2007 BCSECCOM 737

Michael Savage

Sections 161 and 162 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Robin E. Ford	Commissioner
	John K. Graf	Commissioner
	Robert J. Milbourne	Commissioner
Dates of hearing	March 26 - 30 and April 10, 2007	
Date of findings	December 14, 2007	

Appearing

Michael Savage	For himself
Douglas Muir	For the Executive Director

Findings

Introduction

¶ 1 In the amended notice of hearing dated October 31, 2005, the executive director alleges that Michael Savage traded and distributed securities without registration and without a prospectus, and that he made misrepresentations, in a business plan and orally, to eight potential investors. She also alleges that Savage fraudulently sold securities to, and fraudulently conveyed funds invested by, the investors.

¶ 2 Dianne Oslund was a respondent in this matter. The executive director discontinued proceedings against her after they entered into a settlement agreement (2005 BCSECCOM 655), and amended the notice of hearing accordingly (2005 BCSECCOM 650).

¶ 3 BCSC staff did not interview any of the investors. The executive director relies mainly on evidence and admissions in affidavits, a statement of claim, and a statement of defence filed in civil proceedings. She also relies on transcripts of interviews by BCSC staff of Dianne Oslund and an individual who said that he was Savage's and Oslund's personal tax accountant and business advisor. Only Oslund and a BCSC investigator testified in these proceedings.

Summary of findings

¶ 4 Savage contravened sections 34(1) and 61(1) of the Act when he traded and distributed the Savage Tele.com Corporation securities to the Maier group without being registered under the Act and without having filed a prospectus.

¶ 5 Savage, with the intention of effecting a trade in a security:

a. made the statement that Savage Tele.com Corporation was incorporated, when he ought reasonably to have known it was a misrepresentation, and
b. made the statement that Savage Tele.com Corporation had acquired two local internet service providers, when he knew it was a misrepresentation,

and so contravened section 50(1)(d) of the Act.

¶ 6 When he moved what remained of the funds invested by the Maier group to his fiancée's account, giving her unrestricted access to funds to which she was not entitled, Savage perpetrated a fraud in British Columbia contrary to section 57.1(b) of the Act.

Facts

Background

¶ 7 Savage began to raise money for a telecommunications business from family and friends in 1998. Savage Communications Corporation was incorporated in the state of Delaware on April 20, 1999. Savage and Oslund were the directors. The company applied in 1999 to be recognized by the Canadian Radio-television and Telecommunications Commission (CRTC) as a competitive local exchange carrier (CLEC).

¶ 8 In 1999, Savage was doing business in the name of "Savage Tele.com". As part of a plan to develop and market telecommunications products and services, Savage intended to acquire 24 existing internet service providers (ISPs) in major cities in North America and Mexico. A private placement of 1,500,000 shares of "Savage Tele.com Corporation" was targeted for September 1, 1999. It apparently did not take place.

¶ 9 In the autumn of 1999, Savage instructed his lawyers (the "first lawyers") to incorporate Savage Tele.com in Delaware and to assist in the preparation of a business plan and offering memorandum (OM). On February 11, 2000, a US law firm reserved the corporate name Savage Tele.com Corporation.

¶ 10 On February 18, 2000, the first lawyers gave Savage a draft OM for a private placement of 2 million shares of "Savage.com Corporation" (not Savage Tele.com

Corporation). The OM described the anticipated business of the company as a telecommunications business to be built on the purchase of 24 ISPs in major metropolitan centres. Around this time, Savage discovered that a CLEC registrant had to be incorporated in Canada and so asked the first lawyers to incorporate Savage Tele.com in Canada.

¶ 11 Savage became unhappy with the work of the first lawyers. On March 1, 2000, Oslund terminated their relationship with the firm and asked the firm to send certain documents to another law firm (the "second lawyers"). In Oslund's list of documents were "offering memorandum in progress" and "status of Savage Tele.com incorporation in Delaware and name reservation".

¶ 12 By the end of March 2000, as part of a solicitation preliminary to a major fundraising planned for later in 2000, approximately 125 investors had signed subscription agreements for securities of an entity called "Savage Tele.com Corporation". Savage and others involved in the business had solicited some of the subscriptions through a website designed for that purpose. Others were friends or family of Savage (or others involved in the business). As part of the solicitation, some prospective investors had been given a business plan for Savage Tele.com Corporation.

¶ 13 Savage Tele.com Corporation had not been, and never was, incorporated. The name Savage Tele.com could not be used in Canada, so the second lawyers federally incorporated Savage Telecom (Canada) Ltd on April 3, 2000, followed by Savage Telecom (USA) Ltd in Delaware on July 24, 2000. On April 4, 2000, Savage Telecom (Canada) acquired the business that had been carried on in the name of Savage Tele.com.

¶ 14 Savage Telecom (Canada) became part of the Savage group of companies. Savage and Oslund were the directors. Savage was the CEO and directing mind and will of the company. Oslund was the chief operating officer.

¶ 15 The Savage Tele.com business and its successor Savage Telecom (Canada) Ltd were based in British Columbia. Savage resided in British Columbia. Savage has never been registered under the *Securities Act*, RSBC 1996, c. 418. No prospectus was filed for Savage Tele.com Corporation.

Maier group

¶ 16 The investors to which the allegations in these proceedings relate were Friesen, MacLean, Hans and Mark Maier, Mendelman, Reger, Seidel and Zeilstra (together the "Maier group"). Oslund testified that one of the "officers" of the Savage Tele.com business, Roberts, was a friend of the Maier family. Early in 2000, there was a lot of communication between Hans and Mark Maier and Roberts

about the business. MacLean was a friend of Mark Maier. It appears that the remaining five of the eight investors in the Maier group were recruited by Maier and MacLean. It also appears that all these investors were experienced, high net worth individuals.

¶ 17 In a letter dated March 1, 2000, Mark Maier wrote to Savage (describing him as "President, Savage Tele.com Corp"), addressing the letter to both Savage and Roberts. He confirmed that a group of individuals had decided to invest in "your exciting new company". He wrote: "You can expect to have copies of the subscription agreements over the next few days and the funds transferred soon thereafter (i.e. before/by March 15, 2000)."

¶ 18 Mark Maier received a business plan for Savage Tele.com Corporation and signed a subscription agreement purportedly for shares and warrants of Savage Tele.com Corporation on March 2, 2000. By March 21, 2000, everyone in the Maier group had signed and sent their agreements and funds to Savage Tele.com.

¶ 19 The Maier group invested a total of US $765,000. The list of subscribers in evidence (undated, but attached to the letter of July 20, 2000 from the second lawyers quoted below) shows that Friesen, Reger, Zeilstra, MacLean and Hans Maier purportedly invested under the prospectus exemption in section 74(2)(4) of the Act. Mark Maier purportedly invested under the exemption in section 128(b) of the *Securities Rules*, BC Reg. 194/97. Mendelman and Seidel purportedly invested under the exemption in section 128(a) of the Rules.

