/EXH00155 (the Deercrest 2009 OM), p. 14, section 5.1 (e)
BCSC00186/EXH00156 (the Deercrest 2010 OM) p. 14, section 5.1 (e)
[Emphasis Added]

161. During the cross examination of Chan, EXH00273 was entered by the Respondents and used to question the investigator with respect to her summary of the analysis she completed on the DCF portion of her investigation. Chan indicated:

Q Okay. Did you review the respondent's bank accounts and determine the total amount of interest that went to investors in 2009, 2010 and 2011?

A I did review the bank statements that I obtained from the respondents, and I did note that there were cheques paid as -- that were noted as being deposited interest, but did I calculate the total interest paid? No. I don't think I did.

Hearing Transcript, April 14, 2014, p. 17 Lines 11-19

162. The Respondents submit the following as accurate on a factual basis, (not just on the balance of probabilities):

\$ 1,636,000.00	Advanced directly to Developer/Trades (Staff Submissions)
\$ 10,000.00	Paid directly to Trades (not included by Chan)
<u>\$ 606,128.55</u>	Interest Paid by Issuer but responsibility of Developer
\$ 2,252,128.55	

Staff Submission, para 151
*EXH00257 p. 3-5 and/or Hearing Transcript, April 14, 2014, p. 25 Line 9
EXH00273

NOTE: Exhibit 00257 is not entered as evidence but was referred to in the Hearing Transcript on April 14, 2014 (Page 25 Line 9) by the Respondents with no objection from Staff Council.

163. Using the same interpretation the Respondents are relying on with the FCC Offering Memorandum(s), simple math tells us that the majority of the Available Funds in the DCF Offering Memorandum(s) would be .01 more than \$1,724,320 (\$3,448,640.00 in Available Funds ÷ 2).

164. \$2,252,128.55 is 65.30% of \$3,448,640.

165. It is puzzling as to why Chan would indicate she knew about the investor interest but would not include it in any of her summary completed on behalf of the Executive Director when the Offering Memorandum distinctly indicates it is the responsibility of the Developer. Because they were familiar with the Offering Memorandum(s), Staff knew (or ought to have known) that interest paid to investors was the responsibility of the Developer. Specifically, Chan knows of the investor interest and indicates she is familiar with the Offering Memorandum(s) for DCF, yet fails to include any of this in her summary. This is NOT cogent evidence at any level.

Hearing Transcript, April 11, 2014, p.39 L 5-13

166. If the Executive Director wanted to bring clear and compelling evidence based on the balance of probabilities, they would have caused the investigator to determine whether or not the investor interest paid by the Respondents on behalf of the Developer was included in her summary. With all due respect, the evidence brought forward by Staff lacks substance and is not clear, compelling or factual in nature.

167. It should be abundantly clear to all; the Executive Director's Staff have attempted to make their case stronger by eliminating (or ignoring) many key items (the repayments from Wharram's and/or WKL's personal funds, payments made to trades on behalf of the Developer, the investor interest paid on behalf of the Developer, etc.). This is unacceptable considering the seriousness of the allegations and consequences to the Respondents of an adverse finding.

Diamond Ring Purchase

168. Again in the Notice of Hearing, the Executive Director alleges "*Wharram, from the Deercree Investments, used (c) \$24,000 to purchase a diamond ring for his wife.*" During the cross examination of the investigator, she answered the following:

Q During this interview, that's pretty much the only time we spoke about the ring, is it not?

A I think so, is when I showed you the draft.

Q During this interview, you asked me who I bought the ring for, that's correct?

A Yes.

Q You asked me the reason I bought it; is that correct?

A Yes.

Q Okay. But did you ask me if I thought I was committing fraud in buying the ring?

A No.

Q Did you conduct any other interview with me when you asked my intention behind using funds from the respondents bank account to buy that ring?

A I don't think so.

Q Did you ever ask me if I thought it was a commission that I had earned previously with the respondents?

A Not specifically with the ring, but I did ask you quite a few questions about the commissions. You're asking me whether or not we talked about the ring and the commission, and we did cover the commissions quite extensively during your interview, and I asked you sort of what you could take in commission and we discussed that.

...

Q We were talking before the break about the diamond ring and the subject of commissions came up, and my question for you is did you ask me what my opinion of this transaction was?

A Well, I asked you a number of questions about the transaction and you provided your responses to my questions.

Q Did you ask me if I thought in my mind I was taking a commission when I utilized the money to buy the ring?

A I didn't ask you that specific question, no.

169. Chan asked many questions regarding the ring but failed to ask the Respondents intent with respect to using the \$24,000 and more importantly whether or not he felt it was not a commission earned nor did she ever ask for commission reconciliation forms the Respondent would have provided. Additionally, Chan never asked the Respondent Wharram if he felt any other monies were due to him personally from the DCF Offering such as the Working Capital Deficiency in the amount of \$30,000.
170. The Respondent maintains he was taking a commission he felt was earned at that time or the reimbursement of the WCD and understands and acknowledges that while in a rush he skipped a bookkeeping step of paying the monies to WKL or Rodney Wharram directly. In hindsight this was a mistake but does not show an intent to commit fraud on the investors and does not show Subjective Knowledge of a fraudulent behavior. Wharram submits that at NO TIME did he feel that taking funds he felt he had earned or was owed was an act of fraud against the DCF Investors.
171. On the balance of probabilities, Staff has brought no evidence to the Hearing, to prove Wharram did not think he was taking a commission despite having the onus to do so to prove their allegation. The Respondent maintains that at all times the funds used for the purchase of the ring were for a commission earned from selling the DCF offering.

Natures Fare Loan

172. The Notice of Hearing against the Respondent also alleges a \$240,000 loan made to Wharram's wife in a grocery store was fraud on the DCF investors. Section 2.5 of the DCF Offering Memorandum states, *"The corporation intends to spend the available funds as stated and will reallocate funds only for sound business reasons."* At the time this short term loan was made, it was a sound business decision with an interest rate being to be paid to DCF.

Q Okay. I apologize. Can we pull up BCSC00099. Once again this is the interview with Rod Wharram during the compelled interview on March 13th; is that correct?

A Yes, the transcript.

Q If we go to page 139, please. And, Ms. Chan, if you can please read 3 to 25.

...

Q Looking at lines 13 and 16, does it read there was to be an interest rate of five percent per annum charged against the loan?

A Yep.

MR. WHARRAM:

Can we put up EXH 00255, please. And I would like to enter this in, please, as an exhibit, if it hasn't been already.

...

Q Can you please read the bold across the top?

A "Loan Agreement".

Q And can you tell who the parties are in this agreement?

A Okay. It says here Deercrest Construction Fund Inc., the lender, and Jennifer Boyd, the borrower.

Q During your investigation did you ever ask to see this document?

A I don't recall. I did ask for some follow up to the interview, but I don't know if I asked for this specific document.

Q Did you ever ask me if there was a loan agreement between the parties?

A I can't recall.

Q Do you see in the body of the document where there is an amount of \$240,000?

A Yes, in paragraph 1.

Q Correct. And the interest rate in the same paragraph is five percent; is that correct?

A Yes. That's what it states there.

Q Thank you. Can we go to [BCSC00050], please. Once again we have a document here that Deercrest Construction Fund Offering Memorandum; is that correct?

A Yes.

Q Can we go to page 8. Did you and I ever discuss Section 2.5 of this Offering Memorandum?

A No. I don't think so. I don't think so.

Q Did you ever have reason to ask me anything about Section 2.5?

A I don't think so. It's stated there.

Q In the compelled interview you see me reallocating funds. Did you ask me why -- or what ability in my opinion I had to reallocate funds?

A No. I asked you questions about the use of investor funds.

Q But you didn't ask me anything about my beliefs about whether I could reallocate the funds?

A I don't think so.

Q Can you read Section 2.5?

A Yes. It says 2.5, "Reallocation": The corporation intends to spend [the] available funds [as stated and] will reallocate funds only for sound business reasons.

....

Q Did you ever ask the respondent Rodney during the course of your investigation his thoughts on Section 2.5?

A I don't think so. I can't remember exactly, but I don't think so.

Q Did you ever ask me if I thought I was committing fraud by lending the \$240,000?

A I don't think I asked that question, no.

Q Do you have a reason why you would not ask a person that?

A I don't have a specific reason, no, I don't think I do.

Hearing Transcript, April 14, 2014, p.69 Lines 6-12, p.70 Lines 9-15 & 21-25, p.71 Lines 1-25, p.72 Lines 1-14 & 22-25, p. 73 Lines 1-8
BCSC00099/EXH00095, p.139 (lines 3 – 25)

EXH00255

BCSC00185/EXH00155 (the Deercrest 2009 OM), p. 4, section 1.3

BCSC00186/EXH00156 (the Deercrest 2010 OM) p. 4, section 1.3

173. The Respondents view is, and always has been, that the loan was allowed under Section 1.3 of the DCF Offering Memorandum(s). At the time this short term loan was made, it was a sound business decision with an interest rate being to be paid to DCF. And there was certainly no subjective knowledge (*mens rea*) to commit fraud and deceive the investors in DCF by this thought process. In addition, the Respondents maintain this loan and the repayment were all completed in April 2010 - some 6 months before the investigation began with respect to the Respondents.

