2005 BCSECCOM 583

Corporate Express Inc., also known as Corporate Express Club and Corporate Express Club (CEC) 1998, Fortress International Ltd., Great American Gold Ltd., John Thomas McCarthy and Cameron Willard McEwen

Section 161(1) of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken	Vice Chair
	Robert J. Milbourne	Commissioner
	Roy Wares	Commissioner
Dates of Hearing	2004: July 12-15, September 13, 14, 16, 17, October 13-15; 2005: February 28, March 1, 2, 7, 10, 14,15, April 1	
Date of Findings	September 9, 2005	

Appearing

Douglas H. Christie	For Cameron Willard McEwen
Kristine Mactaggart	For the Executive Director (hearing dates in 2004)
Mark Hilford Adrianne Marskell	For the Executive Director (hearing dates in 2005)

Findings

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I Introduction

¶ 1 This is a hearing under section 161(1) of the *Securities Act*, RSBC 1996, c. 418.

A. The Notice of Hearing and Temporary Orders

¶ 2 The Executive Director issued a notice of hearing and temporary orders under section 161(1) on December 9, 1999, alleging that parties including Corporate Express Inc. (also known as Corporate Express Club), Corporate Express Club (CEC) 1998, Fortress International Ltd., Great American Gold Ltd., John Thomas McCarthy and Cameron Willard McEwen contravened the Act by:

- trading securities without being registered to do so,
- distributing securities without filing a prospectus,

- giving an undertaking relating to the future value or price of securities, and
- representing, without the Executive Director's permission, that securities would be listed, or application would be made for them to be listed, on a stock exchange.

¶ 3 On January 5, 2000, the Commission extended the temporary orders until the hearing was held and a decision rendered.

¶ 4 Under the temporary orders the Commission prohibited trading in the securities that are subject to this hearing and removed the use of the exemptions in the Act from all of the respondents. The orders also prohibited the individual respondents from acting as directors or officers of any issuer, and from engaging in investor relations activities.

¶ 5 McEwen appealed the Commission's extension of the temporary orders to the Court of Appeal. Other court proceedings between the Executive Director and McEwen lasted through January 2004.

¶ 6 As described below, the notice was later amended to include allegations that:

- McEwen failed to comply with a summons to appear and a demand for production issued by Commission staff,
- McEwen failed to comply with a compliance order of the Supreme Court of British Columbia, and
- the respondents breached the temporary orders.

B. Summons and demand for production – McEwen

¶ 7 On December 10, 1999 Commission staff issued McEwen a summons and a demand for production under section 144. On October 23, 2000 the British Columbia Supreme Court made an order under section 157 that McEwen comply with the summons and demand.

¶ 8 The summons required McEwen to appear before a Commission staff investigator to give evidence under oath. The demand for production required McEwen to provide all records and things in McEwen's possession relating to Corporate Express, Great American and Fortress and their activities, and all transactions and dealings among all of the respondents.

¶ 9 McEwen has not presented himself to be interviewed as required by the summons nor has he produced any of the documents described in the demand for production.

C. Demand for production – MI Designs

¶ 10 On October 28, 2002 Commission staff issued a demand for production to MI Designs.com Inc. The demand for production required MI Designs to provide all records and things in its possession related to the website "gagold.com" and specified a list of particulars, including the "name and address for the customer who ordered the website design" and "all correspondence between MI Designs and the individual who oversaw the design of the website".

¶ 11 MI Designs complied with the demand.

D. Demand for Bryce Stewart trust account records

¶ 12 During the investigation, Commission staff sought trust account records of Bryce Stewart, a Vancouver lawyer. McCarthy and McEwen retained him to receive funds from those wishing to become members of Corporate Express, to invest in Corporate Express offerings or to buy Great American debentures. McEwen claimed solicitor-client privilege over those documents. The British Columbia Supreme Court ordered which of these records were privileged and which were not. The documents the Court ruled were not privileged were admitted into evidence in the hearing.

E. Disclosure

¶ 13 The Executive Director disclosed the evidence to McEwen on April 13, 2004. On May 26 counsel for the Executive Director wrote McEwen:

- disclosing two additional documents,
- identifying the documents the Executive Director intended to enter into evidence at the hearing, and
- identifying the witnesses the Executive Director intended to call at the hearing and the subject matter of their testimony.

¶ 14 In letters dated June 11 and 30, 2004 counsel for the Executive Director identified two more documents the Executive Director intended to enter into evidence at the hearing and described additional testimony that the Executive Director expected to elicit from one of the Executive Director's witnesses.

F. The Amended notice of hearing

¶ 15 On June 7, 2004 the Executive Director issued an amended notice of hearing and faxed it to McEwen's counsel on June 8. The amendments, described in more detail below, extended the relevant period, added new allegations and sought additional orders.

G. Adjournment application

¶ 16 The hearing began on July 12, 2004. None of the respondents appeared at the hearing, and none except McEwen was represented by counsel at the hearing.

¶ 17 At the outset of the hearing, McEwen applied for an adjournment on two grounds:

1. The Executive Director's disclosure was not given in time to permit McEwen to prepare adequately for the hearing.
2. The Executive Director's allegations in the June 7, 2004 amended notice of hearing differed materially from those in the original December 9, 1999 notice of hearing.

¶ 18 The Executive Director opposed the application, saying that McEwen had had enough time to prepare, and that the amended notice was not materially different from the original.

¶ 19 On July 13 we dismissed McEwen's adjournment application and directed the Executive Director to proceed under the December 9, 1999 notice of hearing, with the amendments described below.

Disclosure

¶ 20 McEwen's first ground was that the Executive Director did not make disclosure soon enough to permit McEwen to prepare adequately for the hearing.

¶ 21 The Executive Director disclosed the evidence to McEwen on April 13, 2004, about three months before the start of the hearing. The Executive Director disclosed the evidence to McEwen by delivering a computer disk (CD) containing the relevant documents, about 2,500 in total. This was followed by the relatively minor supplementary information delivered in May and June.

¶ 22 McEwen said it took several weeks before he could access the documents on the CD because it came without instructions and without a warranty that it contained no viruses or spyware. He said he had to have the CD checked for viruses and spyware and had to acquire unspecified "special" software and hardware to run the CD on his computer. He said that once he was able to review the documents on the CD it took him about a month to review them. He also said he would be traveling for the week preceding, and one week after, the start of the hearing and this would make it too difficult to prepare properly.

¶ 23 We were not persuaded by these submissions. McEwen could have asked Commission staff for instructions on how to open the files on the CD. If he did not want to open the CD without an assurance that it contained no viruses or spyware, he could easily have sought that assurance from Commission staff. He

could have contacted Commission staff for technical assistance in getting the CD to run properly. In fact, it seems to us that contacting Commission staff to discuss all these problems would have been the most logical and expeditious course to take, since it was the Executive Director who supplied the CD. In our opinion, it is likely that had McEwen done so, he would have been successful in accessing the documents much earlier than he apparently did. It would also have had the incidental advantage of notifying the Executive Director that he was having difficulty.

¶ 24 In our opinion, the Executive Director's providing disclosure three months in advance of the hearing was reasonable in this case. It was not reasonable for McEwen to fail to seek the assistance of Commission staff in accessing the documents, or at least inform them that he was having difficulty doing so, and then apply for an adjournment about a week before the hearing was due to start.

¶ 25 Neither was it reasonable for McEwen to ask for an adjournment on the basis that he would be traveling just before, and for some time after, the start of the hearing. The dates for the hearing were set about a year in advance; McEwen had more than ample time to arrange his affairs to accommodate those dates.

¶ 26 This disposed of the first ground of McEwen's application.

¶ 27 We note that as things turned out, after sitting for only four days in July (about one of which was consumed with the adjournment application) the hearing did not reconvene until September 13 – a gap of about two months that was available to McEwen for additional preparation.

