BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Wong, 2016 BCSECCOM 208 Date: 20160616

**Siu Mui "Debbie" Wong, Siu Kon "Bonnie" Soo,
Wheatland Industrial Park Inc.,
1300302 Alberta Inc. and D & E Arctic Investments Inc.**

Panel[1]	Audrey T. Ho	Commissioner
	Judith Downes	Commissioner
Hearing Dates	February 23 – 27, 2015 March 2-4, 6, 9-13, 24-27, 2015 July 13 – 17, 2015 August 4 and 7, 2015	
Submissions Completed	December 16, 2015	
Date of Findings	June 16, 2016	
Appearing		
James Torrance Anthony Abato	For the Executive Director	
Kenneth H. Jang, agent for Lorne W. Scott, QC	For Wheatland Industrial Park Inc.	
H. Roderick Anderson Owais Ahmed	For Siu Mui "Debbie" Wong, Siu Kon "Bonnie" Soo, 1300302 Alberta Inc., D & E Artic Investments Inc.	

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[1] Commissioner Farber was an original member of the panel but left the Commission before the hearing was completed and deliberations began. He took no part in these Findings.

Findings

I. INTRODUCTION

[1] This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

[2] On May 22, 2013, the executive director issued a notice of hearing (2013 BCSECCOM 140) against Wheatland Industrial Park Inc., Siu Mui "Debbie" Wong and Siu Kon "Bonnie" Soo.

[3] On September 25, 2013, the executive director amended the notice of hearing (2013 BCSECCOM 404) and added 1300302 Alberta Inc. and D & E Artic Investments Inc. as respondents.

[4] On May 21, 2014, the Commission issued a temporary order (2014 BCSECCOM 102) against Wong and Soo.

[5] On January 26, 2015, the executive director issued a further amended notice of hearing (2015 BCSECCOM 36) against the respondents. The executive director alleges that:

1. With respect to the Wheatland Joint Venture (described below):

    a) Wheatland, Wong and Soo contravened section 61 of the Act by distributing securities totalling $2 million to 25 investors, without filing a prospectus;

    b) Wong and Soo, as directors and officers of Wheatland, authorized, permitted or acquiesced in Wheatland's contravention of section 61, and therefore are liable for those contraventions under section 168.2; and

    c) Wong and Soo contravened section 57(b) and committed fraud when they misappropriated funds from the Wheatland Joint Venture, transferred Wheatland Joint Venture units without consideration to the benefit of related companies, and inflated the purchase price of the Wheatland lands and lied about it to investors;

2. With respect to the Rocky View Joint Venture (described below):

    a) Wong, Soo, 1300302 and D & E Arctic contravened section 61 of the Act by distributing securities totalling $3.9 million to 63 investors, without filing a prospectus;

    b) Wong, as a director and officer of D & E Arctic, authorized, permitted or acquiesced in D & E Arctic's contraventions of section 61, and therefore is liable for those contraventions under section 168.2;

    c) Soo, as a director and officer of 1300302, authorized, permitted or acquiesced in 1300302's contraventions of section 61, and therefore is liable for those contraventions under section 168.2; and

    d) Wong and Soo contravened section 57(b) and committed fraud when they inflated the purchase price of the Rocky View lands and lied about it to investors, obtained an unauthorized mortgage on the Rocky View lands, used the mortgage proceeds for purposes other than the development of the Rocky View lands, and withheld information about potential delays in Rocky View's development from investors; and

3. the respondents all acted contrary to the public interest.

[6] During oral submissions, the executive director advised that he would not pursue the allegation that the respondents' conduct was contrary to the public interest. Consequently, we ignored this allegation.

[7] During the hearing, the executive director called as witnesses two Commission investigators, nine investors, Wong's sister-in-law, one of Soo's daughters, and the vendor of the Rocky View lands. The executive director also tendered documentary evidence including affidavits of Wheatland investors filed in 2012 court proceedings. Wong testified at the hearing. The respondents tendered documentary evidence.

[8] The agent for Wheatland's counsel tendered into evidence an agreed statement of facts between Wheatland and the executive director at the start of the hearing, and then left the hearing.