¶ 20 Savage argues that all the investors in the Maier group signed Forms 20A to acknowledge the facts supporting an exemption from the registration and prospectus requirements. However, we have no evidence that they did so. Many of the Maier group sent cover notes with their signed subscription agreements indicating that the subscription agreements and, in some cases, cheques were enclosed with the note. In none of these cases did any investor indicate that a Form 20A was also enclosed.

¶ 21 Oslund signed to accept the subscription agreements, purportedly on behalf of "Savage Tele.com Corporation", on March 21, 2000. On March 21, Roberts wrote to Mark Maier to tell him that "our management" had accepted the subscription agreements of the Maier group.

¶ 22 Savage and Oslund met Mark and Hans Maier and MacLean for the first time in Calgary early in May 2000 to discuss the plans of Savage Telecom (Canada). Oslund said that they explained the "legal problems" to them. It is not clear what Savage and Oslund explained, but it appears that at this meeting (if not before) they told them about the delayed (but since completed) incorporation of Savage

Telecom (Canada) and the delayed (but since completed) purchase of Mountain Internet Ltd. Mountain Internet was an ISP, the purchase of which had been described as "completed" in the business plan (see below).

¶ 23 Oslund said that, despite this, Mark Maier and MacLean remained interested in actively participating in company affairs and, as Oslund put it, everyone went away happy. Later in May, Maier agreed to join the board of Savage Telecom (Canada).

¶ 24 Savage had drafted the form of subscription agreement signed by the Maier group. The second lawyers prepared another version to, among other things, reflect the name of the now duly incorporated Savage Telecom (Canada) Ltd instead of Savage Tele.com Corporation. On May 9, Mark Maier wrote to Roberts to ask about a "disclaimer" in the "new subscription form" excluding US investors. He asked Roberts to send the new form to MacLean and "Mendi". In the end, none of the Maier group signed the new agreement.

¶ 25 Because Mark Maier and MacLean continued to discuss business matters amicably with Roberts and Savage, Savage and Oslund were surprised when the Maier group asked for their money back on June 6, 2000 and threatened to sue if they did not receive it. Oslund testified that, in her view, it was only the later news that the telecommunications industry was in trouble that caused the Maier group to seek to get their money back on June 6.

¶ 26 On June 7, 2000, to keep it from being attached in any civil suit launched by the Maier group, Savage and Oslund withdrew from a company bank account most of what remained of the funds invested by the Maier group.

¶ 27 Around that time, lawyers for the Maier group wrote to the second lawyers. They apparently suggested that the Maier group funds should be held in trust. (That letter is not in evidence.) The second lawyers responded on behalf of Savage Telecom (Canada) by letter dated June 9, 2000 as follows:

> We are advised that your description of the contents of the conversation between our clients in Atlanta on June 6, 2000 is incorrect. In particular, we are advised that "the deal" has closed; that no representations were made about funds being held in trust (no funds are in trust); there were no material misrepresentations made to your clients; and no promise was made to return any funds.
>
> …
> Your assertion that the [Maier group] funds are or ought to have been held in trust is without merit. The documents disclosed to your clients that I

> have seen made it clear to them their funds were not going to be held in trust, and I am advised that your clients were kept informed about what [Savage Telecom (Canada) Ltd] was doing and must have been aware that their money was being used by [Savage Telecom (Canada) Ltd] in its business. My clients … had no duty to keep the money in trust.

¶ 28 Savage thought that the Maier group had no right to the return of their investment, and viewed the threat of a civil suit as holding the company to ransom, but he entered into negotiations with them. Some time after June 9, 2000, the Maier group asked for a refund of about 50% of what they had paid, in return for signing new subscription agreements for the same number of shares and warrants in Savage Telecom (Canada) as they had originally subscribed for. The negotiations failed and the Maier group filed a lawsuit on August 1, 2000 in the British Columbia Supreme Court against Savage, Oslund, Savage Telecom (Canada) and others (Reger v. Savage).

¶ 29 Also on August 1, 2000, the Maier group obtained a garnishing order. The Court ordered the bank that had held the company accounts in March 2000 to pay into court amounts up to the value of the claim. The company accounts had, however, been moved to another bank in April 2000. The executive director makes no allegations about this movement of funds. The former bank informed the Maier group that Savage Telecom (Canada) and the other defendants did not have accounts at that branch. There is no evidence as to whether the Maier group attempted to find the company accounts or to obtain another garnishing order.

¶ 30 BCSC staff had by now become aware of Savage's activities. On July 20, 2000, the second lawyers had written to the BCSC:

> …
>
> Mr Savage and Ms Oslund advise that they did not appreciate and were not advised that this delay in the incorporation of the Company [Savage Telecom (Canada) Ltd] and the completion of the Offering Memorandum could affect their solicitation of investments. Prior to incorporation, the directors, officers and employees of the Company accepted subscription money for shares of the Company from close friends and relatives in order to assist with the start up of the Company.
>
> … [The] Company's Board of Directors ratified all of the subscription agreements after the Company was incorporated through a resolution dated April 4, 2000.

> … [We] prepared revised subscription agreements in the name of Savage Telecom (Canada) Ltd and sent the revised agreement to fifty of the close friends and relatives who had initially invested in the Company. At present those subscription agreements are being signed and returned to the Company, and as they are received, share certificates are being issued. …
>
> For the remaining 67 investors, we intend to provide revised subscription agreements and an offering memorandum (once completed), and once such agreements have been signed and returned to the Company, share certificates will be issued.
>
> Separate from the above mentioned investors, we are advised that there is a group of eight sophisticated investors who purchased a total of US $765,000 worth of shares and warrants from the Company and for whom the Company has issued share and warrant certificates. Recently, due to changes in the investment climate, these investors have asserted a claim to the right to rescind their share purchase agreements with the Company. … Failing a settlement, the Company is prepared to have this matter proceed before the courts.
>
> …

¶ 31 BCSC staff reviewed the letter and other materials and asked the company not to issue share certificates until further notice. As the letter of July 20, 2000 stated, however, share and warrant certificates for the Maier group had already been issued (although it appears that the certificates remained in the minute book and were not delivered to them). BCSC staff gave the company the go-ahead to issue the remaining share certificates in May 2001.

¶ 32 The Maier group eventually applied for a summary trial in Reger v. Savage. The application was heard on May 31, 2004 in Vancouver. The only defendant to appear was Oslund. She appeared on her own behalf and without a lawyer. Madam Justice Koenigsberg declared that the subscription agreements signed by the Maier group, purportedly with Savage Tele.com Corporation, were void because the corporation did not exist when the documents were signed. She gave judgment against Savage and Savage Telecom (Canada) for the Canadian equivalent of US $765,000 ($1,022,550) plus interest.