The amended notice of hearing

¶ 28 McEwen's second ground was that the amended notice of hearing differed materially from the original.

¶ 29 Counsel for the Executive Director represented to us that the June 7, 2004 amended notice of hearing "[did] not contain any material allegations that are new". Instead, counsel said, it was "prepared in an updated form" and contained "better particularization". This was misleading. The amended notice of hearing:

- extended the relevant period by four and a half years (the allegations in the original notice were based on conduct that began in January 1998 and ended on the date of the notice – December 9, 1999; the allegations in the amended notice extended the end date to the date of the amendment – June 7, 2004);

- sought orders under sections 162 (administrative penalty) and 174 (costs) and "any other orders as may be appropriate" – the original notice sought orders only under section 161(1) (enforcement orders);
- materially changed the description of the features of one of the alleged investments;
- added the allegation that the alleged investments have 10 features (particularized in the amended notice) in common with "a fictitious investment commonly referred to as a 'prime bank instrument'";
- added 6 allegations of misrepresentation (the original notice did not allege misrepresentation);
- added the allegation that McCarthy and McEwen failed in their duties as directors and officers of the corporate respondents and in so doing contravened the *Company Act (British Columbia)*; and
- added the allegations described above that McEwen failed to comply with a summons and demand, and with a court order compelling compliance with them, and that the respondents breached the temporary orders.

¶ 30 These changes show, contrary to what the Executive Director's counsel represented, that the amended notice of hearing was not merely an update with better particulars, but a new notice that almost tripled the duration of the relevant period and introduced material new allegations.

¶ 31 Disclosure was substantially complete nearly two months before the amended notice was issued, so the Executive Director must have had at that point the evidence necessary to proceed on the original notice of hearing. In our opinion it was unfair to issue an amended notice of hearing containing substantial changes nearly two months after disclosure was made and just over a month before the hearing was due to start.

¶ 32 For those reasons, we directed the Executive Director to proceed under the original notice of hearing, with the amendments discussed in the next paragraph.

¶ 33 We directed that the original notice of hearing be amended to include the allegations from the amended notice of hearing relating to McEwen's alleged failure to comply with the summons and demand, and the allegations that the respondents breached the temporary orders. This is because these allegations, unlike the other new allegations in the amended notice, do not relate to the respondents' alleged trading in securities, but to their conduct in complying with the investigation powers under the Act and the Commission's previous orders.

¶ 34 This disposed of the second ground of McEwen's application, so we dismissed it.

¶ 35 After we ruled on McEwen's application, the Executive Director reversed position on the adjournment application and asked us to grant the adjournment so that the Executive Director could proceed under the June 7, 2004 amended notice of hearing. We refused to do so:

- At the start of the hearing, four and a half years had passed since the proceeding started, with temporary orders in place throughout the whole period.
- The hearing dates had been set for about a year.
- Disclosure was made three months before the start of the hearing.
- The Executive Director had ample time long before June 2004 to consider whether amendments were necessary to the notice of hearing. Counsel for the Executive Director argued that this was not possible because the amendments arose out of the Bryce Stewart trust account documents, whose admissibility was not settled until January 2004. This was not so – we found little or no connection between the June 7 amendments and the Stewart documents .
- It is in the public interest that enforcement proceedings proceed as expeditiously as is consistent with the rules of natural justice. In this case, some delay was unavoidable as a result of the parallel court proceedings, but in our view it was time to hear the matter.

¶ 36 The hearing then proceeded on the basis of a further amended notice of hearing dated July 13, 2004, which we refer to simply as "the notice of hearing". This was the original notice of hearing, amended to include the allegations that we directed be included, and to delete references to parties no longer included in the proceedings.

H. Ruling on admissibility of evidence

¶ 37 During the course of the hearing, McEwen objected to the introduction of some of the Executive Director's evidence, including the evidence obtained by Commission staff from MI Designs, and some of the documents from the Bryce Stewart trust account records. We ruled on most of that, including the evidence from MI Designs, in a separate ruling (see 2004 BCSECCOM 680).

¶ 38 McEwen revisited in argument the evidence from MI Designs, citing testimony from Michael Ferridge, the principal of MI Designs, that he did not provide Commission staff with emails between himself and McEwen. Therefore, McEwen, argued, either that evidence was improperly obtained by Commission staff, or Ferridge testified falsely. Either way, McEwen argued, we should ignore the evidence.

¶ 39 We do not agree. It is clear from the terms of the production order that MI Designs was required to provide the emails to Commission staff. It is also apparent from Ferridge's testimony that he intended to comply, and did comply, with the production order. It is not surprising that he did not recall when he testified, about two and a half years after the fact, that the production order required production of the emails.

¶ 40 McEwen also argued that we should reject some of the Bryce Stewart documents because they should not have been admitted under the terms of the Supreme Court order that dealt with the claims of privilege over these documents.

¶ 41 We do not agree. The documents in dispute were sealed and delivered to the Court. The Court reviewed all of the disputed documents and determined which were privileged. Those that the Court determined were privileged were removed from the files and sealed. The remainder the Court ruled were not privileged and those are ones that were before us. There is no evidence that any of the documents ruled by the Court to be privileged were admitted in the hearing.

II Background

A. The respondents

Corporate Express

¶ 42 Corporate Express Inc. (CEI) is incorporated under the laws of the Bahamas. The evidence does not disclose the identity of its shareholders or officers. Its sole director is a corporate director, which is Fortress. Corporate Express Inc. carried on the business known as Corporate Express Club (CEC), described below. Corporate Express Inc. has never been registered, nor has it ever filed a prospectus, under the Act.

¶ 43 The evidence also contains numerous references to Corporate Express Club (CEC) 1998. Corporate Express Club (CEC) 1998 has never been registered, nor has it ever filed a prospectus, under the Act. It is not clear whether this a separate corporate entity; it appears to be simply a division of CEI, or perhaps merely a trade name. However, its role appears indistinguishable from that of CEI, and so for the purposes of these findings we treat CEI, CEC, and CEC (1998) as one entity, and refer to it as "Corporate Express".

Fortress

¶ 44 Fortress International Ltd. is incorporated under the laws of the Bahamas. The evidence does not disclose the identity of its shareholders, officers or directors. Fortress is the corporate director of Corporate Express and the agent of Great

American. Fortress has never been registered, nor has it ever filed a prospectus, under the Act.

Great American

¶ 45 Great American Gold Ltd. is incorporated under the laws of the Bahamas. The evidence does not disclose the identity of its shareholders or officers. Fortress is its corporate, and apparently sole, director. Great American has never been registered, nor has it ever filed a prospectus, under the Act.

McCarthy

¶ 46 John Thomas McCarthy was apparently an officer of Corporate Express, and in any event ran its operations. He was also apparently a director and officer of Fortress. McCarthy has never been registered under the Act.

McEwen

¶ 47 Cameron Willard McEwen ran the mining operations of Great American, as described below. He also gave instructions to counsel and technology providers on behalf of Corporate Express, Fortress, and Great American. McEwen has never been registered under the Act.

B. Corporate Express

¶ 48 Pat Stojak was a sales agent for Corporate Express in British Columbia. He was interviewed under oath by Commission staff on February 15, 2000, and the evidence includes the transcript of that interview. Stojak also testified at the hearing.

¶ 49 Corporate Express was structured as a "club" and sold memberships. Corporate Express operated largely by word of mouth. It did not advertise for members, but hired 10 to 12 sales agents in British Columbia, Alberta, Manitoba and Ontario. Stojak also sold some memberships to persons he knew in Los Angeles, California.

¶ 50 Corporate Express also ran seminars, to which existing members were invited, and were encouraged to bring others who might be interested. Corporate Express did not advertise the times or locations of the seminars and persons were not allowed in who were not introduced by an existing Corporate Express member. Corporate Express held several seminars in various locations in British Columbia and Alberta, including the lower mainland, the British Columbia interior, Calgary and Edmonton.