[9] In the agreed statement of facts, Wheatland admitted to selling units in the Wheatland Joint Venture to at least 78 purchasers for approximately $85,000 per unit without filing a prospectus, that no prospectus exemption was available for approximately 25 of those purchasers who invested a total of $2 million, and that by doing so, Wheatland had distributed securities in contravention of section 61 of the Act.

II. BACKGROUND

A. The people involved

1. The Respondents

[10] Wong and Soo (the sisters) are sisters. They are residents of British Columbia.

[11] Wong immigrated to Canada from Hong Kong in 1973. For many years, Wong and her husband ran his family's farm in Surrey, B.C.

[12] Soo immigrated to Canada from China in 1975. She owned a flower shop in Surrey for 28 years.

[13] Wheatland is an Alberta corporation and the registered owner of over 306 acres of land in Wheatland, Alberta (the Wheatland lands). It has never filed a prospectus under the Act.

[14] The sisters were the directors of Wheatland at all relevant times.

[15] 1300302 Alberta Inc. and D & E Arctic Investments Inc. are Alberta corporations. They are the registered owners of approximately 158.2 acres of land in Rocky View, Alberta (the Rocky View lands). They have never filed a prospectus under the Act.

[16] At all relevant times referred to in this decision, Soo and one of Wong's sons were the directors of 1300302, while Wong and one of Soo's daughters were the directors of D&E Arctic.

2. Wong and Soo family members

[17] Companies of members of Wong and Soo's families were involved in some of the transactions referred to in the Further Amended Notice of Hearing.

[18] LC is Wong's sister-in-law. At all relevant times, LC was the sole director of 1276420 Alberta Ltd. (LCco). LC has a Caucasian surname even though she is ethnic Chinese.

[19] Wong has two sons whose companies were involved in some of the events alleged in the Further Amended Notice of Hearing.

[20] Soo has six children including three daughters whose companies were involved in some of the events alleged in the Further Amended Notice of Hearing.

[21] In 2007, Wong's two sons and Soo's three daughters were young adults in their twenties and either in school or working.

3. Isle of Mann group

[22] Isle of Mann group of companies is in the business of real estate development and construction. They were active in real estate development in Alberta at the same time as the sisters.

[23] HY and DM are principals of Isle of Mann.

[24] Wong met HY in 1994. Through HY, she subsequently met DM.

[25] Wong communicated with HY from time to time to discuss real estate developments.

B. Pre-2007 real estate activities

[26] The sisters began to develop an interest in real estate investment in 1988.

[27] Typically, they would buy relatively undeveloped land in an area with rezoning/up-zoning potential, and hold it (sometimes for many years) until it appreciated in value before selling. They were quite successful.

[28] Wong is more fluent in English than Soo. Wong frequently attended municipal planning meetings and city council meetings, and spoke with city planners, to identify and research lands with growth potential. It is apparent that Wong, if not also Soo, became very knowledgeable about the processes and stages in rezoning and developing real estate.

[29] In 2006, the sisters became interested in investing in Alberta lands. They partnered with Isle of Mann on several Alberta real estate projects, including a joint venture to buy and develop more than 500 acres of farmland near Calgary.

C. Wheatland Joint Venture

1. Offer to purchase Wheatland lands

[30] According to Wong, HY called her in early 2007 to introduce her to the Wheatland lands. HY told Wong that Wheatland was "good and quick" – meaning that it was already rezoned for commercial and light industrial use, and would have a quick turn-around time for development, subdivision and resale.

[31] Wong testified that she understood HY to be the middleman. According to Wong, the sisters trusted and relied on HY because of their prior business relationship. Wong testified that she and Soo did not ask HY about who owned the Wheatland lands, HY's role, how HY would be compensated, or why he or Isle of Mann did not want to buy the lands themselves if they had such good potential.

[32] The lands in question consisted of about 900 acres. Only the Wheatland lands (i.e., the 306 acres) had been rezoned; the rest was farmland.

[33] Wong testified that the sisters told HY they were interested only in the 306 acres and asked about price. HY said the price was $68,000 per acre. The sisters countered. HY told Wong "he would ask some people and then come back" to them on the price. They learned from HY that someone else would buy the remaining portion that was farmland.