¶ 33 On the basis of the uncontradicted affidavit evidence of misrepresentations and monies moved for the purpose of defeating the claim of the Maier group, the judge also found that the funds were held by Savage and Savage Telecom (Canada) on a constructive trust for the Maier group.

¶ 34 Savage and Savage Telecom (Canada) applied to have the default judgment set aside. The matter was heard in January 2007. On February 7, 2007, Mr Justice Rice rejected the application. We understand that Savage is appealing the decision.

Statements in the business plan and orally

¶ 35 There were several iterations of the business plan. In evidence, we have only one version, numbered STC 94, provided to one of the Maier group. It is not disputed, however, that all the versions of the business plan sent to the Maier group were essentially the same. The plan was 73 pages long. It contained a description of the internet market and Savage Tele.com Corp's plans to exploit that market by purchasing 24 regional ISPs. The plan was not dated. Nowhere in the plan was a statement that it was preliminary or in draft.

¶ 36 In her affidavit sworn on December 13, 2002 and filed in Reger v. Savage, Oslund said the business plan was essentially Savage's work.

¶ 37 The business plan contained the following representations or statements:

- the Savage Tele.com business was incorporated and named Savage Tele.com Corporation,
- the plan was a prospectus,
- Savage Tele.com Corporation had acquired two ISPs, and
- the CRTC had authorized Savage Tele.com Corporation to operate as a CLEC.

¶ 38 It appears that many of the Maier group did not receive, or received but did not read, the business plan before they signed and mailed the subscription agreements. Mark Maier, however, did receive and read the plan before he signed the subscription agreement on March 2, 2000. In his affidavit in the civil proceedings, he said that he had recommended the investment to the Maier group taking into account, among other things, the business plan.

¶ 39 Maier also said that, in February 2000, he had discussed the purchase of shares of an existing company, Savage Tele.com Corporation, with Roberts over the telephone several times. He said that Roberts had directed him to the website of Savage Tele.com Corporation and an investment opportunity website containing information about the company, but he provided no other details of the conversations. Maier said that the material on the websites was generally duplicative of the business plan that he received on March 2 and Roberts offered him "attractive terms" for "friends and family" in advance of an expected public offering. Maier said that Savage confirmed Robert's offer by telephone on or

about February 29, 2000, represented to him that he was the president of Savage Tele.com Corporation, and told him about the company's "pending" acquisition of a second ISP.

¶ 40 In his affidavit, Maier said he passed on to the group the representations in the business plan, and those from Roberts and Savage, including the fact of the incorporation of Savage Tele.com Corporation and the pending acquisition of a second ISP. He understood that the group then relied on what he had told them in deciding to invest, and so relied on the oral representations and statements in the business plan. He said that no member of the group would have forwarded funds if they had known that the company did not exist.

Savage Tele.com Corporation

¶ 41 The business plan described Savage as founder and president of "Savage Tele.com Corporation" and that entity's "driving force". The plan stated that:

> Savage Tele.com Corporation is seeking a combination of equity and or debt financing in the amount of $250 million for its acquisition strategy. (page 7)

¶ 42 The corporate head office was said to be in Vancouver, BC. Other directors and officers (in addition to Savage) were listed. There were several references to "our certificate of incorporation" and Delaware corporate law. The plan stated that Savage Tele.com was incorporated on April 22, 1999 and, elsewhere, that Savage Tele.com Corporation, a Delaware corporation, was founded in December 1998.

¶ 43 In an affidavit sworn on November 30, 2006 and filed in Reger v. Savage, Savage admitted that as agent for the pre-incorporation business he:

- obtained funds from investors before filing a prospectus with the British Columbia Securities Commission and before completing the offering memorandum; and
- represented that Savage Telecom [the Savage Tele.com business] was incorporated before it had been incorporated. (para 98)

¶ 44 **We find that, when the Maier group entered into the subscription agreements, purportedly with Savage Tele.com Corporation, Savage Tele.com Corporation was not incorporated in British Columbia or the state of Delaware. The statement that it was incorporated was untrue**.

¶ 45 In her sworn interview of May 28, 2004, Oslund told BCSC staff that, so far as she was aware, the delay in incorporation was well known to everyone at Savage Tele.com. In our view, that included Savage.

Prospectus

¶ 46 The word "prospectus" occurred three times in the business plan.

¶ 47 Oslund told BCSC staff that the business plan was not a prospectus:

> Q In the second paragraph, the second sentence begins, 'This prospectus is a part of the registration statement' and it's referring to a registration statement that was -- that I guess had planned on being filed with the SEC. Again, it's in your mind that this was just a business plan --
> A Mm-hmm.
> Q -- it wasn't a prospectus.
> A No, just a business plan.
> Q Okay.
> A And it was always presented as a business plan. And I do not remember [Roberts] ever referring to it other than a business plan when he talked to the shareholders.
> (transcript of interview of Dianne Oslund, p. 82, lines 11 – 23)

¶ 48 The business plan was not in the form of a prospectus required by section 61(2) of the Act.

¶ 49 While the statements that the business plan was a prospectus were strictly untrue, we think it is clear from reading the business plan as a whole that the plan was not a prospectus.

¶ 50 **We do not view this statement as an untrue statement of a material fact. We dismiss the allegation that Savage made a misrepresentation to the Maier group by stating in the business plan that it was a prospectus**.

Mountain Internet and Net Puppy

¶ 51 The business plan stated that Savage Tele.com Corporation had acquired two local ISPs:

> We have completed the acquisition of Mountain Internet Ltd, the largest private ISP in Whistler and Squamish, British Columbia. (p. 6)
>
> …

> Using data from our initial ISP purchases of Mountain Internet and Net Puppy, we have concluded that our British Columbia subscriber base currently consists of approximately 50,000 subscribers. (page 39)

¶ 52 In March 2000, Savage instructed the second lawyers to complete the process of purchasing an ISP called Mountain Internet Ltd. Since Savage Tele.com had not yet been incorporated, they used a shelf company BPYA 1896 Holdings Ltd. The purchase of Mountain Internet by 1896 Holdings closed on March 31, 2000. Savage and Oslund owned all the shares of 1896 Holdings and sold those shares soon afterward, on April 4, 2000, to the newly incorporated Savage Telecom (Canada) Ltd.

¶ 53 Savage Tele.com Corporation had not acquired Mountain Internet when the business plan was sent to Mark Maier on March 2, 2000. Savage Tele.com Corporation did not exist. On March 16, 2000, 1896 Holdings signed a letter of intent for the purchase of Mountain Internet. The purchase and sale closed on March 31, 2000.

¶ 54 **We find that, when the Maier group entered into the subscription agreements, purportedly with Savage Tele.com Corporation, the statement in the business plan that Savage Tele.com Corporation had completed the acquisition of Mountain Internet Ltd was untrue**.