¶ 51 The typical sale of a membership went as follows. The sales agent would contact the individual (either someone the agent knew, was referred to the agent by an existing member, or who attended a seminar) and would provide the prospect with

a short brochure describing what Corporate Express was all about. Then, if the prospect showed interest, the agent would provide more detailed information. If the prospect then decided to become a member, the agent would send the necessary forms, which the prospect would sign and return. The prospect could pay his or her membership by providing a bank draft payable to Corporate Express directly to the agent or by sending the funds in trust to Bryce Stewart, the lawyer whom McEwen and McCarthy retained on behalf of Fortress for this purpose.

¶ 52 If the agent received the subscription documents and funds, he would send them to a mail-drop address that Corporate Express maintained in Surrey, British Columbia. McCarthy would collect the funds from the mail drop and send them to Fortress in the Bahamas (Fortress managed the subscription process for Corporate Express; McCarthy described Fortress as the "mother company" of Corporate Express.) If Stewart received the subscription documents and funds, he forwarded them directly to Fortress in the Bahamas. Fortress then sent confirmations and other materials to the member.

¶ 53 Corporate Express sold memberships to 264 people, 117 of whom were resident in British Columbia. At US$350 per membership, this implies total sales of US$92,400, of which US$40,950 came from British Columbia residents.

¶ 54 A document that the Corporate Express agents used to describe its business is a five-page brochure entitled "A Membership Opportunity". The brochure describes the "Membership Program" as follows:

> **CEC** is an international membership organization. Its primary motive is to eradicate the mysteries surrounding offshore tax havens and international banking through a continuing education program and to provide a system of wealth enhancement through shared use of existing offshore financial and investment structures.
>
> **CEC membership requires a personal invitation by an authorized CEC Agent.** To qualify, members must commit to a five year subscription program which requires payment of an annual membership fee and subscription fee.
>
> Corporate Express annual membership/subscription fees form the basis of the Credit Enhancement Program. At the time of sign up, a member has the choice of purchasing additional memberships/subscriptions to further enhance his or her potential share of the accumulated of [*sic*] credit.

¶ 55 The annual membership fee was US$50 and the annual subscription fee US$300. Corporate Express required members to pay an annual membership fee of US$50 for every US$300 subscription ordered.

¶ 56 The brochure describes Corporate Express's business as follows:

> The CEC Membership Program focuses on two very important 'Offshore' issues:
>
> The first concerns education. There is a lot of information and misinformation going around regarding offshore tax shelter structures, the international banking system and especially about the tax-free advantages of investing offshore. It all sounds so easy and wonderful that many can fall into deadly traps and lose their wealth overnight. We are going to give you the straight goods on offshore. We will not fool you about the dangers that you may have to deal with. We will not pretend to have the only solution to the reduction of your tax liabilities, the security of fool proof asset protection or the guarantee of a secured retirement. But you will find these answers and a lot more in our periodic mailings.
>
> The second issue deals with the establishment of an offshore 'tax-exempt' personal wealth building vehicle for all CEC members. Your membership automatically entitles you to share in our International Credit Enhancement Program.

¶ 57 According to the brochure, CEC delivered the education component through the "Offshore Knowledge Network", which it described as the "OKNet". The brochure says OKNet was created to provide "an educational vehicle to raise the level of understanding thus allowing individuals to enter the offshore arena with more certainty, less risk and greatly reduced costs." The brochure goes on to say that members will receive educational materials "throughout the term of the membership program."

¶ 58 The Credit Enhancement Program is described in the brochure as follows:

> International Credit/Debit Card
> CEC has established international trading accounts with a network of financial and investment companies which allows for the development of large credit lines which CEC passes on to its members in the form of international credit cards and personal lines of credit. Credit limits are determined by the success of CEC investments.

The Credit Enhancement Program has a term, or limit, of 5 years. This ensures a high degree of probability on the attainment of large credit sums being available to members.

Upon payment of your second year's annual membership fee, you will receive an internationally recognized credit/debit card for your personal use. You will have guaranteed approval with no credit checks or income verification required. You will receive an increase in the card limit each year thereafter until the program is teminated.

The card is accepted at over 350,000 ATMs around the world.

Card Benefits

- All card transactions clear offshore and are strictly confidential
- Your card is out of reach of creditors, litigants and government agencies
- Use your card to access your offshore funds
- Finance offshore tax shelters and investments through your card account

A Personal Credit Line

CEC will pool a majority of the funds received through membership and subscription sales and place them with large trading and banking firms around the world.

Through the use of high return, low risk investment strategies, CEC and the trading firms will endeavor to maximize the credit line yields.

CEC will, in turn, allow all members to participate in these substantial returns through the establishment of personal credit lines.

Members will receive annual notification of their personal credit line amounts.

The credit lines build in value each year and are available to members at the end of the fifth year.

Why A Line Of Credit And Not Cash?

All high tax jurisdictions such as Canada, the United States, England and most European countries levy taxes on income.

Were you to receive a large amount of cash in the form of earnings, you would be taxed at the highest possible rate. If you were to secure a loan of equal proportion, you would not be required to pay tax on the loan amount. If you used the borrowed money to create additional income, your would be expected to pay taxes on those earnings.

The CEC Credit Enhancement Program enables members to take advantage of the tax free legislation of offshore tax havens to accomplish the following:

- To establish a retirement fund that no one can take away or misspend
- To create a pool of funds sufficient to finance a personal or business goal

¶ 59 The brochure lists "New CEC Member Services Effective 20 November 1998", described as follows:

CORPORATE KIT – a manual detailing all documents, certificates, resolutions, shares and corporate by-laws associated with an International Business Company (IBC), including definitions of terms, description of the process involved and an IBC application form.

IBC – a company duly incorporated under the laws of an offshore jurisdiction which permits corporations to earn, tax-free, income from business activities or investments.

TRUST – a mechanism used to separate legal ownership of assets from beneficial ownership. Used to protect assets from creditors and to deal with the use and distribution of assets in case of death or incapacitation. Often referred to as an "Offshore Will", or "Living Will". There are many types and uses of trusts depending upon individual circumstances.

CORPORATE EXPRESS CREDIT CARD – a secured offshore credit card providing offshore clearing and therefore complete privacy of all transactions conducted with the card. The card requires a (refundable) security deposit of 135% of the desired credit limit.

RRSP CASH OUT – a strategy designed to move cash out of a self-directed RRSP or RRIF (of $100,000 or more) to an offshore account. This tax-free program conforms with all RRSP requirements and is executed by a group of law firms and major brokerage companies.

RRSP MELTDOWN – a three-part program allowing a CEC member to access cash involving a loan secured against existing equity; the use of an RRSP/RRIF to service the loan; the movement of funds to an offshore account. A very cost effective method for getting funds offshore.

GREAT AMERICAN GOLD (GAG) SUBSCRIPTION OFFER - an investment dealing with a private mining stock offer. This mining project offers incredible returns with little risk and is available only to CEC Members in good standing.

OPPORTUNITY INVESTMENT FUND – an international 'pooled' investment fund offering excellent 1, 2 and 3-year secured returns. Available only to CEC Members in good standing.

¶ 60 In October 1999 Corporate Express dropped the Credit Enhancement Program and instead provided members who renewed with "CEC Gold Shares". The membership price also increased from US$350 to US$450. The brochure was revised as follows to describe this program:

Journey To Unlimited Wealth Accumulation

Step One:

(see Chart 1)

Become a CEC member (US$150 p.a.) and Subscribe to OKNet (US$300 p.a.).

- Receive 1,500 CEC Gold Shares in a world-class gold mining venture (300 shares per year for 5 years).
- Receive quarterly dividends for 10 years.