[34] The sisters eventually agreed to pay $63,000 per acre, for a total of $19,278,000. The sisters did not have enough money to pay the purchase price. They intended to partner with Soo's friends who were keen to invest with them.

[35] The offer to purchase was dated May 1, 2007 and accepted on May 1. The closing date was June 29, 2007. It was an all-cash no-subject offer. The vendor named in the offer was "Bob Cavendish Holdings Ltd." and the purchaser was "Wheatland Industrial Park".

[36] Wong testified that HY had the offer prepared. The sisters did not use a lawyer. They did not conduct a land title search nor verify the legal description or the owner's name on the offer to make sure they were correct. Wong testified that she looked at the price and the layout of the lands attached to the offer as "the most important thing is to check that the price is correct". She may have asked her husband to read the offer terms to confirm they were similar to offers they had signed in the past.

[37] Three deposits were required under the offer. The third deposit, payable by May 30, was the largest at $7.5 million. These deposits would be forfeited to the seller if the buyer failed to complete the purchase for any reason other than the seller's default.

[38] On May 15, 2007, the parties entered into an addendum to the offer which eliminated the payment of the $7.5 million third deposit. Wong testified that this change was made at her request and HY negotiated with the seller on her behalf. HY had the addendum prepared. According to Wong, there was no back-and-forth negotiation and the seller did not request any consideration for making this change even though the offer stipulated that the seller could keep the entire deposit as liquidated damages if Wheatland failed to complete the purchase.

[39] Wong testified that she also asked HY to negotiate a vendor-take-back mortgage in as large an amount as possible, because she was concerned about cash flow. Again, HY simply replied to her that he had negotiated a $2.8 million mortgage. Again, there was no back-and-forth in negotiating this change, and there was nothing in writing to document this change.

2. Parties to the Wheatland land deal

[40] The sisters formed Wheatland Industrial Park Inc. to buy and hold the Wheatland lands.

[41] Bob Cavendish Holdings Ltd., the vendor named in the offer to purchase, was an Alberta corporation. Its sole director was JG.

[42] Although the offer was made and accepted on May 1, 2007, Wheatland Industrial Park Inc. was not incorporated until May 7 and Bob Cavendish Holdings was not incorporated until May 9.

[43] We conclude that JG and Bob Cavendish Holdings were in some way associated with the Isle of Mann group, based on the following evidence:

1. A photograph from JG's Facebook page that shows JG posing under an Isle of Mann sign.

2. In an affidavit filed in British Columbia Supreme Court proceedings initiated in or about 2012 by certain Wheatland investors seeking appointment of a judicial trustee for Wheatland (BC court proceedings), HY said:

> "1264065 then assigned the right to purchase the Cavendish Lands to another Alberta company called Bob Cavendish Holdings Ltd. ("Holdings"). **We** used the name of the vendor for ease of reference." (Emphasis added)

3. Actual owner of the Wheatland lands

[44] In reality, Bob Cavendish Holdings was not the owner of the Wheatland lands. The owner was Cavendish Investing Ltd., an unrelated third party.

[45] According to closing documents, Cavendish Investing entered into an agreement with 1264065 Alberta Ltd. on May 1, 2007 to sell the 900-acre parcel for $23,895,000 payable in part by a vendor-take-back mortgage of $17,495,000. The agreement allocated $6 million of the purchase price to the 306 acres that formed the Wheatland lands.

[46] The right to purchase the Wheatland lands was then assigned by 1264065, either directly or through Bob Cavendish Holdings, to Wheatland. The right to purchase the remaining farmland was similarly assigned to 1323947 Alberta Inc.

[47] 1264065 and 1323947 were both companies of HY and DM. HY and DM were the directors of 1264065 and they incorporated 1323947.

[48] Ultimately, Wheatland purchased slightly more land and the purchase price was adjusted accordingly. On closing, Cavendish Investing transferred title directly to Wheatland and received a consideration of $9,140,617. Wheatland and 1323947 granted a joint and several mortgage over all of their lands to Cavendish Investing for $17,495,000.