174. With respect to Chan's testimony, we even have her calling the \$240,000 a "loan" when asked during direct by Staff litigators:

Q And what did you learn about the Nature's Fare payments during the course of your investigation?

A I learned that Deercrest Construction Fund loaned funds to Mr. Wharram's wife Jennifer Boyd of about \$240,000 in order to provide her with the funds to make an investment in Nature's Fare Langley Limited, and that investment was to open up a grocery store in Langley.

Hearing Transcript, April 8, 2014, p. 81 Lines 11-18 [Emphasis Added]

175. Staff submits, *"this prohibited act caused actual deprivation: the Deercrest Investors were deprived of the \$240,000 from the Deercrest Investments which was used for the Wife's Grocery Store Payment."* The Respondents find Staff's wording here questionable – first they are calling it a loan and in their Submissions, they use the wording, *"Wife's Grocery Store Payment"*. At no time, was this considered a payment – it was a loan, all funds were returned to the Respondents, and there was NO ACTUAL DEPRIVATION to the Deercrest Investors at any time.

Staff Submissions, para 138

176. During the testimony of Rick Monahan ("Monahan"), the owner of Natures Fare and witness for Staff, the following statements occurred during his cross examination:

Q Okay, thank you. To recap, did 100 percent of the money put into Nature's Fare by Jennifer and I get returned to the respondents?

A Absolutely.

Hearing Transcript, April 11, 2014, p.19 Lines 10-13

177. It is important to understand, the full amounts of the dollars loaned were returned to the Respondents bank account. There was NO deprivation, or NO actual deprivation caused by the Respondents actions at any time as a result. Despite having the onus to prove their case, Staff have not proven the funds were not placed back into the DCF bank account or were not used for paying expenses associated with the DCF Respondent such as investor interest, commissions, or payments directly to tradespeople.

Purchase of Residence

178. The Notice of Hearing against the Respondent alleges \$130,000 of DCF investor funds went to the purchase of Wharram's residence.

179. The Respondents submit this was a short term loan from one Respondent to another that was to be paid back to the DCF bank account. This loan, like others, would have been paid in full from Wharram's personal funds had the CCAA and investigation of the BCSC had not occurred.

180. There is a history of loans WITH repayments including the \$75,000 deposit on the home (the Capital Direct Mortgage) and the repayment of the \$45,000 to the FCC bank account (from personal funds) and there is no evidence proving Wharram would not have repaid this loan as well. In fact, on August 5, 2011, we have just that - a repayment of \$20,000 going into the DCF bank account from Wharram's personal funds. Chan had this to say during her cross examination:

Q Can we please put in EXH 00268. Go to page 2. This is a bank draft, \$20,000 put in to Deercrest Construction Fund; is that correct?

A Yes. I see that there.

Q It's a bank draft from Margie Wharram; is that correct?

A It says debited by Mrs. Margie Wharram and Wharram-Brown, I see that there.

Q What can you tell us about the source of these funds?

A I have just seen this now. I might have seen this bank draft previously when I was reviewing the bank records, but that's what I know about it. It looks like it's gone into Deercrest Construction

Q Do you know who Margie Wharram is?

A No. I think -- well, no, I don't know who that is, I'm sorry.

...

Q Is it your knowledge that -- is it your testimony that you have no knowledge of why Margie Wharram is issuing a bank draft to the respondent Deercrest?

A Yes. I don't know what this draft is for.

Q We've never spoke of this draft?

A I don't think so. I mean it is long after the period after Deercrest stopped raising funds, and after this point in time it had defaulted on its interest payments.

...

Q Did you ever ask the respondent to explain this cheque during his compelled interview?

A I don't think so, no.

EXH00268, p. 2
Hearing Transcript, April 14, 2014, p. 61 L2-19. P.62 L3-12 & L23-25 [Emphasis Added]

181. The Respondents submit they are placing \$20,000 in personal funds back into the DCF bank account in August 2011 as a payment towards the \$130,000 loan. There is no other reason for the Respondent to be placing non-investor funds back into the DCF bank account during this time frame (August 2011) as the investor interest was stopped in February 2011.

182. Staff submit "*we have exceeded proof on the balance of probabilities of the actus reus of fraud which Wharram, Deercrest, and West Karma perpetrated on Deercrest Investors*" and "*we have exceeded proof on the balance of probabilities of the mens rea of the fraud which Wharram, Deercrest, and West Karma perpetrated on the Deercrest Investors*" yet the lead investigator does not even know about a \$20,000 bank draft made out to the DCF bank account. Again, the Executive Director did not complete a thorough enough investigation to make these allegations. It makes no sense how (or why) the investigator was able to ignore blatant information that was readily available.

Staff Submissions, para 150 & 166

183. Again, Staff have chosen to site a Supreme Court of Canada consideration of a Ontario Court of Appeals decision in *Currie* to be a concrete example of the application of the principles which constitute "other fraudulent means" where the Court confirmed that the use of investors' funds in a manner which was not authorized was sufficient grounds for finding that the accused acted dishonestly.

Staff Submission, para 50

184. While this point is accepted by the Respondents, the grey area in which Staff has not brought any insight to in their submissions is the word **authorized**. The Respondents maintain that due to the wording of the DCF Offering Memorandum(s) where it states, “*Decisions regarding the management of the Corporations affairs will be made exclusively by the officers and directors of the Corporation...*” - they were in fact the AUTHORIZING party in control of the funds. Nowhere in the Submissions, or the case law in *Currie*, does it state the definition of the authorizing party. It is the Respondents submission they were in fact the authorizing party.

BCSC00185/EXH00155 (the Deercree 2009 OM), p. 20 (Reliance on Management)
BCSC00186/EXH00156 (the Deercree 2010 OM) p. 20, (Reliance on Management)

Recapping the Numbers – The Majority of Available Funds Were Advanced to Developer

185. Finally, in Staff Submission #1, Staff alleges the Respondents committed fraud by “**raising \$9,395,400 and only advancing about \$3,936,000 to the Developer.**” Using the Respondents interpretation of the FCC and DCF Offering Memorandums, the numbers in which they relied, the calculations are as follows:

$$\begin{array}{r} \$2,252,128.55 \text{ DCF Funds Advanced to/or on behalf of Developer} \\ + \underline{\$2,332,332.75} \text{ FCC Funds Advanced to/or on behalf of Developer} \\ \$4,584,461.30 \\ \\ \$8,095,426.32 \text{ Available Funds (net)} \\ \div \underline{\$4,584,461.30} \\ \\ \mathbf{56.63\%} \end{array}$$

Staff Submission, para 1

186. 56.63% of the net Available Funds were advanced to the Developer making the allegations in the Notice of Hearing and Staff Submissions, essentially the entire case against the Respondent, inaccurate as the majority of funds needed to be advanced were advanced to the Developer.

OUR POSITION – MAKING A FALSE STATEMENT TO AN INVESTIGATOR

187. It is submitted that the Respondents did not give False Statements to a Commission investigator as alleged in the Notice of Hearing, nor was there ever any intent to do so.
188. When the Notice of Hearing and particulars related thereto are examined (including testimony from one of the Executive Directors witnesses at the Hearing), it is abundantly clear Wharram never deliberately misled Commission investigators in any respect. In fact, he cooperated with the Commission investigation at all times and answered all questions truthfully and to the best of his ability both at the compelled interview and at any time the investigator made contact.

189. It will be clear, as set out in these submissions, that the Respondents did obtain a series of Bridge Loans (or Bridge Financing) from personal friends and Lenders. These loans were to facilitate the purchase of the townhome project by an unrelated company (that was formed in May 2013).
190. During the compelled interview, the individual Respondents were never asked if they were borrowing funds from any friends or family. The investigator was not clear with her line of questioning and did not indicate which of the four Respondents the question was directed to. There were no specific questions regarding which Respondent was borrowing the funds, what the funds were to be used for, and how much they were looking to borrow.
191. Wharram was asked hundreds of questions and had 41 documents placed in front of him during the 2-full day compelled interview and Staff have only alleged Wharram made the False Statements on the last 2 questions of the entire interview at the end of day 2. Staff has NOT submitted Wharram made false statements to any other questions asked over the many hours the interview took place and have not brought forward cogent evidence suggesting the Respondents made any other false statements. After answering hundreds of questions over the interview dates truthfully and accurately, the balance of probabilities would strongly suggest his answers at the end of day 2 would be truthful and accurate as well.

Staff Submission, para 176(a)
 BCSC00168/EXH00138
 BCSC00169/EXH00139

192. If the Respondents had been asked if he had borrowed funds from a friend or friends, again the balance of probabilities (due to the fact no other allegations under Section 168.1 of the Act have been alleged by the Executive Director) indicate Wharram would have answered yes. It is submitted that at no time did Wharram feel his borrowing was related to seeking investor funds and Staff have brought forward no cogent evidence to suggest their allegation to be factual.
193. At his compelled interview, the Respondent gave answers to questions from Chan, and her superior Ms. Lori Chambers (“Chambers”) on whether or not in 2013, he had been raising capital from investors:

Q And that's the calendar year, okay. **Have you raised any funds from investors in 2013?**

A No.