¶ 55 Oslund testified that Savage Tele.com Corporation never purchased an ISP called Net Puppy. Net Puppy was a code name. Oslund said that Savage used it to refer to any company that they were negotiating to purchase. She said that although they were negotiating with several ISPs at the time, and letters of intent may have been signed, a second ISP was never purchased. We have no evidence that a letter of intent for a second ISP (or any form of commitment) had been signed when the Maier group entered into the subscription agreements.

¶ 56 **We find that, when the Maier group entered into the subscription agreements, the statement in the business plan that Savage Tele.com Corporation had purchased a second ISP was untrue**.

CLEC status

¶ 57 The business plan said: "On April 19, 1999, we applied to the Canadian Radio Television and Telecommunications Agency [*sic*] (CRTC) for CLEC status in Canada." The plan also said that a wholly-owned subsidiary of Savage Tele.com Corporation had received preliminary certification as a CLEC. **We find that these statements were untrue.** Neither Savage Tele.com Corporation nor a subsidiary had applied to, or received certification from, the CRTC.

¶ 58 However, Savage Communications Corporation (one of the Savage group of companies) had applied in 1999 and had received preliminary approval as a CLEC. The registration in the name of Savage Communications Corp is shown on a copy of a CRTC document inserted into the business plan. This part of the business plan showed, correctly, that Savage Communications Corp held the CLEC registration, even if the statements elsewhere in plan did not.

¶ 59 After Savage Telecom (Canada) was incorporated on April 3, 2000, the company applied to transfer the CRTC registration of Savage Communications Corporation to Savage Telecom (Canada). The CRTC did so and wrote to Savage Telecom (Canada) on May 3, 2000:

> Savage TeleCom Canada Ltd. ("Savage", formerly "Savage Communications Corporation") expressed its intent to enter into the local exchange telephone market and offer local switched services in Alberta and British Columbia. ....
>
> Savage is recognized as having met CLEC requirements at this time sufficient to make the further arrangements necessary to allow it to provide local switched services. …

What happened to the Maier group's money?

¶ 60 The total amount invested by all investors in the Savage Tele.com business at the end of March 2000 appears to have been about US $1,300,000, including the US $765,000 received from the Maier group that month.

¶ 61 The Maier group funds were deposited into a US$ account in Vancouver in the name of Savage Telecom. The funds were not comingled with other funds. Some of the money having been spent by the company, on April 14, 2000, US $747,919 was moved to an account at another bank, this time in the name of Savage Telecom (Canada). Apart from the funds paid to Savage (see below), funds in this Savage Telecom (Canada) account were used to pay company legal fees, lease fees, and other expenses including payments under contracts for services with key personnel.

¶ 62 As described above, on June 6, 2000, Mark Maier and MacLean, on behalf of the Maier group, asked Savage for their money back and threatened a civil suit if they did not receive it.

¶ 63 Oslund testified that, as soon as she and Savage could, they withdrew most of the remaining funds from the company bank account. They moved the money to keep it from being attached in any civil suit launched by the Maier group:

Q Now, Ms. Oslund, after the eight investors we have been talking about asked for their money back, there was a meeting held … in Vancouver?
A Yes.
Q And you were present and Mr. Savage was present?
A Yes.
Q And it was decided at that meeting that the investors money would be split and moved from the corporate accounts?
A Yes.
Q And it was moved for the purpose of keeping that money away from the investors; isn't that right?
A Yes. (transcript, April 10, 2007, p. 116, q. 437 to 440)

¶ 64 On June 7, 2000, Savage and Oslund caused Savage Telecom (Canada) to issue to Savage a bank draft for US $530,000, leaving a balance of about US $23,000 in the account. By June 9, most of funds remaining in the company account had been spent, leaving a balance of about US $668 at the end of the month. The executive director makes no allegations about the expenditures in the period up to June 9, 2000 (apart from the bank draft to Savage of US $530,000).

¶ 65 On July 5, 2000, Savage deposited the US $530,000 into an account in the name of his sister. Oslund had power of attorney and signing authority over the account. The opening balance in the account was nil, and there were no later deposits into the account apart from interest on the outstanding balance from time to time. The executive director makes no allegations about the expenditures from this account, apart from the bank drafts to Savage (see below).

¶ 66 On August 1, 2000, the Maier group obtained a garnishing order. There is no evidence as to who was served with the order or when it was served. On August 4, 2000, Oslund caused the bank to issue two bank drafts to Savage, drawn on his sister's account, for US $95,714.68 and for US $150,000.

¶ 67 On the same date, Oslund also received US $150,000 from Savage's sister's account. The executive director makes no allegations about the expenditures from Oslund's account. No funds then remained in Savage's sister's account.

¶ 68 On August 23, 2000, Savage deposited the two bank drafts, totalling about US $246,000, into a US$ account in Vancouver in the name of Loree Menton, a person described by Oslund as Savage's "significant other" and by Savage as his "fiancée". The opening balance in the Menton account was nil, so all the funds in the account were, on the face of it, company funds.

¶ 69 From August 2000 to May 2001, from this account, Menton paid VISA and Mastercard bills totalling US $17,500. We do not know on whose behalf these payments were made. Menton paid her own VISA bills (total US $4,954). She also withdrew cash (total US $18,202). On the face of it, none of these payments or withdrawals (total US $40,656) was for company purposes. Apart from an argument about compensation (see below), Savage has not argued that they were.

¶ 70 During the period from September 15, 2000 to March 7, 2001, from time to time, Menton transferred funds from the US$ account to a Canadian dollar account in her name (total US $22,195). The opening balance in this account was $161.98. Apart from interest on the balance from time to time, there were no other deposits into this account in the period from September 15, 2000 to July 16, 2001 when the balance was $839. So virtually all the funds in the account were, on the face of it, company funds.

¶ 71 From September 15, 2000 to July 16, 2001, Menton used these funds to make purchases from, for example, The Bay, Loblaws, a golf club, a rehab clinic, and Holt Renfrew. She also withdrew cash. Again, on the face of it, none of the payments or withdrawals from this account was for company purposes. Apart from the argument about compensation below, Savage has not argued that they were.

¶ 72 Savage argues that the amounts paid to Menton should be treated as compensation for her work for the company, and that the compensation was not unreasonable. He submits that Menton was already under contract, that she was actively involved in assisting him to conduct the affairs of the company, and that she was instrumental in establishing the company's banking relationships. However, he has provided no evidence of a contract between Menton and Savage Telecom (Canada), no evidence of the services she provided to the company, and no other evidence that might justify moving these funds into her personal account.