[49] The sisters both signed various closing documents that referenced the purchase agreement between Cavendish Investing and 1264065, the assignment of the offer to purchase, and the $17.5 million vendor-take-back mortgage.

[50] Nevertheless, Wong testified that she and Soo did not know anything about these dealings at the time nor did they know then that they had agreed to buy the Wheatland lands at more than double the price accepted by the actual owner.

[51] Wong testified that the sisters thought they were buying from the actual owner or a related party, that the lands were worth at least $63,000 per acre, and that they paid $19.278 million to the owner or a related party. Wong testified that the sisters did not pay attention to the details of what they signed.

[52] Wong testified that she did not know who JG was, that she did not know about 1264065 or that HY and DM were behind that company. She testified that she knew from HY that someone else was buying the portion that was farmland, but did not know anything about 1323947 and did not ask HY. She testified that HY told her Wheatland had to share the mortgage with the other purchaser. She and Soo signed the $17.5 million joint and several mortgage on behalf of Wheatland although Wheatland only borrowed $2.87 million.

[53] In the BC court proceedings, both HY and DM swore affidavits attesting to the existence of the offer between Bob Cavendish Holdings and Wheatland. DM also deposed in his affidavit that Wheatland paid the purchase price of $19,278,000 to 1323947.

4. Promotion and sale of Wheatland joint venture units

[54] The sisters created Wheatland to buy and develop the Wheatland lands into saleable subdivided lots, which could be sold at a profit. Wheatland Industrial Park Inc. held the legal title to the lands as bare trustee for the joint venture investors. A joint venture unit entitled an investor to an undivided interest in the Wheatland lands. A total of 306 units were available for sale, corresponding to 306 acres.

[55] From about May 2007, the sisters promoted and sold units in the Wheatland Joint Venture, through referrals from friends and word-of-mouth. The investors were primarily British Columbia residents in the Chinese community. In total, the sisters raised approximately $22 million from investors (excluding the 33.5 units allocated to family companies and the 10 units purchased by the sisters).

[56] Most investors paid $85,000 per joint venture unit, comprising $63,000 per acre plus an estimated development cost of $22,000 per acre. Some later investors paid $86,000 or $88,000 per unit.

5. What investors were told

[57] Five Wheatland investors testified at the hearing. Some of them invested in both Wheatland and Rocky View. They gave generally consistent testimony about the respondents' promotional activities. Typically, the investors were introduced to Wong or Soo by friends who had invested or were interested in investing with the sisters. The witnesses were invited to a Soo family home in west side Vancouver owned by one of Soo's children, where one or both of the sisters would explain the real estate investment.

[58] Wong and/or Soo would show investors a map of the lands and describe the opportunity. Most were told that they would make a profit after one or two years. The sisters talked about their past successes in other real estate projects. Some investors said they were impressed by the large house, particularly the fish pond filled with expensive carp, and took it as confirmation of the sisters' business success.

[59] One investor (IL) testified that Wong told her that the sisters were contributing the Wheatland lands "at cost" to the joint venture - the sisters would not take any profit up front and would only take a profit (5% of net profit) when the investors made a profit. IL was shown Wheatland's offer to Bob Cavendish Holdings, and a pro forma statement showing the cost of the lands at $19.278 million, the projected development costs, and the projected profit.

[60] IL testified that Soo told her that no more money was needed beyond the $85,000, and if subsequently additional funds were needed, an investor vote would be required.

[61] IL decided to invest in part because she believed she was investing at the cost the sisters paid for the lands and because of the quick two-year turn-around time to make a profit. She thought the sisters were generous.

[62] Wong admitted that she told investor IL that the price the investors were paying for the lands was the same price that the sisters paid for the lands, and that they were not taking a profit upfront but would take a 5% management fee.

[63] Wong admitted that the sisters showed to prospective Wheatland investors Wheatland's offer to Bob Cavendish Holdings which showed a purchase price of $19.278 million, and that they told investors that the price paid for the Wheatland lands was $63,000 per acre.

[64] Another investor (CK) testified that Soo did not tell her she had to do anything after making the investment. Soo did not tell CK that she would have any say in the development of the lands, or that there would be mortgages taken out on the lands.