Step Two:

(see Chart 2)

Get active with the CEC Partnership Opportunity in a Venture Capital Group (US$1,000)

- Receive an additional 1000 CEC Gold shares in a world-class mining project.
- Receive quarterly dividends for 10 years.
- Contribute to Annual Pension Fund (US$360 p.a.) to fund new international business and real estate ventures.
- Profit share in Annual Pension Fund returns.
- Earn referral fees on all CEC services and investments.

¶ 61 The third step was the opportunity to become a "Branch Manager" to "represent an International Gold Exchange".

¶ 62 Charts 1 and 2 projected returns on the CEC gold shares and the Venture Partnership. Each chart showed a per share return over a 10-year period. The per share return for both programs were identical in every year for both programs, starting at US$0.47 in the first year and increasing steadily to US$4.68 in the 10th year.

¶ 63 Each chart also showed the number of shares held each year. The CEC Gold Share chart started at 300 shares in year 1, added 300 shares per year until year 5, when the balance reached 1,500 shares, and remained constant at 1,500 shares for years 6 through 10. The Venture Partnership chart showed a constant 1,000 shares for the whole 10 years.

¶ 64 The final column in each chart was headed "Dividend" and represented the annual dividend. The figures were the product of multiplying the shares held in each year by the dividend for that year. At the bottom of each chart the dividends for each year were totalled to provide the cumulative dividend for the 10-year period. This amounted to US$35,783 for the CEC gold shares and US$25,640 for the Venture Partnership.

¶ 65 The Opportunity Investment Fund was one of the "member services" Corporate Express offered. Corporate Express later changed its name to the "International Opportunity Fund". In his interview with Commission staff, Stojak gave this explanation about why the name was changed:

> Q . . . I see you as IOF in some places and OIF in some places. I'm confused, is it the same thing, how do you –
>
> A It is the same thing, It's just IOF was Investment Opportunity Fund and we . . . took the word "investment" out.
>
> . . .
>
> Q How did it come about that it was changed, so they took the word "investment" out? How did that become an issue? Who were you talking to and how did that become an issue?
>
> A Well, John [McCarthy] took – John changed it and took the word "investment" out.
>
> Q Okay. And . . . did he tell you why he did that?
>
> A Well, it was more or less because we shouldn't be promoting investments.

¶ 66 In these Findings, we refer to this fund as IOF.

¶ 67 Corporate Express offered its members two ways to participate in IOF. The first was a "pooled" program that required a minimum investment of US$5,000. Corporate Express took a commission of 20% of profits. The second was a "personal" program requiring a minimum investment of US$50,000. Corporate Express took a commission of 10% of profits.

¶ 68 Corporate Express described IOF in glowing terms in a six-page brochure. The following are excerpts:

> Meet Our 'Personal' Investment Advisor
> Renown [*sic*] Research Director and Investment Advisor, Karim Rahemtulla. He works exclusively for very private international organizations. Very few people know about this man. He is responsible for one of the most enviable track records in the investment advisory business. . .
> . . .
> In the last 10 months, the average trade recommended by Karim has returned an astonishing 81%, for an annualized return of 108%. And that doesn't include the positions he left open. Those are up a tidy 40% to 420%.
> . . .
> The first two trades Karim made for his trading service returned 100% and 38% in just five weeks time. His next two trades earned 190% in just six weeks and 100% gains in just four months. No losses whatsoever!
>
> Had you started with a mere $10,000 stake – and rolled profits over as Karim told us to buy and sell – you'd have over $160,000 in your pockets today. That's 1,500% profits in just over 8 months time!
> . . .
>
> A Legendary Resources Speculator
> . . . we'd like to introduce you to Doug Casey. He logs 150,000 miles a year, trekking through jungles, deserts and high mountain passes, while investors who follow his guidelines, sit at home collecting returns of 400% …. 4,170% …. even 10,060%. [ellipses in original]
>
> . . . we use Doug's reports to offset a portion of our portfolio to not only hedge against a currency crisis, but as a major investment opportunity with huge anticipated return.
> . . .
> Many of our members have asked us how we can get such high returns on our investments? . . . You see, we have direct access to Karim for daily trading information and Doug Casey, with his 30 years of proven

> experience, providing us with regular updates and investment advice on precious metals and other natural resources. That's right, we've got the best of the best, the top guns, providing us with the latest market intelligence and investment buy/sell advice that you can get. And we are offering this fabulous and unique opportunity to offshore, Corporate Express Club members.

¶ 69 An IOF brochure headed "Secured Returns 1, 2 & 3 Year Terms" offered three "Contribution Options" as follows:

> **3 Contribution Options To Choose From:**
> - 1 Year 50% Return
> - 2 Year 175% Return
> - 3 Year 400% Return

¶ 70 About US$185,000 flowed from investors through the Bryce Stewart trust account to Fortress for the account of IOF. The Stewart trust records show that eight residents of British Columbia (including Stojak) invested US$59,500 in IOF.

C. Great American

¶ 71 This summary of Great American's activities is drawn primarily from two documents, one entitled "Fortress International Ltd. presents . . . . A Great American Gold Opportunity". It is seven pages long. The second is six pages long with the Fortress corporate name, address and email at the top and entitled "Information Release – Arizona Mining Project".

¶ 72 The documents describe the project as follows:

> The project offers significant benefits:
>
> - It involves the mining and processing of gold, a commodity that will play a strategic role in the world economy in the near future.
> - It is located in the United States, a politically stable area of the world.
> - It has proven and economically viable reserves of gold.
> - It employs state-of-the-art recovery technology.
>
> The implications for investors in this project are also significant:
>
> - It offers enormous, long term revenue potential.
> - Investor participation will be structured offshore to minimize domestic tax implications.

¶ 73 The documents project proven reserves of over 16 million troy ounces of gold, and probable reserves of over 71 million ounces. Using a gold yield of 4 grams per ton of material extracted, a gold price of US$250 per ounce, and extraction costs of US$75 per ounce, the documents project revenues of over US$4 billion from proven reserves and nearly US$18 billion from probable reserves.

¶ 74 Great American offered investors convertible debentures. According to the documents, its intention was to raise US$5,000,000 through the sale of these securities. The debentures were available in units of US$15,000 each and carried an annual interest rate of 12% until the mine entered commercial production. Interest was to be paid annually in cash or reinvested, at the investor's option. When the mine entered commercial production, debentureholders were to have the option of converting their debentures into common shares of Great American (or another entity created for the purpose) on the basis of one common share for each US$1 of debenture face value (plus accrued and unpaid interest).

¶ 75 The documents go on to say that, based on proven reserves, the net present value of each US$15,000 unit of debentures would be US$57,500. Based on total reserves, the documents say the per-unit net present value would be just over US$2.8 million. The documents contained a chart showing various annual rates of return, depending on the number of mills operating on the property. The annual returns shown ranged from 208% (one mill) to 2,496% (12 mills).

¶ 76 About US$635,000 flowed from purchasers of Great American debentures through the Bryce Stewart trust account to Fortress for the account of Great American. The evidence does not disclose how much of these funds were invested by residents of British Columbia.

¶ 77 One resident of British Columbia, whose correspondence with Corporate Express is in the record, bought one unit of Great American debentures. The Stewart trust records show three British Columbia residents bought another four units.

¶ 78 In addition, three British Columbia investors who testified were Great American debenture holders (two bought one unit, one bought two units).

¶ 79 All of this adds up to sales of nine units of Great American debentures (US$135,000) to seven residents of British Columbia.

D. Corporate Express and Great American websites

¶ 80 In early 2000 McCarthy contacted MI Designs, the corporate vehicle through which Michael Ferridge carries on his web development business in the lower mainland. McCarthy asked Ferridge to create a website for Corporate Express.

Ferridge says it took only about 11 days to build the site and he hosted it on a server in Vancouver for two to three years.