Q **Are you currently trying to raise any funds from investors?**

A No.

BCSC00099, p.176, Lines 3 - 12 (*Emphasis Added*)

194. Oxford Dictionaries defines *CURRENTLY* as:
“Belonging to the present time; happening or being used or done now”

195. Staff has decided to break down into two parts the two questions Wharram was alleged to have given false statements on during his compelled interview.

Staff Submissions, para 182

196. The “First False Statement” was, “*Have you raised any funds from investors in 2013?*” to which the answer was, “*No.*”. In hindsight, the Respondents find this question most confusing as it does not outline which particular Respondent the question was directed. The question is very vague and does not seek a clear answer that should be relied on. The Respondents maintain they did not raise any funds from investors from January 1, 2013 until the day this question was asked at the compelled interview (March 13, 2013).

197. The “Second False Statement” was, “Are you currently trying to raise any funds from investors?” and the answer was, “No.” Again, this question is very confusing as it did not pinpoint which of the Respondents the investigator was seeking the answer from. Additionally, on the balance of probabilities, the answer was accurate. On March 13, 2013, (the day of this particular question) Wharram and/or the rest of the other Respondents were not raising funds from investors. Based on the definition of “currently”, the question does not cover any period after the date of the question.

198. What the Respondents did after the interview was never questioned. If Chan and/or Chambers wanted an answer to ascertain what the Respondents were doing AFTER the interview dates, they should have asked, “Are you going to be raising capital from investors in the future?” This simple question was never asked at any time by Chan or Chambers.

199. Staff again has failed to bring any clear or compelling evidence to the Panel that would suggest this answer is not accurate. The only evidence that has been brought in by the Executive Director, to which they want to rely on, were the investigators notes (which may not be accurate), bank statements showing funds going into the bank account, and the Wharram interview statements. But no compelling oral evidence or sworn affidavits from any of the lenders (or as Staff alleges “investors”) that would even suggest the allegations to be accurate.

Staff Submissions, para 208

200. The Executive Director has implied in the Notice of Hearing that a loan the Respondent received from a personal friend, Mr. Gerry Schacher (“Schacher”) of Edmonton, Alberta, was an investment and not a loan. This loan was received on March 8, 2013 – just five days before the compelled interview of the Respondent.

Notice of Hearing, dated June 14, 2012, para 23(b)(i)

201. On June 5 - 6, 2013, Chan tried to contact Schacher twice in a 22-hour window as outlined in her notes. Just 9 days later the Respondents received the Notice of Hearing and Temporary Order bringing forward the allegation of making a False Statement to an Investigator. Despite the investigator NOT talking to Schacher, the Executive Director relied upon an assumption of the investigator in bringing forward their allegation under Section 168.1 of the Act.

BCSC00573/EXH00118, p. 3

202. When asked under cross examination, the investigator stated:

Q But did you speak to Mr. Schacher regarding the \$50,000 transaction on or before June 14, 2013?

A No, I attempted to contact him. He didn't return my calls. I think subsequently through our counsel has spoken with him.

Q Do you know when?

A No, I don't know the exact date.

Q Was it before June 14, 2013?

A No...

...

Q And why did you not speak to Mr. Schacher before the Notice of Hearing of June 14th?

A I tried to call him. He didn't return my calls.

Q And how many times did you try to call him?

A **I tried to call him twice. Once on June 5th and the other time on June 6th, 2013, specifically with regards to this deposit.** However, I had spoken with him previously in 2012 with regards to his investment in Falls Capital Corp.

Q Is there a reason why you did not try to call him after June 6th?

A **No, no particular reason.**

Hearing Transcript, April 9, 2014, p.54 Lines 20-25, p.55 Lines 1-3 & Lines 9-20 [Emphasis Added]

203. What is truly baffling, during the hearing Staff supplied evidence showing the investigator knew there were funds in the amount of \$55,000 being returned to Schacher on June 10, 2013 but still brought forward the allegation of making a False Statement to an investigator. The investigator did not communicate with Schacher before or AFTER the Notice of Hearing was issued to determine the reason behind the \$55,000 going to Schacher from the Respondent:

Q Can we pull up BCSC 00134, please. Can we go to page 18. Again, do you recognize this document?

- A Yes. It's a document provided to me by Envision Financial in response to one of my demands.
- Q And when did you first become aware of this cheque?
- A It would have been sometime in June or July of 2013.
- Q Was it when Jaime Lord from Envision Financial spoke to you on June 10th, 2013 and sent you over information?
- A Quite possibly. I do see that there is a June 10, 2013 date on the top left hand corner.
- Q Can we go back to BCSC 00158, please. Can you tell us what this document is?
- A This is my first affidavit in this matter sworn on June 14th, 2013.
- Q Can we go to page 13 and can you read 87 at the bottom of the page?
- A On June 10, 2013, Jaime Lord (Lord) senior investigative corporate security at Envision called me to discuss the June 7 demands. We discussed, among other things, a transfer and some of the payments that came out of the West Karma Envision account and Lord said the following. Paragraph (a), the \$40,000 transfer on April 2, 2013 was from another member account held by Ryan Lang, and that this was a short-term loan that was repaid with interest on April 10, 2013.
- Q So we can see here from your affidavit that it was a short – that the \$40,000 was a short-term loan?
- A Well, this is a different amount than what we were talking about. Mr. Schacher's investment was \$50,000.
- Q I will get into that in a moment. This \$40,000 though, was that –
- A That's what Ms. Lord told me. She said it was a short-term loan that was repaid with interest.
- Q So there was no reason at that point for you to question Ryan Lang and ask him anything because you were under the impression that it was a loan because –
- A No –
- Q Because Miss Lord told you that?
- A Sorry, can you repeat your question?
- Q I'm just wondering why you know, your investigating these 3 other cheques, the 50,000, the 150,000 and the 250,000 but then you see one here that's 40,000. A bank representative is telling you that it is in fact a loan. Is there a reason why you didn't investigate this \$40,000 or were you comfortable with Mrs. Lord's evidence that it was a loan?
- A It was Ms. Lord who told me that it was a loan and then that was the –

Q So no further investigation into the Ryan Lang loan?

A No. Ryan Lang was a former employee of Envision, from what I understand from Ms. Lord.

Q Okay. Can we go to the next page, and can you read 87 (i)?

A The \$55,000 payment on April 10, 2013 was to Gerald Schacher.

Q **Okay. So here we are, you were seeing 50,000 go into a bank account in March and from Gerry Schacher and 55,000 going back to the same person in early April. Is that correct?**

A **Yes, I see that.**

Q **And again, you did not speak to Mr. Schacher during any of this time regarding this transaction to find out what the heck was going on?**

A **No I didn't talk to him.**

Q Why not, you're investigating –

A I tried to – I tried to contact him. He didn't return my calls.

Q But before hand, you contacted him in May or sorry, in June 5th and 6th?

A I tried to contact him, yes.

...

MR. WHARRAM:

Again one more time for the record, are you assuming that Gerry Schacher was investing dollars rather than lending me dollars during this \$50,000 transaction?

A Mr. Wharram, it was my belief that it was an investment. The form of that investment, I did not know the specifics of it, whether it was a share investment or a loan investment. **All that I believed was that it was an investment.**

Hearing Transcript, April 9, 2014, p.61 Lines 9-25, p.62 Lines 1-25, p.63 Lines 1-25, p.64 Lines 1-10, p.65 Lines 12-20(*Emphasis Added*
BCSC00134, p. 18
BCSC00158, para 87

204. It is abundantly clear from the testimony of the investigator that on June 10, 2013 she became very aware of the \$55,000 cheque back to Schacher yet still in the days from June 10, 2013 to June 14, 2013 (a Tuesday – Friday); she did not even make an attempt to speak to Schacher to verify her assumption (See #204 below) with respect to the Schacher funds. Assumptions cannot be considered cogent evidence in a case before this Panel.
205. Knowing what Chan knew as fact on June 10, 2013, it is baffling why she did not contact the Executive Director, or even her superior, to notify others that the Schacher funds might not be a she had assumed. Chan has FULL knowledge of the complete transaction between the Respondents and Schacher but did not even make an attempt to contact Schacher during this very important time frame.

206. As noted above, Ryan Lang (“Lang”), a former employee of WKL and friend of Wharram, lent \$40,000 to the Respondents on April 2, 2013 and the funds (with interest and fees) were returned to Lang on April 10, 2013. This again, follows in line, with the theory that Wharram was utilizing a series of short term loans in the Spring of 2013. By paying back Lang and Schacher their respective capital with interest, there is no reason to suspect the Respondents would not have done the same with **ALL** the other loans given the opportunity.
207. How the Respondents were going to pay back these loans is irrelevant to the allegations before this Panel. At no point did the lenders receive collateral (or security) with respect to the project and no paperwork that would suggest this was anything more than a loan. The Executive Director has not brought forward evidence (subscription agreements, no investor contracts, registered liens, mortgages, or witnesses) that any of the short term lenders were investors in the new project.
208. The Respondents submit the lenders knew about the project but were no way involved and the discussions between the Respondents and the Lenders regarding Wharram’s involvement in the project were simply with respect to Wharram’s plans and ability to repay the loans.