[65] Some of the Wheatland investor witnesses testified that the sisters required them to form a company with other investors in order to keep the maximum number of investors to not more than 50. They were unclear on the reason for doing so; some thought it was because their individual investments were too small; some thought it was for tax reasons.

[66] Wong admitted to suggesting that investors group together in companies to invest. She also could not clearly explain the purpose, and thought it had something to do with getting tax benefits or it was more convenient to make contracts if they limited the number of investors to 50. Whatever the reason, many investors grouped together in companies to invest in Wheatland, and the total number of joint venturers was kept to 50.

6. Joint venture documentation

[67] The sisters prepared and arranged for investors to sign a joint venture agreement and a bare trust agreement to record the parties' respective rights and interests.

[68] Under the bare trust, the investors authorized Wheatland to manage and deal with the lands and execute documents as their agent, at the direction of the investors. Wheatland could not deal with the lands without the prior written consent or direction of the investors.

[69] Under the joint venture agreement, all decisions, except major decisions as defined in the agreement, were to be made by the Wheatland directors (the sisters, at all relevant times). Major decisions are decisions relating to the sale, mortgage or final use of the lands. Major decisions require a majority vote of the investors holding at least 65% of the total interests in the joint venture.

[70] The joint venture agreement also provided for the following:

1. investors were responsible for obtaining financing;
2. the Wheatland directors were authorized to hire a manager to develop and resell the subdivided lands, and to accept offers from end users that exceeded certain stipulated prices per acre;

3. the sisters would be paid 5% of the net profits as remuneration for their work and efforts.

7. Joint venture units allocated to Wong and Soo family companies

[71] Twenty Wheatland joint venture units were allocated to four family companies owned by Wong and Soo's adult children, and 13.5 units were allocated to a company owned by the sisters' husbands.

[72] Wheatland's unaudited financial statements for the years 2008 to 2010 show these 33.5 units as fully paid equity and Wheatland having fully paid equity contributions of over $26 million since 2007.

[73] But the court in the BC court proceedings stated that Wong and Soo admitted to transferring 20 units to the benefit of their adult children without consideration.

[74] At our hearing, Wong testified that the children's companies fully paid for the 20 joint venture units (at $85,000 per unit). The sisters claimed the payments were made on June 26, 2007 and deposited with the law firm that represented Wheatland on the land purchase. That law firm's client ledger for this time does not reflect any such deposits, and there is no corroborating evidence of these payments.

[75] The sisters also claimed that the children later asked for refunds because they needed money for other investments. Wong said that in October 2008, Wheatland refunded to each of the children's companies $425,000 ($85,000 per unit), plus another $3,000 per unit to reflect the appreciated value in the lands. Wong testified that it was always intended that the children's companies would pay back eventually the money that was refunded.

[76] Although there is evidence that Wheatland paid $425,000 each to several of the children's companies in late 2008, Wheatland's unaudited financial statements for the years 2008 to 2010 show these four companies holding their respective joint venture interests notwithstanding the purported refunds in 2008.

[77] Wong's explanation was contradicted by Soo's daughter who testified at the hearing. Wong had testified that this witness owned one of the children's companies that bought five of the 20 unpaid Wheatland joint venture units. But the witness testified that she was not familiar with the company, and did not know she was a director of that company. She had not heard of Wheatland Industrial Park in 2007. The investor form whereby the company subscribed for the five units was not in her handwriting. She did not have $425,000 in 2007 to invest and she did not pay $425,000 for Wheatland joint venture units.

[78] With respect to the husbands' interests, Wong does not dispute that the 13.5 units were allocated without consideration. Wong testified that they had Wheatland issue the 13.5 units to their husbands' company at their accountant's suggestion. She said these units remained unsold and the accountant told the sisters that in order to complete the joint venture's financial statements, they should issue these units to a dummy company.

[79] According to Wong, the sisters chose a numbered company held by their husbands because it was available. Wong said the sisters never hid from investors that some units remained unsold, and they never intended that these units would be given without consideration to the husbands' company.