¶ 73 Contradicting Savage's submissions about Menton's relationship with Savage Telecom (Canada), Oslund testified:

> Q Ms. Oslund, in your role as at chief operating officer, you were aware of and familiar with the kind of employment or contractual relationships between the various personnel of the company and the company?
>
> A Yes.
>
> Q Could you tell me what the relationship between the company and … Menton was?
>
> A [Menton] originally started with the companies at the very beginning. There was [*sic*] five or six or seven or eight companies

> that we were going to incorporate, one would be Savage Entertainment, which … Menton would be involved with. Savage Entertainment never went anywhere and that was the end of [Menton's] involvement with the company. (transcript, April 10, 2007, page 117)

¶ 74 In her interview, Oslund told BCSC staff that Menton had been involved in the Savage group of companies and said:

> Q Do you want to expand on that [Savage's personal life]?
> A His significant other was Loree Menton who was involved with the entertainment way back, and she had a lot of control over [Savage] – well, to me, in my opinion – (interview transcript, May 28, 2004, page 24, line 22)

¶ 75 She also told BCSC staff that everyone involved with the Savage group of companies, including Menton, was involved in "all" of the companies in the sense that they worked for the business as a whole. She said that everyone worked "on contract" and that Menton had a contract in the 1998/99 period, but she did not remember the amount. It appears that Menton had a contract with Savage Corporation prior to 2000, presumably for the work she did on the entertainment side. The contract is not in evidence.

¶ 76 In Oslund's opinion, Menton had a lot of control over Savage and her control over Savage had an impact on the companies, but there is no evidence that Menton provided any services of any significance for Savage Telecom (Canada) itself. While a draft OM prepared by the second lawyers in July 2000 stated that Menton and others were to receive share options in Savage Telecom (Canada), the fact remains that there is no evidence of a contract for services between Savage Telecom (Canada) and Menton, or work performed by her for the company.

¶ 77 **We find that Menton was not entitled to the US $245,715 endorsed over to her by Savage**.

¶ 78 We have evidence of specific expenditures by Menton totalling about US $63,000 (as described above). In addition, in four separate payments from November 10, 2000 to March 15, 2001, Menton gave a total of US $122,000 back to Savage from the US$ account. We have no evidence on what happened to those funds. We have no evidence on what happened to the rest of the initial sum of US $245,715, an amount of about US $65,000, other than the fact that it is gone.

Applicable Law

¶ 79 In the amended notice of hearing, the executive director alleges that Savage:

(a) traded in securities without being registered under the Act, contrary to section 34(1) of the Act;
(b) distributed securities without having filed a prospectus, contrary to section 61 of the Act;
(c) made statements that he knew, or ought to have known, were misrepresentations, contrary to section 50(1)(d) of the Act; and
(d) participated in a series of transactions that he knew, or ought reasonably to have known, perpetrated a fraud, contrary to section 57.1(b) of the Act.

¶ 80 Section 34(1) of the Act states that:

> A person must not
>
> (a) trade in a security … unless the person is registered in accordance with the regulations as
> (i) a dealer, or
> (ii) a salesperson, partner, director or officer of a registered dealer and is acting on behalf of that dealer.

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

> (a) a disposition of a security for valuable consideration whether the terms of payment be on margin, installment 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).

¶ 82 Section 61(1) of the Act states that:

> Unless exempted under this Act or the regulations, a person must not distribute a security unless
>
> (a) a preliminary prospectus and a prospectus respecting the security have been filed with the executive director, and
> (b) the executive director has issued receipts for the preliminary prospectus and prospectus.

¶ 83 "Distribution" is defined in section 1(1) of the Act to mean:

> a trade in a security of an issuer that has not been previously issued.

¶ 84 "Security" is defined in section 1(1) of the Act to include:

> …
> (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, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, reorganization certificate or subscription ….

¶ 85 Section 50(1)(d) of the Act states that a "person … with the intention of effecting a trade in a security, must not … make a statement that the person knows, or ought reasonably to know, is a misrepresentation".

¶ 86 "Misrepresentation" is defined in section 1(1) of the Act to mean:

> (a) an untrue statement of a material fact, or
> (b) an omission to state a material fact that is
> …
> (ii) necessary to prevent a statement that is being made from being false or misleading in the circumstances in which it was made.

¶ 87 A "material fact" is defined in section 1(1) of the Act to mean:

> where used in relation to securities issued or proposed to be issued, a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value of those securities.

¶ 88 Section 57.1(b) of the Act states that:

> A person in British Columbia must not, directly or indirectly, engage in or participate in a transaction or series of transactions relating to a trade in or acquisition of a security or a trade in an exchange contract if the person knows, or ought reasonably to know, that the transaction or series of transactions
> …
> (b) perpetrates a fraud on any person anywhere.

¶ 89 The executive director must prove four elements to establish fraud. These were set out in *Durante*, 2004 BCSECCOM 634:

> 33. The elements of fraud are set out in *R. v. Théroux*, [1993] 2 SCR 5 at page 20:

> … the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

34. In *R. v. Long* (1990), 61 CCC(3d) 156 at page 174 (BCCA), the court said:

> … the mental element of the offence of fraud must not be based on what the accused thought about the honesty or otherwise of his conduct and its consequences. Rather, it must be based on what the accused knew were the facts of the transaction, the circumstances in which it was undertaken and what the consequences might be of carrying it to a conclusion.

35. *Théroux* and *Long* are criminal law cases. In *Anderson v. British Columbia (Securities Commission*), 2004 BCCA 7, the court, having cited the excerpts above from those cases, said:

> 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 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.

36. Therefore, to make a finding of fraud under section 57, the elements of fraud as set out in *Théroux* and *Long* must be established to the standard of proof set out in *Anderson*.

¶ 90 In *R. v. Long*, at page 10, Taggart JA wrote:

> When considering the element of intent in fraud the principal concern is to determine what knowledge an accused had of the conduct which has been found to be dishonest, and what knowledge or foresight he had of the consequences which amount to the deprivation alleged. As will be apparent from my conclusions on this aspect of the matter, the inquiry is not what the accused himself thought about the honesty or otherwise of his conduct. The honesty of the conduct is to be decided applying the standards of the average person acting reasonably in similar circumstances.

Analysis

Unregistered trading and distribution without a prospectus

¶ 91 If we are to find that Savage contravened sections 34(1) and 61(1) of the Act, we must first find that:

1. there were securities involved,
2. Savage traded those securities in British Columbia,
3. for section 34(1), no registration exemption applied, and
3. for section 61(1), his trades were a distribution and no prospectus exemption applied.

Securities

¶ 92 The Maier group signed subscription agreements for the purchase of shares and warrants of Savage Tele.com Corporation. Even if void, they were a "security", falling within the definition of "security" in section 1(1) of the Act, including "a document … evidencing a subscription or other interest in or to a security". In addition, shares and warrants were issued pursuant to the purported subscription agreements, although not delivered to the Maier group. These too were securities.