The BCSC Investigator Admits to Assuming

209. Oxford Dictionaries defines ASSUMPTION as:

“A thing that is accepted as true or as certain to happen, without proof”

Source: <http://www.oxforddictionaries.com/definition/english/assumption>

210. During the cross examination of the Lead BCSC investigator, she admits to giving information to the Executive Director that was based on an assumption; which ultimately lead to the allegation of making a False Statement to an Investigator in the Notice of Hearing:

Q Is it possible the information you gave the executive director that caused him to make a notice of hearing **was based on an assumption** that I was trying to raise capital from Gerry Schacher?

A **Yes.**

Hearing Transcripts, April 9, 2014, p. 60 Lines 1-5 [*Emphasis Added*]

211. This testimony of Chan is profound on so many levels. After a 33-month investigation by the Staff at the Commission, we have assumptions being made by the lead investigator in a case where the Executive Director has alleged the Respondent made a False Statement to an Investigator. Chan (knowing that the Executive Director was bringing forward the allegation of *Making a False Statement to an Investigator* in the Notice of Hearing), gave information she ought to have known that was not accurate or only partially completed to the Executive Director, causing the allegation under section 168.1 of the *Act*.

212. In addition, she indicates she has “*no particular reason*” to not following up with Schacher after her initial two attempts on June 5 and 6. Assumptions and the apparent lack of effort in attempting to complete her investigation are not cogent – as it is certainly not compelling or convincing. The Respondents respectfully submit there are many reasons the investigator should have followed up with Schacher including but not limited to, the seriousness of the allegations against the Respondents.
213. Schacher mistakenly had the bank representative write “investment” on the memo line on the wire transfer and the investigator **assumed** this was accurate BUT never determined whether or not this was factual. It was as simple as picking up a phone or sending an email to Schacher but she failed to do so, and caused the Executive Director to rely on a theory rather than fact – this is most certainly NOT cogent evidence. Chan had made contact with Schacher in December 2012 (both via email and a phone call) so she most certainly had his correct contact information.

Hearing Transcript, April 9, 2014, p.55 Lines 15-17

214. Schacher attended the Hearing on April 11, 2014, as a witness for the Commission, (and during his cross examination) he indicated the following:

Q Did you loan me \$50,000 in 2013?

A I did

Q Was it a loan or an investment?

A As far as I know, it was just a loan. It was initially for one week until everything got straightened and it was going to be paid back.

...

Q Has anyone contacted you from the Commission recently and asked you whether it was a loan or an investment?

A Yeah. Yes.

Q And who was that?

A I think it was [Bode] that asked if it was a loan or investment.

Q And what did you tell him?

A As far as I know it's just a loan. It was never classified as an investment.

...

Q This is the supporting document related to the wire transfer of the loan for \$50,000 is this correct?

A Yes.

Q Do you have any idea why it would say investment on there? Is that something you would have told the teller to do or is this something that - -

A It probably was what I mentioned to the teller.

Q Is that - -

A She probably asked what this was for and I guess I just put down investment.

Q Okay. And in hindsight would that be a mistake?

A Yes it would.

Hearing Transcript, April 11, 2014, p.103 Lines 22-25, p.104 Lines 1-2 & 9-18, p.105 Lines 17-25, p.106 Lines 1-5 [Emphasis Added]
BCSC00154, p. 37

"Bode" refers to (Staff Litigation Counsel – Mr. Olubode Fagbamiye)

215. This testimony IS compelling and the only contradiction (or evidence brought in by Staff) is the wire transfer document where it mistakenly says "investment" that Schacher indicates was a mistake. The Executive Director's Litigation Staff only took the opportunity to place a phone call to Schacher some months after the Notice of Hearing was issued and even then he repeatedly indicated he considered his funds a loan as outlined above. Either way, they still called him as a witness in an attempt to bolster their case.

216. With all due respect, the investigator for the Commission assumed because she "*recognized that name and I went back to the falls list of investors, and he's listed there as a Falls Capital investor*" that automatically this loan was an investment. The investigator did not talk to Schacher before June 14, 2013 to ensure accuracy of the accusation in the Notice of Hearing. It is apparent by the testimony of Schacher at the hearing, that if she would have, Schacher would have told her the same thing he told Staff Litigator Mr. Fagbamiye when he contacted him in 2014, which was "*it was never classified as an investment.*"

Hearing Transcript, April 8, 2014, p. 128 Line 25, p.129 Lines 1-4
Hearing Transcript, April 11, 2014, p. 104, Lines 16-18

217. In addition to the Schacher testimony, Chan's own notes indicate she spoke to a Mr. Gordon Drury ("Drury") who indicated his \$150,000 was a loan. Norm Neigum ("Neigum"), another personal friend of Wharram's, indicates to the investigator he "*wanted this to be a one time deal and did not want an ongoing working involvement with West Karma.*" And that he "*wanted to help a person out.*" With all due respect, it makes no sense that Schacher, Lang and Drury all indicate they lent the Respondent money and that a forth party (Neigum) would be offered something completely different by the same Respondent. The Respondent maintain the Schacher, Lang, Drury, and Neigum funds were all loans, to be paid back with interest to all relevant parties.

BCSC00573/EXH00118, p. 2 – 3

218. Despite having the onus to bring forward evidence to prove their allegations, Staff brought forward no witnesses to collaborate their theory of the case. Rather, during the investigation and subsequent hearing, the following was uncovered:

- Chan contacted Drury and he told her it was a “loan”;

BCSC00573/EXH00118, p. 2

- she contacted Neigum who indicated he was a friend who “*wanted to help a person out*” and that “*he did not want an ongoing going, working involvement with West Karma*”;

BCSC00573/EXH00118, p. 4 (first and fourth paragraphs)

- she contacted Jamie Lord at Envision Financial who told her the Lang funds were a loan;

BCSC00158, para 87
Hearing Transcript, April 9, 2014 p. 62 Lines 19-20

- Schacher indicating his funds were “a loan and never considered an investment”.

Hearing Transcript, April 11, 2014, p. 104, Lines 16-18

219. Nonetheless, the Executive Director has relied on simple notes from the investigator as evidence that could be (or could not be) complete. This is not cogent evidence and when asked on the stand questions regarding the follow-up with Neigum, the investigator had the following to say:

Q Mr. Naigum states this is a one time thing and that he wants no working involvement with West Karma, is this correct?

A That's what he told me.

Q **And did you investigate this comment any further to check for accuracy?**

A **No.**

Q Can you read the last main paragraph at the bottom?

A I asked Mr. Naigum to provide me with copies of his documents. He said he would not provide me with anything unless I gave him everything on what I was doing. I said I would send him an e-mail requesting his documents and that if he wanted to, he could discuss my request with his lawyer.

Q And again, just to clarify one more time, **you never followed up on this?**

A I think you asked me if I sent him a summons. I did not send him a summons. I **might** have sent him an e-mail, a follow-up e-mail requesting documents.

Hearing Transcript, April 9, 2014, p.79 Line 15-25, p.80 Lines 1-8 [Emphasis Added]

220. Even in just her notes from a single call to Neigum and her testimony during her cross examination, she contradicts herself.

Q And he told you I provided an OM?

A I don't recall. I don't think that he said that you did.

Hearing Transcript, April 9, 2014, p.75 Lines 21-23

And:

still sent over the money. He says he didn't get a prospectus but he has an offering memorandum. He doesn't know the date of the offering memorandum.

BCSC00573/EXH00118, p.4 para 7 (from the top)

221. It is telling that the only evidence Staff have tendered with respect to the Neigum loan was Chan's investor notes that may or may not be complete. Staff wants the Panel to rely on these investor notes to seal their theory of the case. These investor notes are NOT clear and compelling and are not fact – they are an investigators interpretation of a call she had with a friend of the Respondent and are not factual.

222. What is before the Panel is the question, "*Are you currently trying to raise any funds from investors?*" to which Wharram replied, "*no*". The Respondents submit there is NO backup support for any of the evidence they have brought before the Panel – only assumptions and opinions of the lead investigator. No follow-up with Neigum, no follow-up with Schacher, no follow-up with Drury, and no contact whatsoever with Lang in not compelling in nature and prove NOTHING with respect to the balance of probabilities.

223. Staff have submitted the alleged false statement was a lie because if it was characterized as a deliberate falsehood it would tend to reinforce their theory that the Respondents were raising capital in 2013 and, more specifically, that the answers "*misled Commission investigators Chan and Chambers by making the First and Second False Statements, which statements were the opposite of the actual facts.*"

Staff Submissions, para 205

224. Again, the problem for Staff is that the Respondents testimony during his compelled interview on this point is not contradicted by any evidence before the Commission, and Staff have provided no reasonable basis upon which to accept this evidence. Even in Staff Submissions (paragraph 187) in which they want to rely, Schacher is stating the reason he was paid back \$55,000 was "*interest on the loan*".