[80] There was no note in the financial statements to indicate these were unsold units. There was no corroborating evidence on this issue and no explanation as to how having unallocated unsold units could prevent the completion of the joint venture's financial statements.

[81] The sisters did not inform investors nor obtain their prior approval to allocate 33.5 units to the Wong and Soo family companies without consideration. Investors invested believing that payment of at least $63,000 would be required for each allocated joint venture unit.

[82] One investor filed an affidavit in the BC court proceedings in 2012, attesting that it was not until recently that she found out about the unpaid units, that she had always understood that all 306 acres were assigned and therefore paid for and the proceeds used to pay Wheatland's obligations.

[83] In August 2012, while the BC court proceedings were ongoing, the sisters agreed with investors to pay Wheatland for the 33.5 units (the children's and the husbands' units) at $85,000 each, by July 2013. The money was fully paid after that date.

8. Personal use of joint venture funds

[84] Wong admitted that, between August 2007 and February 2010, the sisters caused Wheatland to make loans totalling $5,389,500 to themselves and various family companies, using joint venture funds. The money from these loans was used for Wong and Soo families' business endeavours unrelated to Wheatland. The loans were all repaid with interest by the end of December 2010.

[85] Wheatland engaged Grant Thronton Limited in December 2012 to conduct independent accounting procedures. According to Grant Thornton's report, Wheatland made loans to Wong and 10 related companies from August 2007 to February 2010 for a total amount of $5,389,500. The maximum outstanding loan balance was $3,912,000 excluding accrued interest.

[86] Grant Thornton concluded that Wheatland incurred additional costs because of its loans to the sisters' or their family companies. Grant Thornton estimated that Wheatland incurred incremental interest costs in the range of $260,000 to $289,000, and approximately $205,299 or less for additional mortgage fees.

[87] We find that two related company loans totalling $1,208,000 were funded, directly or indirectly, by investors' subscription proceeds, based on Grant Thornton's report. According to Grant Thornton, Wheatland investors had issued cheques related to their investments directly to the related companies rather than to Wheatland. We therefore conclude that these two loans were funded by investors' subscription proceeds.

[88] Although there is some evidence that the remaining related company loans were funded to some extent by investors' proceeds and/or unauthorized mortgage proceeds, we do not have sufficient evidence to accurately identify and make a finding on the source of funds for these loans. The executive director did not trace the source of funds used to make these loans.

[89] At her compelled interview with Commission investigators, Wong said she did not ask investors for permission to lend joint venture money to her family. At the hearing, Wong testified that she could not remember asking for permission from any investor. Wong claimed that she or Soo told some investors about these loans but she could not give any details about who was told, and there was no corroborating evidence.

[90] We find that the sisters did not obtain investors' consent to make personal loans nor did they inform investors before investors made their investments.

[91] Wong testified that the loans were needed and not inappropriate because the sisters or their families had guaranteed Wheatland's debt, which eroded their ability to fund their other investments. She said it was especially difficult to obtain financing at the time as it was during the 2008 financial crisis.

[92] In an August 2012 affidavit filed in the BC court proceedings, Soo deposed that the sisters had lent substantial funds to the Wheatland project at various times over the course of the project, often without charging interest. Soo did not specify when the sisters made those loans relative to when Wheatland loaned money to the sisters or their family companies.

[93] Although the respondents submitted evidence at our hearing purporting to be payments of Wheatland expenses from personal funds, these payments were all in 2012. We have no other evidence of any family loans made to Wheatland in or before February 2010.

[94] We find that the sisters used approximately $5.4 million of Wheatland joint venture funds for their personal benefits.

9. Wheatland's financial situation and subsequent events

[95] After the Wheatland distributions, Wheatland started work to develop the lands. It needed money for the development work and to refinance the vendor-take-back mortgage. Wheatland borrowed money from various lenders while it made the loans described above to the sisters or their family companies.

[96] According to Grant Thronton's report, Wheatland obtained six mortgage loans ranging from $3 to $11 million between February 28, 2008 and August 9, 2011. One of them, a $5 million mortgage loan from First Calgary (referred to below), was obtained on October 3, 2008, in the same month that Wong claimed Wheatland refunded the subscription payments to the children's companies.