Trading

¶ 93 Savage was "trading" as defined in paragraph (f) of the definition of "trade" in section 1(1) of the Act. Savage was the directing mind behind the business of Savage Tele.com and Savage Telecom (Canada) Ltd. He promoted the business to Mark Maier and so to the Maier group. He led the drafting of the business plan, and authorized or permitted sending it to the Maier group, he drafted the subscription agreement, and he accepted funds from the Maier group. These were acts "in furtherance of" "a disposition of a security for valuable consideration" – whether the eventual disposition was valid or not.

Distribution

¶ 94 Savage also distributed securities, within the definition of "distribution" in section 1(1) of the Act, when he acted in furtherance of the disposition of securities of Savage Tele.com Corp, not previously issued, to the Maier group.

Registration and prospectus exemptions

¶ 95 The onus of showing that any of the exemptions from sections 34(1) and 61(1) of the Act applied rests on the person who seeks to rely on the exemption (*Bilinski*, 2002 BCSECCOM 102).

¶ 96 Sections 45(2)(5) and 74(2)(4) of the Act, and sections 90 and 129 of the Rules, were the $97,000 registration and prospectus exemptions. They required that the purchaser be purchasing the shares as principal for his own account and that the aggregate acquisition cost be not less than $97,000. Under sections 91, 130 and 135 of the Rules, the exemption did not apply unless the issuer had obtained the individual purchaser's acknowledgement in Form 20A. Friesen, Reger, MacLean and Hans Maier met the conditions for exemption, except the requirement for a Form 20A. Zeilstra did not. He invested less than $97,000.

¶ 97 Sections 89(b) and 128(b) of the Rules were the $25,000 registration and prospectus exemptions. They required that the purchaser be a "sophisticated purchaser", that the aggregate acquisition cost be not less than $25,000, and that an offering memorandum be delivered to the purchaser in advance of the purchase. Mark Maier invested more than $25,000, but an OM was not delivered to him. We have no evidence as to whether he met the criteria of a "sophisticated purchaser" as defined in section 1 of the Rules.

¶ 98 Sections 89(a) and 128(a) of the Rules were the 50 purchasers registration and prospectus exemptions. They required that, during the 12 month period preceding the sale of a given allotment of shares to a particular subscriber, sales had not been made to more than 49 purchasers and that the purchaser be a "sophisticated purchaser" or a spouse, parent, brother, sister or child of a senior officer or director of the company. They also required the delivery of an OM to the purchaser. An OM was not delivered to Mendelman and Seidel. We have no evidence as to whether they met the criteria of a "sophisticated purchaser".

¶ 99 **We find that no registration or prospectus exemptions applied to Savage's trades and distributions to the Maier group**.

Due diligence

¶ 100 Savage argues that he should be excused from liability for breach of sections 34(1) and 61(1) of the Act because BCSC staff "approved" the issuing of share certificates in May 2001. There is no evidence that BCSC staff, in allowing the company to issue share certificates (to investors other than the Maier group), were in some way acknowledging that the exemptions applied to the Maier group or approving the issue of shares to them.

¶ 101 Savage admitted that the Maier group invested US $765,000 when Savage Tele.com Corporation did not exist. He asserts, however, that their money was not invested in a different business than the one in which they thought they were investing. That business was conveyed to Savage Telecom (Canada) Ltd after it was incorporated. Savage Telecom (Canada) assumed the pre-incorporation contracts. Savage says that the Maier group got what they paid for. In our view, even if the Maier group got the business they paid for, that fact does not excuse trading and distributing securities without registration or a prospectus.

¶ 102 Even if we were inclined to accept a due diligence defence to unregistered trading and distribution without a prospectus, Savage has not proved that defence here. He traded without ensuring that it was legal to do so, and that he was in full compliance with securities requirements.

¶ 103 **We find that Savage contravened sections 34(1) and 61(1) of the Act when he traded and distributed the Savage Tele.com Corporation securities to the Maier group without being registered under the Act and without having filed a prospectus**.

Misrepresentations

¶ 104 The executive director alleges that Savage made the following misrepresentations to the Maier group:

(a) Savage Tele.com Corporation had been incorporated in British Columbia or the state of Delaware;

(b) shares in Savage Tele.com Corporation were, or were going to be, listed on the National Association of Securities Dealers Quotation system;

(c) the business plan was a prospectus;

(d) Savage Tele.com Corporation had acquired two local internet service providers; and

(e) Savage Tele.com Corporation was authorized by the CRTC to operate as a competitive local exchange carrier.

¶ 105 Savage Tele.com Corporation was never incorporated. We found that statements in the business plan and orally to the contrary were untrue.

¶ 106 The executive director makes no submissions on the NASDAQ allegation. We treat this allegation as withdrawn.

¶ 107 We have already dismissed the prospectus allegation.

¶ 108 Savage Tele.com Corporation had not acquired Mountain Internet when the Maier group entered into the subscription agreements. The business never acquired a second ISP. We found that statements in the business plan to the contrary were untrue.

¶ 109 Savage Tele.com Corporation had not been granted CLEC status. We found that statements in the business plan to the contrary were untrue.

¶ 110 To find that Savage contravened section 50(1)(d) of the Act, we must find that:

1. the untrue statements related to material facts, and therefore were misrepresentations, as defined in the Act,
2. Savage knew, or ought reasonably to have known, that they were misrepresentations, and
3. Savage made the misrepresentations with the intention of effecting a trade in a security.

Material Facts

¶ 111 Did the three untrue statements relate to material facts?

¶ 112 In our view, whether the business was, or was not, incorporated was a fact that could reasonably be expected to significantly affect the value of the securities. It went to the heart of what the investors thought they were buying.

¶ 113 Savage argues that incorporating the business was merely administrative and easily completed. We do not agree but, even if it were easily completed, that would in no way detract from the materiality of the untrue statement.

¶ 114 **We find that the untrue statement that Savage Tele.com Corporation was incorporated in British Columbia or the state of Delaware was of a material fact and so was a misrepresentation**.

¶ 115 The primary goal of the Savage Tele.com business was to acquire 24 ISPs. Two ISPs, Mountain Internet and Net Puppy, would have been significant start-up assets of the Savage Tele.com business. On an objective test, in our view, the untrue statements about the ownership of these two ISPs could reasonably have been expected to significantly affect the value of the Savage Tele.com securities. The two ISPs would have been the only significant business assets and operations of the company at the time, and their ownership status would have significantly affected any assessment of the value of the business and its future prospects.

¶ 116 **We find that the untrue statement that Savage Tele.com Corporation had acquired two local internet service providers was of a material fact and so was a misrepresentation**.