Staff Submission 187 (Schacher Direct – April 11, 2014, p.100 Line 22)

225. Given Staff's failure to introduce ANY compelling or convincing evidence from their witnesses who could have corroborated the allegation, liability should not be imposed upon the Respondents simply because their answer is irreconcilable with Staff's theory of the case.

ANALYSIS

A. The Burden and Standard of Proof

226. Staff carries the burden of proving the allegations set forth in the Notice of Hearing.
227. Staff must also be held to the allegations made in the Notice of Hearing and must not stray beyond the same.
228. As the Commission noted in *Re Blackmont Capital Inc.*:

[24] A notice of hearing is the foundation of hearings before IRROC Panels and this Commission. It identifies the alleged misconduct that the respondent has to meet. It establishes the issues to be determined at the hearing. It follows that a Panel does not have jurisdiction to determine matters not alleged in the Notice of Hearing. (Particulars need not be in the Notice of Hearing, but must relate to an allegation that is in the notice.)

[2011 BCSECCOM 490](#)

229. Staff argue that “prior to the *McDougal* decision of the Supreme Court of Canada in 2008, there was uncertainty about the standard of proof to be applied in civil cases which involved grave allegations like fraud” and indicate a confusion arose as a result of cases like the British Columbia Court of Appeal’s decision in *Anderson* in which the Court found that fraud under s. 57 of the Act is a “very serious allegation” requiring a “high standard of proof.”

Staff Submissions, para 37 – 39

230. From *McDougal*, Staff has included a series of points and sub-points. The Respondents will do the same:

[39] I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

- (1) The criminal standard of proof applies in civil cases depending on the seriousness of the allegation;*
 - (2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;*
 - (3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegations are serious;*
 - (4) **No heightened standard of proof applies in civil cases, but the evidence must be clear, convincing and cogent;** and*
 - (5) No heightened standard of proof applies in civil cases, but more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.*
- (4) The approach Canadian Courts should now adopt*

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of

probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

F.H. v. McDougall, supra, at para 39-40 [Emphasis Added]

231. There is NO confusion, and Staff's assertion that a court invoking the adjectives "clear and convincing" is "*no longer the law in British Columbia or anywhere else in Canada as the Supreme Court of Canada has expressly rejected this approach*" is telling because 3 years later, this very Commission Panel heard and ruled on the *Hu* case.

Staff Submissions, para 38 & 39

232. Although Staff must prove the allegations in a Notice of Hearing only on a balance of probabilities, the serious nature of the violations (and severe consequences for a respondent from an adverse finding) require that the proof tendered by Staff be clear and convincing. The proof must be based on cogent evidence, which in turn must be "*convincing or compelling*".

Re Hu, 2011BCSECCOM 355, at para. 13

233. Several other cases, with findings, rulings, and decisions have all used the standard set out in *Anderson*.

Castiglioni, 2011 BCSECCOM 62, para 19-20

Mesidor, 2013 BCSECCOM 460, para 27

Keller, 2011 BCSECCOM 303, para 10

McHaffie, 2014 BCSECCOM 213, para 17

234. Fraud is considered "*the most serious misconduct prohibited by the Act.*"

Re Mesidor, 2014 BCSECCOM 6, para 13

235. In *Reynolds*, the Panel dismissed the allegations against the Respondents and cited the following as part of their decision:

6. *In Hu 2011 BCSECCOM 355, the Commission said:*

"13 It is well-established that the executive director must prove allegations in a notice of hearing on a balance of probabilities. The proof must be clear and convincing and based on cogent evidence. The Canadian Oxford Dictionary (Oxford University Press, 1998) defines cogent as 'convincing, compelling'."

...

53. **We therefore find that the executive director failed to provide clear and convincing proof, based on cogent evidence, that Reynolds' March 19 order resulted in, or contributed to, an artificial price for the Coltstar shares in contravention of section 57(a).**

2013 BCSECCOM 15

[Emphasis Added]

236. Staff has submitted “we have proved the allegations in the Notice of Hearing on the balance of probabilities.”

Staff Submissions, para 209

237. With all due respect, this submission, at least as it relates to the Respondents, is not compelling or convincing. The Respondents have exceeded the balance of probabilities by bringing in factual evidence and explanations for their actions, NOT assumptions and wrong interpretations of key evidence.

B. The Law: There was no Fraud

238. The language describing fraud in sections 57(b) of the Act states:

“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.

239. Section 57(b) was considered by the British Columbia Court of Appeal in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7. The Court said:

[28] *The Commission's decision was based on what the appellants ought to have known of the transactions, rather than on what they actually knew. This error in misconstruing s. 57 of the Act was one of law which attracts a standard of review of correctness: see **Gill v. Canadian Venture Exchange Inc.** 2003 BCCA 431 , (2003), 15 B.C.L.R. (4th) 259, 26 C.C.E.L. (3d) 1, 2003 BCCA 431, at paras. 26 to 29. It follows that the Commission's finding that the appellants perpetrated a fraud must be set aside. The question then is whether the factual issue should be remitted back to the Commission and that depends on whether the evidence before the Commission was capable of supporting the mental element of subjective knowledge required for proof of fraud.*

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

[30] *In my view, the evidence in this case could not meet that standard. There is no evidence that the appellants made any intentionally false statements to investors, and the allegation rests on concealment of information from investors that was material to the risk to their investments. While as **R. v. Cuerrier**, 1998 796 (SCC), [1998] 2 S.C.R. 371, 162 D.L.R. (4th) 513, 127 C.C.C. (3d) 1 confirms, dishonest concealment of material facts can amount to fraud, **proof of the accused's subjective knowledge of those facts is still required.***

...

[33] *The Commission also found evidence of fraud in the appellants' self-dealing, and that it was "not for the proper conduct of 439's business". Here again the Commission*

ignored the subjective state of mind of the appellants and the history of the business. In this regard, the reasons of McLachlin J. in R. v. Zlatic, 1993 135 (SCC), [1993] 2 S.C.R. 29 at 46, 100 D.L.R. (4th) 642, 79 C.C.C. (3d) 466, are apposite; she states:

The critical question was whether the transfer of investment vehicles could be considered within the bona fides business interest of the target company, or was more appropriately seen as a transfer designed to serve the personal ends of the parties who effected the transfer, bearing no relation to bona fides business purposes.

Anderson v. British Columbia Securities Commission, 2004 BCCA 7 (Emphasis Added)

240. Additionally:

The actus reus of fraud is established by proof of a prohibited act, be it an act of deceit, falsehood or other fraudulent means, and by proof of deprivation caused by the prohibited act (which may consist in actual loss or the placing of the victim's pecuniary interests at risk). Just as what constitutes a falsehood or a deceitful act for the purpose of the actus reus is judged on the objective facts, the actus reus of fraud by "other fraudulent means" is determined objectively, by reference to what a reasonable person would consider to be a dishonest act. Correspondingly, the mens rea of fraud is established by proof of subjective knowledge of the prohibited act, and by proof of subjective knowledge that the performance of 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).

R. v Théroux, [1993] 2 SCR 5

241. There are many Commission decisions which have considered the indicia of fraud.

242. For example, in *Re Keller*, the Commission found that the Respondent contravened the predecessor section to section 57(b) by:

5. *Keller lied to investors about his background, telling them he was an expert foreign exchange trader who made millions while attending the University of Southern California in 2001. He never attended USC nor did he engage in foreign exchange trading (in 2001 he was 12 or 13 years old).*
6. *Keller told investors he would execute foreign exchange trades, or otherwise invest funds on their behalf. He told investors their funds would be protected by him and Great White against loss. Keller did not invest any of the investors' funds. Keller used the funds for his own personal purposes.*
7. *Keller lied to investors about how their investments were performing. He prepared false account statements that induced some investors to invest more.*

2011 BCSECCOM 303, Decision, para 5-7.

243. Similarly irrelevant for present purposes are the characteristics of fraud identified by the Commission in *Re Sullivan*. There the Panel found that the respondents had contravened the predecessor section to section 57 on the basis of fraud by:

8. *“...telling investors they had “oil spill clean-up and fire-fighting technology called the MUSKOX system...”*
9. *“...GRG shares would soon be listed on stock exchanges...GRG had sold the MUSKOX system to the Chinese National Petroleum Company (CNPC)...”*
10. *None of these statements were true.*

[2012 BCSECCOM 464](#), Decision, para. 8-10

244. More recently in *Re Chosen Media*, the Commission found the Respondent had breached the predecessor to section 57(b) by:

9. *“told prospective investors that there were more investors with Chosen Media than there actually were, and used multiple identities in his correspondence with investors to create the impression that there were more employees with Chosen Media than there actually were. The most serious misrepresentation and dishonesty was in his promise of “risk free” rates of return of 30% to 70% in 30 to 90 days (which would equate to an annual non-compounded rate of return of 120% to 840%), and a guaranteed minimum return of 20% within six months (which would equate to an annual non-compounded return of 40%).”*