[97] None of these mortgages were obtained with investors' consent as required by the Wheatland joint venture agreement.

[98] At some point, Wheatland fell into financial difficulty. The 2008 financial crisis also made financing difficult.

[99] By August 2011, First Calgary started foreclosure proceedings against the Wheatland lands.

[100] In November 2011, Wong and Soo held a meeting with some investors. They advised these investors that First Calgary had started foreclosure proceedings and that Wheatland was experiencing financial difficulties. They also advised that their family companies controlled but had not paid for 33.5 joint venture units. They asked for (but did not get) additional monies from the investors.

[101] Ultimately, in July 2012, a subset of investors petitioned the courts (in the BC court proceedings) to appoint a judicial trustee over the project. Some investors filed affidavits in that proceeding indicating that they were not told of any financing needs or difficulties and had no access to financial information. They were unaware that the project required additional financing, that the sisters would solicit financing on their behalf without consultation, that financing was obtained, or that the sisters both borrowed and loaned money to the joint venture.

[102] Although the petition was ultimately unsuccessful, the court found that Wong and Soo had:

1. transferred units to the benefit of their adult children without consideration,
2. placed mortgages on the property that were not authorized by at least 65% of the joint venturers,
3. allowed the First Calgary mortgage to go into default,
4. caused the joint venture to become short on cash so that it could not meet its obligations, and

5. generally mismanaged the joint venture without accounting to the joint venturers until pressed to do so, and then, only after the petition was issued.

[103] At the time of the B.C. court proceedings, the west side of the lands had been serviced and around 57 acres had been sold, with another 58 acres remaining to be sold on the west side.

[104] The sisters resigned as directors of Wheatland at some point.

[105] Investors subsequently repaid the First Calgary mortgage and the foreclosure proceedings were discontinued.

D. Rocky View Joint Venture

1. Purchase of the Rocky View lands

[106] Wong testified that, in the fall of 2006, the sisters set up LCco (an Alberta numbered company) for the purpose of buying Alberta lands. Wong asked her sister-in-law LC to be the director of this company.

[107] A Calgary realtor introduced the sisters to the Rocky View lands. These were farmland not yet rezoned for a higher use.

[108] On February 19, 2007, LCco made an offer to the owner of the Rocky View lands, an unrelated third party, to buy the lands for $5.54 million. $2.77 million of the purchase price was payable by way of a vendor-take-back mortgage and the closing date was June 15, 2007.

[109] LCco made the offer as bare trustee for Wong and Soo family companies. Wong does not dispute that her family acquired the right to buy the Rocky View lands for $5.54 million through LCco. Wong acknowledged that the sisters controlled LCco and were in charge of this purchase and of LCco. LC's only role was to sign documents and cheques when asked to do so by Wong. This was consistent with LC's testimony.

[110] One day after LCco's offer was accepted by the Rocky View owner, 1300302 offered to buy the Rocky View Lands from LCco for $10,271,300, almost twice the price payable by LCco, closing on June 15, 2007.

2. Transfer of Rocky View lands from LCco to 1300302 and D&E Arctic

[111] LCco transferred title of the Rocky View lands to 1300302 and D & E Arctic (the Rocky View nominees) in August 2007.

[112] No documentary evidence was produced before us as to the payment of the purchase price by the Rocky View nominees to LCco prior to the transfer of the Rocky View lands. The law firm used by the sisters to document the land transfer from LCco to the Rocky View nominees told Commission staff that the financial side of the transaction was handled by the parties themselves, but there was no evidence of payment going through LCco's only bank account at the time.

[113] Wong insisted that LCco was paid over time for the purchase of the Rocky View lands, but she could not say how much was paid and when.

3. Promotion and sale of joint venture units

[114] Soo set up the 1300302 joint venture and Wong set up the D&E Arctic joint venture. 1300302 and D&E Arctic held the legal title to the Rocky View lands as bare trustees for their respective investors.

[115] Between June 2007 and January 2008, the sisters promoted and sold units in the 1300302 and D & E Arctic joint ventures through referrals from friends and word-of-month. The investors were mostly British Columbia residents in the Chinese community. Some of them also invested in the Wheatland joint venture.