¶ 81 The Corporate Express website contained information about the services available to Corporate Express members as described above, including information about IOF and the Venture Partnerships.

¶ 82 Later in 2000, McEwen approached Ferridge to create a website for Great American. McEwen dealt extensively with Ferridge in connection with the design and content of the Great American website, on at least one occasion meeting with Ferridge in the Vancouver area. Ferridge hosted the Great American site until it moved to another server, which Ferridge thinks happened sometime in 2002.

¶ 83 The Great American website contained a great deal of information about the mining operation, as well as information about the Great American debentures, including an updated version of the documents described above, along with a subscription form and instructions as to how to invest.

¶ 84 Both websites were designed to require a password so that they were accessible only by existing Corporate Express and Great American investors. In discussing this by email with Ferridge, McEwen said:

> This method keeps the GAG portion of the site confidential and away from watchful eyes of the regulators and others who would do us harm.

E. Fortress

¶ 85 Fortress was significantly involved in the financing activities of Corporate Express and Great American:

- Fortress was the corporate director of Corporate Express.
- Fortress managed the subscription process for Corporate Express; McCarthy described Fortress as the "mother company" of Corporate Express.
- Stewart understood he was retained by McCarthy and McEwen on behalf of Fortress.
- Fortress was the "agent" of Great American. It was the entity that "presented" the Great American opportunity to investors.
- Corporate Express members wishing to buy Great American debentures were required to sign confidentiality agreements. These were addressed to Fortress.
- Stewart forwarded to Fortress all of the funds deposited to his trust account to buy memberships in Corporate Express, to invest in IOF or to buy Great American debentures.

- In early 2001, McCarthy ceased to have any involvement with Corporate Express and Fortress. It was Fortress that instructed Ferridge to take instructions from McEwen, rather than McCarthy, on all matters related to Corporate Express.

F. McCarthy

¶ 86 McCarthy and McEwen established Corporate Express in early 1998. After it was established, McCarthy was the one who mostly ran the show. Stojak took instructions from McCarthy, and Stojak identified McCarthy as the person responsible for drafting most of the documents Corporate Express used to describe its business to prospective members. Stojak identified McCarthy as the primary speaker at Corporate Express seminars. This was corroborated by the Corporate Express members who testified at the hearing. McCarthy also managed member's subscriptions and dealt with membership funds delivered to the sales agents.

¶ 87 In early 2001, McCarthy and McEwen apparently had a falling out. A letter to Corporate Express members later in the year accused McCarthy of misleading Corporate Express members and misappropriating funds. The letter said that McCarthy was removed as an officer of Corporate Express, and as a director and officer of Fortress, on April 30, 2001, implying that he held those offices prior to that date.

¶ 88 The evidence does not disclose when McCarthy became an officer of Corporate Express, or an officer or director of Fortress.

G. McEwen

¶ 89 The following summarizes McEwen's involvement in the affairs of Corporate Express, IOF, Great American and Fortress.

¶ 90 Although McCarthy and McEwen retained Stewart together, in practice Stewart appears to have taken almost all his instructions from McEwen, who also approved and saw to the payment of Stewart's accounts for services rendered. Stewart's trust records, and the correspondence between Stewart and McEwen, show that McEwen instructed Stewart about where to wire funds that Stewart received from investors.

¶ 91 In 1998 and 1999, McEwen directed Stewart to wire more than US$1.7 million to accounts for the benefit of Corporate Express, IOF, Great American, and Fortress.

¶ 92 On November 10, 1998 McEwen directed Stewart to open a trust account at a different bank than Stewart had been using, and said the following:

> In view of the anticipated amounts we will be sourcing in B.C. and elsewhere, (we plan to raise $15M) and moving through your account, I would like to see you establish an account with a branch that will accept direct deposits from anywhere in the Province.

¶ 93 In an email dated April 6, 1999 McEwen instructed Stewart to prepare documentation in connection with two loans to Fortress, one for $100,000 and the other for $75,000. He said, "John [McCarthy] has corporate seal for Fortress and we both have signing authority. Probably need a corporate resolution, right?"

¶ 94 On June 23, 1999, McEwen wrote Stewart as follows: "The I.O.F. is due to start July 1/99. We have funds to send as part of our first pool. What are the wiring coordinates?"

¶ 95 On July 15, 1999, McEwen instructed Stewart as follows:

> You will maintain separate trust ledgers for Fortress to account for the different divisions of its business activity. Presently, these accounts include Fortress, GAG and IOF. I also want you to start an account for CEI (Corporate Express).

¶ 96 On July 28, 1999, McEwen instructed Stewart as follows:

> 1. Transfer USD$7,500 from the GAG account to the IOF account. This is part of a deposit that was made by D Roth. The total amount of the deposit was USD$15,000. Of this amount, USD$7,500 was intended for the IOF . . . .
> 2. Transfer USD$5,266.65 from the IOF account to the Fortress account . . .
> 3. Transfer USD$117,000 from the IOF account to the Fortress account . . .

¶ 97 Stewart testified at the hearing and characterized his relationship with McEwen as follows:

> [under cross-examination by counsel for McEwen]
> Q [counsel showed the witness a referral from a Corporate Express sales agent] And you accepted that there may be other agents of Fortress International besides Mr. McEwen, I take it? This being one?
> A Yes.
>
> Q And like any other agency, anyone who purports to be an agent, you are entitled to accept their ostensible authority and act as if they were an agent, correct?

A Yes.

Q And that, I take it, is what you did in regard to this and other matters?
A Yes, although I would not have taken any action without checking with certainly the senior agent, of you like, or the person that I thought was the person in charge, Mr. McEwen.

Q The person in charge of the agency as a whole?
A Well, I am fishing for words. I am not quite sure what the label would be, but the person that I felt, that I was comfortable taking direction from was Mr. McEwen.

Q The person with whom you had received the largest number of communications?
A Yes.

Q And the person form whom you initially received communications?
A Yes, and the only person that gave me instructions as to the disposition of funds, or any other instruction with regard to my services to the company.

[under examination by the panel chair]
Q Mr. Stewart, you, at the outset of your testimony, you have said that you had met with Mr. McEwen and Mr. McCarthy together?
A Yes.

Q And you understood it to be that the two of them were retaining you to act for Great American and Fortress International?
A Yes.

Q After that initial meeting, did you ever take any instructions from Mr. McCarthy or was everything from Mr. McEwen?
A I would say 90 per cent came from Mr. McEwen. The odd time I would hear from Mr. McCarthy but not often.

Q Now, I think you testified that in terms of instructions to move funds around, that was always Mr. McEwen; is that – did I hear that right?
A It was in practice. I concede that if had received a direction from Mr. McCarthy, I would have accepted it. But it seemed that the way they worked together, at least the way, the impression to me

that they worked together, is that the administrative person, the person who looked after that aspect of things, was Mr. McEwen.

¶ 98 McEwen was the sole individual who instructed Ferridge about the development of the Great American website.

¶ 99 After the falling out between McCarthy and McEwen, McEwen took over administration of the Corporate Express website. He communicated with Ferridge about the status of payment of Ferridge's invoices for the Corporate Express work and about the need to keep the Corporate Express website up and running for a period of time.

¶ 100 It was McEwen who sent Ferridge the letter from Fortress to Ferridge about limiting contact with McCarthy and others, as well as the letter from Corporate Express to its members about McCarthy that McEwen asked be posted to the Corporate Express website.

III Analysis and Findings

¶ 101 All of the statutory sections cited below refer to the Act and the *Securities Rules*, BC Reg 194/97 as they read in 1998 and 1999.

A. Trading securities without being registered and without filing a prospectus

¶ 102 The Executive Director alleges that the respondents contravened sections 34(1) and 61(1). Section 34(1) says "a person must not . . . trade in a security . . . unless the person is registered in accordance with the regulations . . .".