[2013 BCSECCOM 300](#), para. 9

245. And finally, in June 2014, in *Re McHaffie*, Staff found the Respondent breached the predecessor to section 57(b) by:

9. *McHaffie told investors, among other things:*
 - *Their investment money would be used for expenses related to the development of the resort, and that it would be completed before the 2010 Winter Olympics (held in February 2010).*
 - *Their money would be used to build the resort, and completion was “just around the corner” or “about to happen”. (This was after September 2010, when the government of British Columbia rejected his proposal to build a ski hill.)*
 - *Their investment money would be used for legal fees to have the Bigfoot shares listed on the Toronto Stock Exchange.*
 - *The public listing was imminent.*

[2014 BCSECCOM 213](#), para 9

246. On the contrary, it is submitted The Falls property existed and was viable in the context of which the investors participated. The Respondents did not lie to and purposely deceive the investors

at any time and the returns offered to investors were realistic given the input from the developer. Many of the FCC and DCF investors visited the property during the relevant period, including some of the Commissions witnesses at the hearing on this matter, whom indicted they received exactly what they were told they were going to receive and in fact, the property and opportunity existed:

Bartho Amado (Deercrest Investor) on stand April 14, 2014

Q Okay. Up until February 2011, the date when the developer, Blackburn, entered into the CCAA protection, did you receive anything that you were told you were going to get?

A In what respect?

Q Did you get your bond certificates?

A In February of 2010?

Q At the time of the investment?

A Yes. I got bond certificates, I got -- all the --a package of information and stuff, I got, yeah.

...

Q How were you getting cheques?

A They were being mailed to me.

Q Okay. So you did receive some cheques in the mail that you received from the respondents?

A I got my interest rate every month.

Q Okay.

A Until basically December, when they stopped.

Q And we just saw those cheques, that's correct?

A Yes.

Q Okay. You were on -- you mentioned you were onsite at the property, so you can tell us if it existed, it was physically there, you saw it with your own eyes?

A I saw a golf course, yes, with homes being built on it.

Q You went down and saw the actual Deercrest project, the construction that was happening at the time?

A I saw a house being built, yes, it was Deercrest...

Hearing Transcript, April 14, 2014, p. 12 Lines 12-25, p.13 Lines 1-20

And additionally:

Kyla Lucas (Deercrest Investor) on stand April 9, 2014

Q Was anything Jim Duke told you about these investments at the time you invested not true?
Was it an investment in Chilliwack?

A Yes.

Q Was it paying 12.5 per cent?

A For a short period of time.

Q Did you receive payments until the developer went into CCAA creditor protection?

A If that was about a year after, then yes.

Q Okay. Did you get everything that you were supposed to, including bond certificates and the cheques from the time you invested until the CCA started in February 2011?

A We received the bond certificates. We received the interest cheques until November of 2010 when they started bouncing.

Hearing Transcript, April 9, 2014, p.31 Lines 13-25, p. 32 Lines 1-5

247. Gerry Schacher, a FCC investor and personal friend of Rodney Wharram, testified at the hearing as a witness for the Executive Director. His testimony was as follows:

Q And what did you learn about Falls Capital Corp. at the seminar?

A I think basically it was, after we had been down at The Falls looking at the project, and anything I seen there was just a confirmation of what I seen when I was at the project.

...

Q And you said earlier that you actually visited the project site?

A We did, yes.

Q And what did you learn when you went to the project site, can you tell the panel?

A No, we, we golfed there, and there's a beautiful golf course. It had -- we met with the developer, Mr. Wellsby from Blackburn, and we discussed what his plans were. He was very creative. He had lots of plans for the project. It was very interesting.

Q Did you receive an offering memorandum from the Falls Capital Corp.?

A Yes, I did. Yes.

Q Did you receive marketing materials from the Falls Capital Corp.?

A Yes. Lots of it, yes.

Hearing Transcript, April 11, 2014, p.94 Lines 9-14, p.95 Lines 24-25, p.96 Lines 1-15

C. The Law: There was No False Statement to an Investigator

248. With respect to the alleged False Statement to an Investigator, Section 168.1 of the Act reads:

168.1 (1) *A person must not:*

(a) make a statement in evidence or submit or give information under this Act to the Commission, the Executive Director or any other person appointed under this Act that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading, or

...

(2) A person does not contravene subsection (1) if the person

(a) did not know, and

(b) in the exercise of reasonable diligence, could not have known that the statement or information was false or misleading.”

249. There are many Commission decisions which have considered the indicia of Making a False Statement to an Investigator. For example, in *Re Hu*, the Commission found the Respondent had concealed a relationship with another in an attempt to frustrate the investigation:

10. *As far as Hu’s contravention of section 168.1(1)(a) is concerned, this is also serious misconduct. By attempting to conceal his relationship with Tian, Hu attempted to frustrate the investigation by hiding the key fact that would have tied him to the illegal trading. Hu knew that, and did his best to mislead Commission staff. This was not a case of mere denial of the allegations, or a defence posing a different interpretation of the facts. It was a deliberate attempt to mislead Commission investigators so that they would not discover his connection with Tian, the owner of the account through which we found he made his illegal trades.*

2011 BCSECCOM 514

250. Elsewhere, in *Re Castiglioni*, the Commission found that the Respondent contravened the predecessor section to section 168.1 by misrepresenting to an investigator the amount of money in a bank account:

10. *In May 2009 Castiglioni met with Commission staff and told them he traded securities for CPLC through a trading account at a Swiss bank. At staff’s request he later provided purported copies of statements for the account. The statements showed a balance in the account at June 30, 2009 of about €4.6 million.*

11. *In fact, according to the Swiss Financial Market Supervisory Authority, CPLC had no accounts at the Swiss bank and the balance in the account with the number shown on the statements was only €7,000. That Authority says the account statements appeared to be forgeries, and, based on that statement, we so find.*

251. On the contrary, it is submitted by the Respondents that they did not intentionally make a false statement to an investigator in an attempt to hide any business transactions or regarding banking transactions in which were later backed up with forged documents. Wharram was forthright at all times and answered the questions in a truthful manner.

THE ISSUES

252. It is submitted that the following issues should be considered by the Commission in determining whether the Respondents are liable with respect to the allegations made against them in the Notice of Hearing:
- a) As a matter of law, has the Executive Director established on a balance of probabilities with cogent evidence that a fraud occurred contrary to 57(b) of the *Act*?
 - b) If yes, has Staff proven on a balance of probabilities with cogent evidence that the Respondents;
 - i. committed a fraud against the FCC and DCF investors identified in the Notice of Hearing;
 - ii. if so, whether such conduct resulted in or contributed to a fraud on the Investors of the Respondents and whether the Respondents knew or reasonably should have known that it would do so?
 - c) Has staff convincingly proven on a balance of probabilities with cogent evidence that the following statements made by the Respondent Wharram at his compelled interview on March 12-13, 2013 were, in a material respect and at the time and in light of circumstances under which they were made, false or misleading, namely that:
 - i. had not raised any funds from investors in 2013; and
 - ii. was not currently trying to raise any funds from investors.

NOTICE OF HEARING DATE IS WRONG

253. On June 14, 2013, the Respondents received email correspondence from Staff containing the Notice of Hearing, Temporary Orders and the Freeze Orders. At some junction, while reviewing the documents, the Respondent noticed the date was wrong on the Notice of Hearing – it was dated June 14, 2012.

The Notice of Hearing, dated June 14, 2012

254. Notwithstanding the Respondents previous arguments regarding the alleged fraud and false statements, the Respondents are perplexed as to how the Executive Director can even make these arguments without having properly brought these allegations forward in an Amended Notice of Hearing.

255. While the Executive Director has the utmost authority to modify Notice of Hearings, having done so on *Sungro Minerals*, *David Michaels*, *Bossteam E-Commerce Inc.* and *Rashida Samji*. In some cases like Sungro going as far as to modify the Notice of Hearing more than once with an "Amended NOH", and a "Further Amended Notice of Hearing", yet for some reason in this matter, the Executive Director chose not to amend the Notice of Hearing once the error surrounding the date was discovered. We find out below from the Staff's witness (Ms. Chan) when she states, "...*Either on that day or the following days after, like, very close to that date...*" there was NOT a long delay in Staff noticing the mistake and furthermore, Staff knew of this mistake in June of 2013.

256. In the testimony of the lead investigator, she states that it was known by at least 2 parties at the Commission's office:

Q Thank you. Your comments after that were unclear. Did you say you knew about the mistake?

A I knew as soon as I saw -- sorry, how should I say this? After it had been issued someone just indicated to me that it had been sent to you, and they showed me that copy. And then as soon as I saw that, said, "oh, the date should say 2013, not 2012." And that was my comment. So, I noted it right away as soon as I saw it.

Q So, you noted that --

A Either on that day or the following days after, like, very close to that date.