¶ 117 The executive director argues that CLEC status was critical to the Savage Tele.com business and its ability to conduct the operations set out in the business plan. We agree, but we are not persuaded that the identity of the holder of the registration could reasonably be expected to significantly affect the value of the securities. The correct information was elsewhere in the business plan. In any event, we do not think that a reasonable investor would have been deterred by the correct information that CLEC status had been awarded to another member of the Savage group of companies, but would shortly be transferred to a newly incorporated Canadian company in order to comply with CRTC requirements.

¶ 118 **We dismiss the allegation that Savage made a misrepresentation to the Maier group by stating in the business plan that Savage Tele.com Corporation was authorized by the CRTC to operate as a CLEC.**

Savage's knowledge

¶ 119 Savage was the directing mind and will of the Savage Tele.com business. The business plan described him as founder and president of "Savage Tele.com Corporation" and as that entity's "driving force". He led the drafting of the business plan and must have been aware of its contents. He knew that it was being sent to prospective investors.

¶ 120 As the CEO, he was responsible for ensuring that all the representations in the business plan were true before providing them, or allowing them to be provided, to potential investors. He should have checked to ensure that they were true.

¶ 121 There is also evidence that Savage actually knew that the business had not been incorporated and that he and others involved in the business were making untrue statements to prospective investors. On March 1, 2000, he and Oslund terminated the first lawyers, in part because of their failure to incorporate the business. He and others involved in directing and managing the business had already been soliciting investments in "Savage Tele.com Corp" for several months and must have known about the delay in incorporation.

¶ 122 Nevertheless, the second lawyers advised BCSC staff in July 2000 that Savage had not appreciated that the delay in incorporation could affect the solicitation. In our view, while Savage must have known that Savage Tele.com Corporation did not exist, and that he (and those working under his direction) were falsely

representing that it did, he did not appreciate that the untrue statement was material.

¶ 123 **We find that Savage ought reasonably to have known that Savage Tele.com Corporation had not been incorporated, and that the untrue statement to the Maier group was a misrepresentation**.

¶ 124 As directing mind and will of the Savage Tele.com business, Savage must have known that Savage Tele.com Corporation had not acquired Mountain Internet when the business plan was sent to Mark Maier. Similarly, he must have known that Savage Tele.com Corporation had not purchased the second ISP. It is obvious that such facts would be material.

¶ 125 **We find that Savage knew that Savage Tele.com Corporation had not acquired two local ISPs, and that the untrue statement to the Maier group was a misrepresentation**.

¶ 126 Savage argues that there is no evidence that the Maier group did not at all times know the true state of Savage Tele.com's affairs. In our view, the executive director having proved the misrepresentations, it is for Savage to prove what he asserts, that full disclosure about the delay in incorporation and the ISPs had nevertheless been made to Mark Maier (and so to the Maier group) before they entered into the subscription agreements. He has not done so.

Intention of effecting a trade

¶ 127 Savage led the drafting of the business plan and sent it (or authorized or permitted it to be sent) to investors with the intention of soliciting them to invest, and so with the intention of effecting a trade.

¶ 128 **We find that Savage, with the intention of effecting a trade in a security:**

- **a. made the statement that Savage Tele.com Corporation was incorporated, when he ought reasonably to have known it was a misrepresentation, and**
- **b. made the statement that Savage Tele.com Corporation had acquired two local internet service providers, when he knew it was a misrepresentation,**

and so contravened section 50(1)(d) of the Act.

Fraud

¶ 129 Under section 57.1(b) of the Act, a person in British Columbia must not, directly or indirectly, engage in or participate in a transaction or series of transactions relating to a trade in or acquisition of a security if the person knows that the transaction or series of transactions perpetrates a fraud on any person anywhere.

¶ 130 **We find that, in soliciting and purporting to sell securities of an entity named Savage Tele.com Corporation, that did not exist, and in moving funds raised in the solicitation out of a company bank account and into accounts held by individuals, Savage engaged or participated in a transaction or series of transactions relating to a trade in or acquisition of a security**.

¶ 131 The executive director alleges that in purporting to sell to the Maier group securities of an entity named Savage Tele.com Corporation, that did not exist, and in moving the solicited funds from a company account into non-company accounts to put the funds out of their reach, Savage committed fraud. Soliciting and purporting to contract for the purchase of securities of a company that did not exist and moving the funds may have been improper, but were these transactions fraudulent? Apart from moving funds to Menton's account, we are not convinced that they were.

Incorporation

¶ 132 Savage engaged, or participated, in a series of transactions culminating in the purported sale to the Maier group of securities of a company, Savage Tele.com Corporation, that did not exist.

¶ 133 With respect to the four elements of fraud outlined above, we find as follows.

The prohibited act

¶ 134 **We find that Savage deceived the Maier group when he falsely represented to them that they would be buying securities of Savage Tele.com Corporation that did not exist**. The falsehood went to the heart of what they were buying.

Deprivation caused by the prohibited act

¶ 135 Was deprivation caused by the prohibited act, consisting of actual loss or the placing of the investors' pecuniary interests at risk? **We find that investors' pecuniary interests were put at risk.** They did not get the contract with Savage Tele.com Corporation that they were told they would get.

Knowledge of the prohibited act

¶ 136 Did Savage know that Savage Tele.com Corporation did not exist? We have already found that Savage knew that he was falsely representing to the Maier group that they would be buying securities of Savage Tele.com Corporation.

¶ 137 *Knowledge that the prohibited act could have as a consequence deprivation*
Did Savage know that the deception about incorporation 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)? While he knew the facts of the misrepresentation, we are not convinced that Savage appreciated what the consequences would be of carrying it to a conclusion. It appears that he thought, albeit unreasonably, that the delay in incorporating the business was just an administrative detail that would not affect the solicitation. There is no evidence that he was aware of the full implications of what he was doing.

¶ 138 **While his conduct may have been negligent, we are not convinced that it amounted to subjective knowledge of the risk of deprivation**. **We dismiss the allegation that Savage perpetrated a fraud when he purported to sell to the Maier group securities of an entity named Savage Tele.com Corporation that did not exist.**

Movement of funds

¶ 139 In June 2000, Savage and Oslund moved the balance of the funds invested by the Maier group from a company bank account to the personal account of Savage's sister. They continued to spend the funds for company purposes. In August 2000, after Oslund took US $150,000, Savage moved what remained of the funds in his sister's account to the personal account of his fiancée Menton.

¶ 140 With respect to the four elements of fraud outlined above, we find as follows.

The prohibited act

¶ 141 Savage moved funds invested by the Maier group out of a company bank account, initially into his sister's account and, subsequently, into Menton's account, to keep them from being garnished. Savage intended to avoid a possible court order requiring the company to pay the funds into court while a civil suit took its course. He intended to deceive the Maier group about the location of the funds.

¶ 142 **Commissioners Graf and Milbourne find that moving the funds out of the company bank account to accounts held by individuals to avoid a possible court order was an act of deceit**.