¶ 103 Section 61(1) says " . . . a person must not distribute a security unless . . . a preliminary prospectus and a prospectus respecting the security have been filed with the executive director" and the Executive Director has issued receipts for them.

¶ 104 If we are to find that the respondents contravened sections 34(1) and 61(1), we must first find that:

1. there were securities involved,
2. the respondents traded those securities in British Columbia, and
3. for section 61(1), the respondents' trades were a distribution.

1. Were securities involved?

¶ 105 Section 1(1) defines *security*:

> "security" includes
> (a) a document, instrument or writing commonly known as a security,
> . . .
> (c) a document evidencing an option, subscription or other interest in or to a security,
> (d) a bond, debenture, note or other evidence of indebtedness, a share . . .
> . . .
> (l) an investment contract
> . . .

The Corporate Express memberships

¶ 106 The definition of security includes an investment contract, which has been defined in the common law as an investment of money in a common enterprise with profits to come from the efforts of others. (See *SEC v. W. J. Howey Co.* 328 U.S. 293 (1946), *SEC v. Glen W. Turner Enterprises, Inc.* 474 F. 2d 476 (1973), *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. 112.)

¶ 107 Each Corporate Express membership included participation in the Credit Enhancement Program. Under that program, the members' funds were pooled and invested by Corporate Express. The profits from Corporate Express' investment efforts were returned to the members under the Credit Enhancement Program by making "credit" available to the members though a personal line of credit, and a credit card.

¶ 108 It is important to note that the "credit" available to each member was essentially the member's own money. Corporate Express portrayed it as a line of credit secured by the member's money, but this is purely a matter of form, rather than substance. It is clear from the Corporate Express brochure that the amount of credit available to each member depended on Corporate Express' investment results:

> CEC has established international trading accounts with a network of financial and investment companies which allows for the development of large credit lines which CEC passes on to its members in the form of international credit cards and personal lines of credit. *Credit limits are determined by the success of CEC investments*. [our emphasis]

¶ 109 It is also clear that the returns from Corporate Express's investment program could just as easily have been distributed to the members in cash, but instead were made available to them as "credit" so as to avoid any flow of "income" to the members: This structure, the brochure explains, allows the members to spend

their share of the investment profits by "borrowing" against their line of credit and credit card:

> Why A Line Of Credit And Not Cash?
> All high tax jurisdictions such as Canada, the United States, England and most European countries levy taxes on income.
>
> Were you to receive a large amount of cash in the form of earnings, you would be taxed at the highest possible rate. If you were to secure a loan of equal proportion, you would not be required to pay tax on the loan amount.

¶ 110 We note that these so-called loans to the members were no more than a distribution to them of their own money. Unlike a true loan, it does not appear that there would be any need for the member to repay the amounts "borrowed" because, after the member withdrew the credit balance under either the line of credit or credit card, the balance would simply be zero, and no money would be owed under the credit line or to the credit card carrier. And no more credit would be available until Corporate Express' investment operations were able to again restore a credit balance.

¶ 111 Because Corporate Express invested the membership proceeds with a view to generating returns, in the form of credit available to its members, the purchase of a Corporate Express membership was an investment of money, and the members were dependent on others, that is Corporate Express and its investment advisers, to produce the profits. In *Pacific Coast*, the court said (at p. 129):

> … the "commonality" necessary for an investment contract is that between the investor and the promoter. There is no need for the enterprise to be common to the investors between themselves.

¶ 112 That commonality existed between Corporate Express and its members, so the Corporate Express memberships contained all three elements of an investment contract. We therefore find that they are securities within the meaning of the Act.

IOF and the Venture Partnerships

¶ 113 An investment in IOF was also an investment contract. Corporate Express marketed it as an investment, and it clearly met the three elements of an investment contract. This is also true of the Venture Partnership offered by Corporate Express in late 1999. In both cases, members' investments were pooled and profits were dependent on the management of the pooled funds by Corporate Express and its investment advisers, and the element of commonality was present.

We therefore find that the interests in IOF and the Venture Partnerships offered by Corporate Express are securities.

The Great American debentures and the Corporate Express gold shares

¶ 114 The convertible debentures issued by Great American clearly fall within paragraphs (a) and (d) of the definition of security. A debenture is an instrument commonly known as a security, and is evidence of indebtedness.

¶ 115 Similarly, the gold shares issued by Corporate Express fall within paragraphs (a) and (d) of the definition. Shares are commonly known as securities, and although the precise attributes of the shares were not described, the gold shares purported to pay dividends, one of the essential elements of a share.

¶ 116 We therefore find that the Great American debentures and the Corporate Express gold shares are securities.

2. Were securities traded in British Columbia, and if so, by whom?

¶ 117 Section 1(1) defines *trade*:

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

Corporate Express, Great American and Fortress

¶ 118 Corporate Express sold memberships (which we have found to be securities) to 117 British Columbia investors for the price of US$350 each. Corporate Express also sold investments in IOF (which we have also found to be securities) to eight residents of British Columbia. This alone establishes that Corporate Express traded securities in British Columbia under paragraph (a) of the definition of trade, and we so find.

¶ 119 Corporate Express also offered to its members, which included residents of British Columbia, the opportunity to invest in Corporate Express Gold Shares, IOF, the Venture Partnership and Great American debentures, all of which we have found to be securities. This also establishes that Corporate Express traded these securities under paragraph (f) of the definition of trade because it advertised and solicited investments in these securities, and facilitated sales to investors. We therefore find that Corporate Express traded these securities in British Columbia.

¶ 120 Great American sold its debentures to at least seven investors in British Columbia for the price of US$15,000 each. This establishes that Great American traded securities in British Columbia under paragraph (a) of the definition of trade, and we so find.

¶ 121 Fortress managed the flow of funds from the investors to the accounts of Corporate Express and Great American, and facilitated the recording of the investors' interests in the securities they purchased. It sent instructions to Stewart, who was located in British Columbia. In so doing, it engaged in conduct in furtherance of the trades by Corporate Express and Great American in securities to residents of British Columbia under paragraph (f) of the definition of trade. Fortress therefore traded in securities in British Columbia, and we so find.

McCarthy

¶ 122 It is clear from the evidence that McCarthy was the controlling mind and will of Corporate Express. Section 1(1) of the Act defines *director* as "a director of a corporation or an individual occupying or performing, with respect to a corporation . . . a similar position or similar functions". It defines *officer* as ". . . the president, vice president, the secretary, . . . the treasurer, . . . and any other individual . . . acting in a capacity similar to those specified offices."

¶ 123 McCarthy was in charge of Corporate Express' activities. He drafted the Corporate Express brochures, organized the seminars held in British Columbia, presented the Corporate Express story at those seminars, and managed the Corporate Express sales force. He also handled subscription proceeds collected by the sales agents.

¶ 124 We therefore find that he was performing the role of director and officer of Corporate Express and accordingly, under the definitions of those terms, was a director and officer of Corporate Express. The functional definitions in the Act of *directo*" and *officer* are intended to ensure that the substance of an individual's relationship with an issuer is what is relevant, and that the individual cannot escape accountability by merely avoiding the formal title, or through the artifice of appointing compliant nominees

¶ 125 All of McCarthy's activities that have led us to conclude that he was a director and officer of Corporate Express, also fall squarely within paragraph (f) of the definition of trade. We therefore find that McCarthy traded securities of Corporate Express in British Columbia.

McEwen

¶ 126 McEwen directed Stewart to allocate over US$1.7 million of funds raised from investors among Corporate Express, IOF, Fortress and Great American. He asked

Stewart to open a special trust account for Fortress in anticipation of raising "$15 million" in British Columbia and elsewhere. He asked Stewart to maintain separate ledgers for Fortress "to account for different divisions of its business activity", naming Fortress, Great American, IOF and Corporate Express specifically. He asked Stewart to transfer funds among the accounts of Great American and IOF.