Q Okay. And who is the person that brought it to your attention?

A Colette -- well, I brought it to their attention.

Q Okay.

A It would have been one administrative assistants in the litigation group.

Q Okay, thank you. And do you know their name?

A Yes, it's Colette Coulter.

Hearing Transcript, April 11, 2014, p. 21 Lines 1-20

257. But just two days earlier during her cross, Chan had this to say:

Q Okay. And the same with the notice of hearing that was produced on June 14th in your review of that, did you see any mistakes?

A Nothing that I recall, no.

Q So it is your testimony here today that all the information in your affidavit is accurate, in your affidavits is accurate and truthful?

A Yes. To the best of my knowledge, yes.

Q And it is your testimony here today that the information in your notice of hearing that you were instrumental in preparing is accurate and truthful?

...

MR. WHARRAM:

I will back up then. Did you review the notice of hearing?

A Yes, I did review the notice of hearing.

Q You checked it for accuracy?

A Yes, I did.

Hearing Transcript, April 9, 2014, p.40 Lines 22-25, p. 41 Lines 1-7 & Lines 17-21

258. The Respondents submit it is remarkable that Chan would only admit there was a fundamental mistake within the Notice of Hearing after it was presented as an exhibit later during her cross examination.

259. What is before the panel, in evidence, is a *Notice of Hearing* dated June 14, 2012. There is no amended Notice of Hearing dated June 14, 2013, despite the Executive Directors ability to do so.

260. This is the only document in evidence that makes allegations against the Respondents - a Notice of Hearing dated 2012 that is alleging false statements before an investigator during an interview that did not happen until March 2013. The Respondents do not see how this allegation can be made, let alone proven given the date on the Notice of Hearing.

THE MARTINSEN MISTAKE

261. Additional mistakes by the Executive Director / Investigator were noted by the Respondents during the preparation for the hearing. During the hearing, the investigator was asked during cross:

Q Can we go to page or, sorry, British Columbia Securities Commission 00567, please, page 59. And once again, can you tell us what we're looking at?

A These are my notes.

Q These are your notes and thoughts from discussions with different investors?

A These are my notes from various discussions including discussions with investors.

Q Under October 10 on the third paragraph, can you please read we briefly?

A We briefly discussed that NOH -- Wharram and the hearing process for potential outcomes. I also informed her that the Insurance Council of B.C. had disciplined Wharram and that this disciplinary action was posted on their website. That should have been -- that should have said Duke, not Wharram.

Q So this is a typo?

A Yes.

Q You've made a mistake in this document?

A It's a typo.

Q It's a mistake as well; could a person call it a mistake?

A It's a typo.

Q That was a yes or no question, please.

A It could be called a mistake.

Q Did you make others?

A It's possible.

Q Are you certain right now that you didn't tell Mrs. Martinsen that?

A I'm not a hundred per cent certain, but I do know that I had conversations about the Insurance Council of B.C. with investors such as Ms. Martinsen, and it was Mr. Duke that I was talking about.

Hearing Transcript, April 9, 2014, p.83 Lines 11-25, p.84 Lines 1-20

262. With all due respect, items tendered into evidence on behalf of the Executive Director, should be checked for accuracy. Because of bias created by both a conversation between Chan and this client and sending out the Investor Impact Statements before the allegations are proven before this Panel, the Respondents have not been able to contact Mrs. Martinsen to ascertain whether the investigator told her wrong information or this was a typo. Either way, Ms. Chan was not able to say this was 100% typo and this is NOT acceptable.

THE RESPONDENTS DISAGREE WITH MANY SUBMISSIONS OF STAFF

263. As indicated earlier in these submissions, Paragraph 10(a) of Staff's submissions purposely tries to mislead the reader – Staff have cut and pasted 2 different parts of the FCC Offering Memorandum in an attempt to bolster their case. When one reads the entire 1.1 and 1.2 Section of the FCC Offering Memorandum, it is clear that by taking out the definition of Available Net Funds, it is an attempt to persuade the reader. The Respondents encourage the reader to read the full 1.1 and 1.2 sections of the FCC Offering Memorandum(s).
264. In paragraph 17, it is submitted by Staff that Wharram confirms in the compelled interview that “13.4615% of the funds loaned to the Joint Ventures for reimbursement of sales commission and expenses.” (Emphasis Added) Nowhere in the corresponding exhibit (highlighted by Staff as being BCSC00169 P56 L2-L21 and P57 L5-L12) mention ANYTHING about reimbursement of expenses. The Respondents submit that at all times, Wharram thought he could take the expenses out of the funds not advanced to the Developer as per the wording in the Offering Memorandums of the Respondents.
265. In paragraph 25, Staff has again drawn the reader away from Section 1.1 and 1.2 of the DCF Offering Memorandum(s), and away from the definition of *Net Available Funds*. The Respondents encourage the reader to read Section 1.1 and 1.2 of the DCF Offering Memorandum(s).
266. With respect to paragraphs 34 and 35, Staff ask Wharram a direct question about an exhibit that is being placed on front of him and he indicates the numbers match. He is confirming the amount on the piece of paper but does not indicate whether this numbers are audited or 100% accurate. Staff does not ask any questions with respect to audited financial statement at this point or regarding who prepared these documents.
267. In paragraph 38 and 39, Staff submits “confusion” arose from a decision in the *Anderson* case in 2004 whereby that Court found fraud to be held to high standard of proof invoking adjectives like “clear and convincing”. Staff submits because of a decision in 2007’s *McDougall* this is no longer the law in British Columbia or anywhere else in Canada. With all due respect to Staff, paragraph 39 is a statement that is not true as this very Panel has used these adjectives (and subsequently referred to *Re Anderson*) as recently as 2011 in the BCSC *Hu* decision and 2014 in the *McHaffie* decision.
268. In paragraphs 46 and 47, Staff brings forward establishing factors of *actus reus* and *mens rea* of fraud. The Respondents submit that by repaying the respective \$75,000 and \$45,000 to FCC, the *actus reus* (deprivation caused by the prohibited act) is not present in this matter. At no time did the Respondents feel they had subjective knowledge (or *mens rea*) of the alleged fraudulent act.

269. In paragraph 53, the FCC OM's did say the majority of the money raised from investors would be loaned to the Developer, however they also said they majority of the net available funds would be loaned to the Developer. The Respondents maintain the latter is the one they relied on AND the majority of the FCC net available funds were loaned to the Developer.
270. In paragraphs 65 and 66, WKL was to receive 13.4615% to pay their expenses with respect to the FCC offering. However, they were not responsible for direct FCC expenses that were paid by WKL or WKL's credit cards. Again, Staff has never determined an accurate amount of the expenses incurred by FCC such as accounting, professional fees, etc.
271. In paragraph 71, Staff once again indicates only 42.30% of investor's funds reached the Developer. This statement is simply not true and the Respondents have made factual submissions proving their case without assumptions, partial records, and only completing summary work.
272. In paragraph 73, Staff indicates the Falls Investors did not get their monies back. The FCC Investors did not get their monies back due to the CCAA process Blackburn entered into in February 2011, not the alleged fraudulent acts of the Respondents.
273. In paragraph 75, Staff indicates Wharram admitted that he advanced less than half of the Falls Investments to Blackburn. When reading the transcript of Wharram's compelled interview that Staff have submitted that the parties are to rely, it is very apparent that Wharram is confused by this question. The question asked is as follows:

Q Okay. So I am going to ask the questions again. The total at the bottom of this column is \$2,189,301, is this the total amount of the loans made by the Falls Capital to Blackburn?

BCSC00169/EXH00139, p.61 Lines 13-27

Wharram, although confused by the question, is admitting that FCC loaned \$2,189,301 to the Developer but the investigator is not asking about the 4 Joint Venture companies that FCC Investor Funds also made loans to the Developer. In fact, Wharram had the following to say during the compelled interview:

Q Besides the loans made to Blackburn, did the Falls Capital invest any other funds in the Falls Resort project?

A Again, I'd have to review. I don't know until I see documentation to refresh my memory. I don't know.

BCSC00169/EXH00139, p.62 Lines 18-22

Staff is trying to indicate that Wharram admitted he "advanced less than half of the Falls Investments to Blackburn, but again are not showing the whole picture. Using Staff's

interpretation of the math and this very isolated question that does not include all the relevant parties to the transaction (WKL and the 4 JV Companies) is not cogent evidence.