¶ 143 Commissioner Ford is not convinced that moving the funds into non-company accounts was in itself an act of deceit or other fraudulent means. Savage intended to avoid a possible court order requiring the company to pay the funds into court while a possible civil suit took its course. His actions did not have that effect, however, because the August 1, 2000 garnishment order named a bank that no

longer held the company accounts. There is no evidence that the Maier group attempted to find the company accounts and to obtain another order.

¶ 144 In any event, although his immediate purpose was to deceive, in Commissioner Ford's view, Savage thought that he was first and foremost acting in the best interests of Savage Telecom (Canada) Ltd by moving the funds in June from a company account in order to preserve them.

¶ 145 As reflected in their letter of June 9, 2000, the second lawyers had advised Savage that he was not obliged to hold the funds in trust or to stop using the money for company purposes. More important, in his sworn interviews of December 2 and 11, 2003, Savage's accountant told BCSC staff that he had advised Savage that it was his duty to "preserve" the funds for all investors and he could do so by opening "another bank account somewhere else so that nobody will know" and the funds would not be garnished in any litigation. The accountant said he reminded Savage that, wherever they were, the funds would remain company funds. He told Savage that, to the extent the funds were used for his personal expenses, they would be taxable as personal income. Oslund told BCSC staff that Savage told her that the accountant told him that it was acceptable to move the funds to a non-company account in the name of an individual. Oslund said she had received similar advice from the accountant.

¶ 146 While Savage and Oslund took funds out of a more tightly controlled account, Oslund had power of attorney and signing authority over Savage's sister's account. At this stage, it appears that they were still managing the funds as company funds.

¶ 147 Moving the funds made it less likely that the Maier group would be able to attach a pot of money by a garnishing order, if they decided to sue. However, while some might view this as sharp practice or improper, Commissioner Ford is not convinced that a reasonable person would likely conclude that moving the funds was, in itself, dishonest, taking into account the fact that Savage had been advised that he should hide them. It does not help that the executive director has provided no submissions on why a "reasonable decent person" would, on these facts, view moving the funds to avoid garnishment as dishonest.

¶ 148 Nevertheless, we all agree that, in subsequently moving funds to Menton's account, Savage committed an act of deceit or other fraudulent means. Not only did Savage intend to hide the funds, Savage gave up all company controls on the funds. Menton was not a company director, officer or employee. There is no evidence that either Savage or Oslund had power of attorney or signing authority over the account. It appears that Menton was the only person who had authority

over the account. Savage allowed or enabled her to use the funds in the account entirely as she saw fit. She did so.

¶ 149 Savage argues that Menton was entitled to the funds as compensation for services to the company and the amounts paid to her were not unreasonable. Savage, however, provided no evidence that supports his assertions. He produced no contract for services or evidence of any services provided by Menton to Savage Telecom (Canada).

¶ 150 Oslund testified that Menton was involved with Savage Entertainment Corporation which "never went anywhere and that was the end of [Menton's] involvement with the company". Oslund's evidence was that Menton was not involved with Savage Telecom (Canada). Savage did not examine Oslund on this evidence, or produce any evidence to rebut it.

¶ 151 **Commissioner Ford finds that Savage's moving the funds from a company bank account and, subsequently, to Menton's account was an act of deceit or other fraudulent means**.

Deprivation caused by the prohibited act

¶ 152 Were the pecuniary interests of the Maier group placed at risk by moving the funds from the company account to non-company accounts?

¶ 153 Moving the funds, first to Savage's sister's account, reduced the company's control over them. In the case of Menton, Savage gave the funds to someone who was not entitled to them and was not a director, officer, or employee of the company, without any controls on her use of the funds at all. Obviously this put all investors' pecuniary interests at risk. The company was at greater risk of losing the assets and any return on those assets, and investors' potential returns were threatened accordingly.

¶ 154 **We find that Savage's moving the funds from a company bank account to accounts held by individuals put the Maier group's pecuniary interests at risk**.

Knowledge of the prohibited act

¶ 155 Savage knew about the movement of the funds from the company bank account to accounts held by individuals to avoid a court order, and must have known about the lack of controls.

¶ 156 **We find that Savage had subjective knowledge of the movement of the funds from a company bank account to accounts held by individuals, to avoid a court order, and the lack of controls over the funds**.

Knowledge that the prohibited act could have as a consequence deprivation

¶ 157 Did Savage know that moving the funds from the company account 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)?

¶ 158 When Savage moved the funds to his sister's account, company control was, to some degree, maintained through Oslund's having a power of attorney and making her a signatory on the account. At this stage, it appears that Oslund and Savage were still managing the funds as company funds and that Savage thought that he was acting in the best interests of Savage Telecom (Canada) Ltd in moving the funds to his sister's account. There is no evidence that Savage appreciated that the Maier group's specific pecuniary interests might be put at risk. Oslund said that Savage believed they had no legal right to the funds.

¶ 159 We are not convinced that Savage subjectively knew that moving the funds from the company account to his sister's account could put the pecuniary interests of the Maier group at risk.

¶ 160 However, Savage must have known that Menton was not entitled to the funds he moved to her account. It is obvious that enabling or allowing the expenditure of funds by someone who is not entitled to them, by someone who is not a director, officer, or employee of the company, and without any controls on her use of the funds whatsoever would put all investors' pecuniary interests at risk. The company was at much greater risk of losing the assets and any return on those assets, and investors' potential returns were threatened accordingly.

¶ 161 **We find that Savage must have been at least reckless or wilfully blind as to the risks entailed in moving the funds to Menton's account**. (see *R v. Sansregret* (1985), 18 CCC (3rd) 223 (SCC) at 233) **Accordingly, we find that Savage had subjective knowledge that moving the funds to Menton's account put investors' pecuniary interests at risk.**

¶ 162 **We find that Savage perpetrated a fraud in British Columbia contrary to section 57.1(b) of the Act when he moved what remained of the funds invested by the Maier group to Menton's account, giving her unrestricted access to funds to which she was not entitled**.

Submissions on sanctions

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

> By December 21, 2007 the executive director delivers submissions to Savage and the secretary to the Commission.

By January 11, 2008 Savage delivers response submissions to the executive director and the secretary to the Commission.

By January 18, 2008 the executive director delivers reply submissions (if any) to Savage and the secretary to the Commission.

¶ 164 We will consider whether to impose sanctions under sections 161(1) and 162 of the Act, as amended to November 22, 2007.

¶ 165 If either party wishes an oral hearing on the issue of sanctions, they must tell the other party and the secretary to the Commission by January 14, 2008. If so, an oral hearing will be held on January 21, 2008.

¶ 166 December 14, 2007

For the Commission

Robin E. Ford
Commissioner

John K. Graf
Commissioner

Robert J. Milbourne
Commissioner