¶ 127 Correspondence from McEwen to Stewart reveal McEwen's involvement in IOF – he says it is "due to start in July 1/99. We have funds to send as part of our first pool. What are the wiring coordinates?"

¶ 128 McEwen directed Stewart to prepare loan documentation on Fortress' behalf, indicating that McCarthy had the corporate seal and both he and McCarthy had signing authority.

¶ 129 McEwen's role was central to all of Fortress' and Great American's capital raising, and much of Corporate Express', at least when it came to looking after the money. Furthermore, it is clear that it was he who instructed Stewart as to how to allocate funds among Corporate Express, IOF, Great American and Fortress.

¶ 130 As with McCarthy, all of McEwen's activities fall squarely within paragraph (f) of the definition of trade. We therefore find that McEwen traded securities of Corporate Express and Great American in British Columbia.

3. Were the trades by the respondents "distributions"?

¶ 131 Section 1(1) defines *distribution* as "a trade in a security of an issuer that has not been previously issued".

¶ 132 All of the securities traded by the respondents were securities not previously issued and therefore the trades were distributions under the Act, and we so find.

4. Contraventions of sections 34(1) and 61(1)

¶ 133 We have found that the Corporate Express memberships, the Corporate Express gold shares, the investments in IOF and the Venture Partnership offered by Corporate Express, and the Great American debentures are securities. We have also found that Corporate Express, Great American, Fortress, McCarthy and McEwen all traded securities in British Columbia.

¶ 134 None of the respondents has ever been registered under the Act, nor did any of them file a prospectus. Therefore, in the absence of an applicable exemption, the respondents contravened sections 34(1) and 61(1) when they traded securities to British Columbia investors.

¶ 135 The legislation provides exemptions from section 34 (1) and 61(1). The onus of showing that any of those exemptions applies rests on the person who seeks to rely on the exemption (see *Bilinsky* 2002 BCSECCOM 102). There is no evidence that any of the exemptions apply.

¶ 136 We therefore find that:

1. Corporate Express, Fortress, McCarthy and McEwen contravened sections 34(1) and 61(1) when they traded and distributed Corporate Express memberships and gold shares and investments in IOF and the Venture Partnership; and
2. Great American, Fortress and McEwen contravened sections 34(1) and 61(1) when they traded and distributed the Great American debentures.

B. Undertaking as to future value

¶ 137 The allegation in the notice of hearing reads as follows:

> 1.21 It appears to staff of the Commission that representations are being made to investors by the Respondents with regard to the rates of return available through the investment program, in contravention of section 50(1)(b) of the *Act*.

¶ 138 Section 50(1)(b) says:

> 50 (1) A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not do any of the following:
> . . .
> (b) give an undertaking relating to the future value or price of the security;

¶ 139 Section 1(1) defines *investor relations activities* as "any activities or oral or written communications, by or on behalf of an issuer . . . that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer."

Corporate Express and IOF

¶ 140 Corporate Express, in promoting IOF, offered three investment options (1 year, 2 year or 3 year) offering returns of 50%, 175% and 400%. These returns set out in a brochure headed "Secured Returns, 1, 2 & 3 Year Terms". These statements by Corporate Express reasonably could be expected to promote the purchase securities of Corporate Express (namely investments in IOF) and clearly they

relate to the future value of an investment in IOF. The only question is whether the statements constitute an "undertaking" within the meaning of section 50(1)(b).

¶ 141 The meaning of "undertaking" in that section was considered by the Commission in *Foerster* [1997] BCSC Weekly Summary 18 as follows:

> "Undertaking" is defined in the Oxford English Dictionary as a "pledge or promise" and in Black's Law Dictionary as a "promise, engagement or stipulation". Foerster did not merely state that the shares had excellent potential, or even just that they would increase in price. In several instances, he cited specific values for the shares, accompanied by a time frame within which the price would be met. One investor was told the shares would increase in value by 20% to 30% in four to six months". Another was told it would go to $10 in "a month or so". Yet another was told that "in two years, the stock would be worth $24".
>
> The specific nature of Foerster's predictions amounts in our view to undertakings within the meaning of section [50(1)(b)] and we therefore find that Foerster contravened [that section].

¶ 142 We have the same situation here. The brochure indicates specific returns for each term of investment, and characterizes those returns as secured. These statements are even more specific than in *Foerster*. In our opinion, the statements in the brochure are undertakings within the meaning of section 50(1)(b), and we therefore find that Corporate Express contravened that section.

Great American and the Great American debentures

¶ 143 Great American, in the documents it used to describe the Great American debentures, stated that, based on proven reserves, the net present value of each US$15,000 unit of debentures would be US$57,500, and that based on total reserves, the documents say the per-unit net present value would be just over US$2.8 million. The documents also contain a chart showing various annual rates of return, depending on the number of mills operating on the property. The annual returns shown ranged from 208% (1 mill) to 2,496% (12 mills).

¶ 144 In our opinion, these statements, when read in context, do not amount to an undertaking within the meaning of section 50(1)(b). Reading the documents as a whole, it is clear that the mine is in the development stage and has not reached commercial production. Certainly, by stating, for example, that a debenture unit has a net present value of US$57,000, when the company is selling units for US$15,000, Great American is inviting the reader to assume that the future value of a debenture will be significantly higher in the future. But the context of that statement includes the contingencies associated with whether the mine will ever

achieve commercial production. This is uncertain, and so the representation as to future value, unlike IOF, is not associated with any particular time frame.

¶ 145 It is clear from the evidence we heard from the three investors in Great American that they clearly understood that, and set no store by the US$57,000 figure.

¶ 146 Misrepresentation was not alleged in this case. Had it been, then the issue of the reasonableness of the US$57,000 figure, and the other statements relating to value, would have been before us. However, all we have to consider is whether these statements constituted "undertakings" within the meaning of section 50(1)(b), and in our opinion they do not. We therefore do not find that Great American contravened that section.

C. Representation of a stock exchange listing

¶ 147 The Executive Director alleges that the respondents represented that the common shares of Great American, into which the Great American debentures were convertible, will be listed on an exchange, without first obtaining the permission of the Executive Director, contrary to section 50(1)(c). That section says:

> 50 (1) A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not do any of the following:
> . . .
> (c) represent, without obtaining the prior written permission of the Executive Director,
> (i) that the security will be listed and posted for trading on an exchange, or
> (ii) that application has been made or will be made to list and post the security for trading on an exchange;

¶ 148 In support of this allegation, the Executive Director relies on the statements by Fortress that "it is the intent of GAG to complete an underwriting of common stock on one of the major international stock exchanges".

¶ 149 There is no issue about whether any of the respondents obtained the Executive Director's permission (clearly none did), so all we need consider is whether the statements by Fortress were the kinds of statements prohibited by section 50(1)(c).

¶ 150 What is prohibited by that section is a representation that the security "will" be listed. In our opinion, the statements by Fortress fall well short of that. All that Fortress said was that it was Great American's "intent" to complete an underwriting on some exchange in the world. It did not represent that the Great American common shares "will" be listed.

¶ 151 The purpose of section 50(1)(c) is to ensure that investors are not persuaded to invest by the prospect of imminent liquidity (and the other advantages of listed securities) when there is no reasonable basis for concluding that a listing will occur. In this case, we do not think any reasonable person, reading the statements made by Fortress, would be moved to place any confidence on the likelihood of the Great American common shares being listed anytime soon. The statements are merely an expression of intent. They contemplate an underwriting, a complex business that Great American was clearly as yet in no position to pursue, and the specific exchange was not unidentified.

¶ 152 We therefore do not find that the respondents contravened section 50(1)(c).

D. Failure to comply with summons and demand

¶ 153 The Executive Director alleges that McEwen failed to comply with a summons to appear and a demand for production, both issued by Commission staff under section 144 on December 10, 1999. The Executive Director also alleges that McEwen failed to comply with an order made under section 157 and dated October 23, 2000 of the British Columbia Supreme Court ordering McEwen to comply with the summons and demand.