274. In paragraph 79, the FCC Investors were NOT deprived of the \$75,000 from the Residence Purchase Payment as the funds were returned in January 2010.
275. With respect to paragraphs 82 and 83, it is submitted the \$45,000 of personal funds Wharram placed into the FCC bank account in February 2012 returned funds to the FCC bank account making these statements inaccurate. There was no actual deprivation committed against the FCC Investors as the funds were returned to the account in which they were taken or subsequently paid expenses associated with FCC. Staff has brought no evidence, despite having the onus to do so, proving the funds were not returned.
276. In answer to paragraphs 84 and 85, by the Respondents replacing both the Residence Purchase Payment (the Capital Direct Mortgage proceeds) and the Personal Use of Sale Proceeds (the personal funds deposited into the FCC bank account) they DID NOT commit a prohibited act within the first branch of the *actus reus* of fraud nor did an actual deprivation flow from this prohibited act. There is only a theory presented by Staff showing proof on the balance of probabilities that Wharram, FCC and WKL committed prohibited acts and that those acts caused both risk of deprivation and actual deprivation.
277. In paragraphs 86 and 87, Staff has not brought forward cogent evidence which makes these statements correct. They have not exceeded proof on the balance of probabilities of the *actus reus* of fraud by stating, "*Wharram, the Falls, and West Karma did not use a substantial portion of the Falls Investments for the purpose for which the investors had entrusted these funds to them.*"
278. In paragraph 90 and 91, Staff alleged that Wharram "diverted" the funds from the Falls Account to West Karma but fail to bring cogent evidence showing these funds were not used for FCC business expenses. WKL paid many bills and invoices on behalf of FCC and Staff have not brought an accounting that provide ANY accurate numbers to support their allegation. Wharram did advance the majority of available funds to the Developer.
279. In paragraphs 94-99, Staff indicates Wharram had Subjective Knowledge that the prohibited acts would cause deprivation to the FCC Investors. The Respondents have respectfully submitted several points in this document that suggest he did not have Subjective Knowledge his actions would cause deprivation during the relevant times.
280. In paragraph 104, Staff submit the DCF OM's state the majority of the money raised from investors would be loaned to the facilitate funding of the Deercrest Resort and Clubhouse Development. Again, they have skipped over Section 1.1 and 1.2 of the DCF Offering

Memorandum(s) where it distinctly states the definition and meaning of Net Available Funds. This is what the Respondents relied upon at all times.

281. In paragraphs 107 and 108, the Respondents submit that Wharram was answering a direct question regarding a number on a piece of paper. The amount at the bottom of the column said \$1,636,000. Wharram was never asked about the \$606,000 that was spent on behalf of the Developer and made a mistake when filling out the forms in the DCF Claim amount with the Price Waterhouse Coopers monitor. None of the submissions from Staff prove on a balance of probabilities, that the Respondents did not submit less than half of the money to the Developer.
282. Paragraph 119 is simply incorrect – the Respondents did advance the majority of the available DCF monies as per the Offering Memorandums.
283. In paragraph 126, Staff submits that *“Wharram admitted that he advanced less than half of the Deercrest Investments to the Blackburn”*. First of all, there is no admission by Wharram whatsoever. Secondly, the reader is told to go to **BCSC00169/EXH00139 P. 61 L 8-17** which states:

Q Can you please tell me what information is presented in that column?

A No, I don't know what that is.

Q Go ahead

A I'd be guessing if I answered that.

Q At the amounts listed here the loans that were made to Blackburn?

A That's what it appears, yes.

Q Again, the total of that column is \$2,189,301.42?

A Yes

This section of the interview is not even relevant to Staff Submission #126 – the reader is sent to here to read about the DCF entity and it's a section relating to FCC. The next section readers are sent to review is P85 L19-27 and Wharram is asked questions directly related to the amount of the cheques. In his confusion and duress, he forgot about the \$606,000 of investor interest paid by DCF on behalf of the Developer.

284. In paragraph 130, the investors were not deprived of \$130,000. Wharram has repaid \$20,000 of these funds from a personal source and was never paid back his \$30,000 in Working Capital Deficiency that was due.

285. In paragraph 154, Staff submits that Wharram knew that \$1,367,086.72 was advanced to WKL. There was NO DIVERSION of funds – WKL was due 12% of the funds raised which formed part of these funds. Using the word ‘diversion’ is Staff’s attempt to twist facts and strengthen their case. The additional funds (that were not part of the 12%) that were advanced to WKL went towards paying for DCF expenses that WKL paid due to DCF not having its own credit card.

286. Paragraphs 155 and 156 make no sense as Wharram, Deercrest, and WKL did advance the majority of the funds required as per section 1.1 and 1.2 of the DCF Offering Memorandum(s), therefore Wharram did NOT have subjective knowledge of the prohibited act.

287. In paragraph 176 (d)(v), Staff submit that there was a review of the “*general ledger supplied by Wharram but did not rely on it heavily as had the source documents themselves – bank statements*” but this is contradicted at different times when Chan admits she did not have a complete set of bank records.

Hearing Transcript, April 9, 2014, p. 86 Lines 15-21

Hearing Transcript, April 14, 2014, p. 33 Lines 8-12

288. In answer to paragraph 186, it is submitted that Schacher was NOT involved in “*Wharram’s 2013 attempts to revive Deercrest*”, merely a lender to facilitate Wharram being able to purchase the property. Just because Schacher was on a list of investors does not mean he was part of the so called 2013 attempt to revive Deercrest. At no time was Schacher provided any marketing materials, Subscription Agreements, Offering Memorandums related to the Deercrest property. He simply knew of Wharram’s plans for the property and fully supported it:

Q What is your knowledge of the deal I had tried to put together with Primex in 2013? Can you tell us a little bit about that?

A I never seen any of the documents. Uh, the only thing is what you told me about that was if you could, if you could make that deal work, that you would give the investors some of their money back, or at least their principal, so.

Q Did you support that plan?

A I did, yes. That was the basic reason that we were lending that \$50,000, to try to make that work.

Hearing Transcripts, April 11, p. 117 Lines 22-25, p.118 Lines 1-8

289. In answer to paragraph 189, it was Schacher’s testimony during the hearing (while appearing for Staff) this was a mistake on his part and that the wire transfer should not have said investment;

Hearing Transcripts, April 11, p.106 Lines 4-5

290. In answer to paragraph 190 and 191, the Respondents argue it is irrelevant what the bank account balances were in the WKL bank account at Envision. And what the Respondents did with the Schacher funds on March 8, 2013 is just as irrelevant as Schacher was not part of the

project. With all due respect, if Wharram would have purchased a car with the \$50,000 loan from Schacher would it have been different? As submitted above, Wharram had only explained the business transaction he was getting involved with to Schacher as the way in which he would be repaid his loan;

291. In paragraph 195, it is submitted by Staff that Chan testified that during a phone call with Drury he told her the funds were considered a loan. Yet this is contradicted in 200(a) where Staff submits Wharram called Drury in February 2013 asking him to invest funds in the Deercrest project.
292. In 200(b-f), Staff insist on revisiting the Schacher funds. As Schacher testified, these funds were a loan and returned 30 days after they were borrowed by the Respondents.
293. In paragraph 202, other than Liz Chan's interview notes, there is no evidence submitted by Staff proving their theory the Respondents were raising funds up to the March 13 Interview. This is not cogent as it lacks clear and compelling evidence brought forward by Staff.
294. In paragraph 203, Wharram was NOT continually raising funds. Wharram approached 4 friends and asked for loans – he repaid the loans with interest to 2 of the 4 people he borrowed these funds and on the balance of probabilities would have paid back/will pay back the remaining 2 loans with interest as well.
295. In respect to paragraph 208, Chan did not have a "conversation" with the most important party with respect to the \$50,000 loan – Schacher himself. Reviewing the bank account statements does not prove anything and would only lead to speculation. Staff brought forward no evidence, (other than Chan's personal notes) that even suggests Drury, Lang, Neigum were investors. There is no evidence tendered by Staff that contradicts what Schacher indicated on the stand when he stated, *"It was never classified as an investment"*.

CONCLUSION

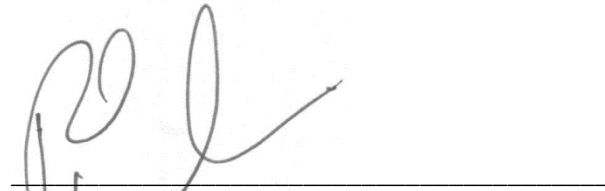
296. The Executive Director failed to provide clear and convincing proof, based on cogent evidence that the Respondents engaged in or participated in conduct relating to a fraud on the FCC and/or DCF investors. The Executive Director failed to prove the allegations in the Notice of Hearing on the balance of probabilities.
297. Staff has failed to bring any witness forward that had any knowledge of any fraudulent act alleged to have been committed by the Respondents.

298. The Executive Director failed to provide clear and convincing proof, based on cogent evidence, that on March 12-13, 2013, the Respondent made two false statements to an investigator. On the contrary, one of the Staff's witnesses (Schacher) gave testimony that actually went against the theory of the Staff.

299. The Respondents have countered each and every one of the allegations brought forward by the Executive Director with clear and precise facts – with no assumptions or speculation. Staff had a theory of the events surrounding the operation of the Respondents businesses, alleged a fraud and then brought forward very little in terms of cogent evidence.

300. It is therefore submitted that the allegations in the Notice of Hearing that the Respondents violated sections 57(b) and 168.1 of the *Act* should be dismissed in their entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to read 'RW', is written over a horizontal line.

Rodney Wharram
(for the Respondents)

July 6, 2014
Chilliwack, British Columbia