¶ 154 We treat the court order as conclusive evidence that McEwen did not comply with the summons and demand for production and we so find.

¶ 155 These are the relevant portions of section 144:

> 144. (1) An investigator appointed under section 142 or 147 has the same power
>
> (a) to summon and enforce the attendance of witnesses,
> (b) to compel witnesses to give evidence on oath or in any other manner; and
> (c) to compel witnesses to produce records and things and classes of records and things
>
> as the Supreme Court has for the trial of civil actions.
>
> (2) The failure or refusal of a witness
>
> (a) to attend,
> (b) to take an oath,
> (c) to answer questions, or

(d) to produce the records and things or classes of records and things in the custody, possession or control of the witness

makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

¶ 156 In *LOM (Holdings) Ltd*., 2005 BCSECCOM 29, the Commission considered an application by the Executive Director for a cease trade order under section 161(1). The Executive Director alleged that the respondent did not comply with a demand for production issued under section 144. The Commission said:

> 32 In *Re James Nelson McCarney* 2003 BCSECCOM 656, the Commission considered the use of temporary order power under section 161 to compel the production of documents and information. It said this:
>
> > 38 In reading the powerful provisions of Part 17 and 18 together, it is clear that temporary enforcement orders were not intended to be the regulatory tool to compel compliance in the investigative process. Instead, express powers in Part 17 make clear that the appropriate regulatory tool to deal with non-compliance in the investigative process is an application for contempt to the Supreme Court under section 144(2) of the Act.
> > …
> > 40 Section 144(2) of the Act provides an appropriate remedy when a witness fails or refuses to attend, take an oath, answer questions, or to produce the records and things. When these circumstances are present staff may apply to the Supreme Court to have the witness committed for contempt as if in breach of an order or judgment of the Supreme Court.
> >
> > 41 Our conclusion that it was not appropriate in these circumstances for staff to issue temporary enforcement orders to compel production of documents and information during the course of an investigation is consistent with the reasoning of the Supreme Court of Ontario (High Court of Justice) in *Ontario (Securities Commission) v. Biscotti* [1988] O.J. No. 1115 and 40 B.L.R. 160. In that case the mere threat of a cease trade order by staff of the Ontario Securities Commission in order to compel a potential respondent to testify, invoked the censure of the Court.
>
> 33 In *McCarney* the Commission was considering the Executive Director's power to make temporary orders under section 161 without a

> hearing. However, the same reasoning applies in this case. The Commission's point in *McCarney* was that the appropriate means of dealing with a failure to produce information under a demand under section 144(1) is to follow the procedure set out in section 144(2).
>
> 34 *McCarney* therefore disposes of the issue . . . .

¶ 157 *LOM* therefore applies to McEwen's failure to comply with the summons and demand for production. In this case, the Executive Director applied to the court for a compliance order under section 157. Whether section 144(2) or 157 is used, the Act contemplates the use of the courts to enforce section 144(1) orders, not the use of section 161(1).

¶ 158 McEwen has not presented himself to be interviewed as required by the summons nor has he produced any of the documents described in the demand for production. We therefore find that McEwen has not complied with the Supreme Court's compliance order.

¶ 159 This is the relevant portion of section 157:

> 157. (1) In addition to any other powers it may have, if the commission considers that a person has contravened or is contravening a provision of this Act or of the regulations, or has failed to comply or is not complying with a decision, and commission considers it in the public interest to do so, the commission may apply to the Supreme Court for one or more of the following:
>
> (a) an order that
>
> (i) the person comply with or cease contravening the provision or decision . . .
>
> (2) On an application under subsection (1), the Supreme Court may make the order applied for and any other order the court considers appropriate.

¶ 160 In our opinion, the reasoning in *LOM* also applies here. As contemplated by the Act, the Court is the place to deal with McEwen's failure to comply with its order. It would not be appropriate, for the reasons cited in *LOM* and *McCarney*, to make orders under section 161(1) for this aspect of McEwen's conduct.

D. Breach of the temporary orders

¶ 161 The temporary orders prohibited all of the respondents from trading in Corporate Express memberships, Corporate Express gold shares, the venture partnerships, IOF and the Great American debentures, and prohibited the individual

respondents from engaging in investor relations activities. They came into force on December 9, 1999 and have been in force ever since.

¶ 162 As set out above, the Act defines *trade* to include "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a disposition of a security for valuable consideration". It defines *investor relations activities* as "any activities or oral or written communications, by or on behalf of an issuer . . . that promote or reasonably could be expected to promote the . . . sale of securities of the issuer."

¶ 163 Both Corporate Express and Great American established websites in 2000 using the services of a BC-based web designer. McCarthy, McEwen and Fortress facilitated the creation of the websites by instructing the designer and providing content for the websites. The content included material that promoted the business of Corporate Express and Great American. Access to the website was restricted to existing Corporate Express and Great American investors, but included information about how to purchase more Corporate Express and Great American securities and encouraged existing investors to refer new investors.

¶ 164 Corporate Express sold memberships and Great American sold debentures after the date of the temporary orders. They therefore, along with Fortress (which facilitates the investment process for both companies) traded in securities of Corporate Express and Great American after December 9, 1999 by selling Corporate Express memberships and Great American debentures. In our opinion, the activities of Corporate Express, Great American and Fortress in connection with the establishment and operation of the Corporate Express and Great American websites in British Columbia also amounted to trading, because those activities were acts in furtherance of the sale of securities of Corporate Express and Great American.

¶ 165 McCarthy and McEwen also traded securities for the same reason: their activities were also acts in furtherance of the sale of securities of Corporate Express (in the case of McCarthy and McEwen) and Great American (in the case of McEwen). McCarthy's and McEwen's activities were also clearly to promote, or reasonably could be expected to promote, the sale of securities, being Corporate Express memberships (McCarthy and McEwen) and Great American debentures (McEwen), and they therefore engaged in investor relations activities after December 9, 1999.

¶ 166 We therefore find that Corporate Express, Great American, Fortress, McCarthy and McEwen breached the temporary orders.

F. Summary of Findings

¶ 167 We find that:

1. Corporate Express, Great American, Fortress, McCarthy and McEwen traded in securities without being registered to do so, contrary to section 34(1);

2. Corporate Express, Great American, Fortress, McCarthy and McEwen distributed securities without filing a prospectus, contrary to section 61(1);

3. Corporate Express gave an undertaking relating to the future value or price of an investment in IOF while engaging in investor relations activities or with the intention of effecting a trade in those securities, contrary to section 50(1)(b);

4. Corporate Express, Great American, Fortress, McCarthy and McEwen breached the temporary orders by trading in securities of Corporate Express and Great American after the date of the orders; and

5. McCarthy and McEwen breached the temporary orders by engaging in investor relations activities in connection with the securities of Corporate Express and Great American after the date of the orders.

IV Temporary Orders and Sanctions

¶ 168 The temporary orders we described at the beginning of these Findings remain in effect.

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

1. We direct the Executive Director to file submissions with the Secretary to the Commission and to send a copy to the respondents on or before October 12, 2005.

2. We direct respondents wishing to make submissions to file them with the Secretary and send a copy to the Executive Director on or before November 4, 2005.

3. If the Executive Director wishes to reply to the respondents' submissions, we direct that the Executive Director file the reply with the Secretary and send a copy to the respondents on or before November 18, 2005.

4. Any party that wishes to make oral submissions in addition to its written submissions must request the same of the Secretary when filing its

submissions. The Commission will then set a date to hear the oral submissions.

¶ 170 September 9, 2005

¶ 171 **For the Commission**

Brent W. Aitken
Vice Chair

Robert J. Milbourne
Commissioner

Roy Wares
Commissioner