[116] A total of 158 units were available for sale, corresponding to the 158 acres in the Rocky View lands. 28.1 acres remained unsold. Most investors paid $65,000 per unit.

[117] With respect to the 1300302 joint venture units, at least one investor paid for its subscription by a bank draft on September 27, 2007. The other 1300302 distributions were made before September 25, 2007.

[118] Wong testified that, as at September 25, 2007, D&E Arctic did not have any investors. Based on that and evidence of subscription payments, we are satisfied that all the D&E Arctic distributions were made after September 25, 2007.

[119] In October 2007, the sisters asked investors to pay an additional $2,000 (later increased to $3,000) per unit to help pay for miscellaneous costs and fees for IBI, an engineering firm that worked on the Rocky View lands rezoning.

4. What the investors were told

[120] Six Rocky View investors testified at the hearing. They gave generally consistent testimony about the respondents' promotional activities. Typically, and similar to the Wheatland fund-raising, the Rocky View investors were introduced to Wong or Soo by friends who had invested or were interested in investing with the sisters. The witnesses were invited to the Soo family home in west side Vancouver where one or both of the sisters would explain the real estate investment.

[121] Wong and/or Soo would show them a map of the lands and certain documentation, and describe the opportunity. Most were told that the development would take place in phases over an approximate five-year timeline, with the value of the lands increasing as development progressed, and investors would stand to make a significant profit. They were told a $65,000 investment could eventually be worth over $1.5 million. The sisters talked about their successes in other real estate projects. Some investors said they were impressed by the west side house and took it as confirmation of the sisters' business success.

[122] We have the testimony and affidavit evidence of three Rocky View investors, whose evidence was consistent. They say that either Wong or Soo told them that the sisters were transferring the Rocky View lands to investors at the original price that the sisters acquired the lands, meaning $10,271,300, and that the sisters would not make any profit from the investors but would take a 5% commission at the last stage of the joint ventures when the investors receive a profit. Some investors said they were motivated to invest in part because of that.

[123] Wong admitted at the hearing that she showed to prospective D&E Arctic investors a statement of adjustments for the transaction between LCco and 1300302 showing a purchase price of $10.27 million. She could not recall if she also showed it to 1300302 investors. Wong acknowledged that they told at least some investors that they were purchasing the Rocky View units at cost. She said this statement was true because the Rocky View nominees had made a contract to pay that price to LCco.

[124] Wong denied that she made any representations to investors about how long the rezoning or the project would take, or that the sisters would not profit from the land transfer from LCco to the Rocky View nominees.

[125] Several investors testified they were told that once they paid the subscription amount, they did not have to do anything further.

[126] One individual who invested in the 1300302 joint venture through a BC company indicated to the Commission on her investor questionnaire that 15 individuals co-invested in Rocky View using that BC company.

5. Joint venture documentation

[127] The following agreements documented the respective rights and interests of the Rocky View nominees and investors:

1. a bare trust agreement dated September 21, 2007 between 1300302 and investors in the 1300302 joint venture,

2. a substantially similar bare trust agreement dated September 21, 2007 between D&E Arctic and investors in the D&E Arctic joint venture, and

3. a joint venture agreement dated September 21, 2007 between 1300302 and D&E Arctic. The stated purpose of the joint venture was to hold, develop and market the Rocky View lands.

[128] Each bare trust agreement provides that the bare trustee could not deal with the lands other than in the ordinary course of business, without the express written instructions of the investors.

[129] Under the joint venture agreement, the Rocky View nominees retained the sisters to manage the project. All management decisions other than major decisions were to be made by the sisters. Major decisions are defined in the agreement to be decisions of the two joint venturers regarding the sale in whole or in part, mortgage of or application to develop the lands. Major decisions require the majority vote of joint venturers holding at least 55% of the total ownership interest. That means an unanimous vote of both Rocky View nominees is required. The sisters would be paid 5% of the net profit as compensation for their management services.

6. Unauthorized mortgage and use of mortgage proceeds

[130] The vendor-take-back mortgage came due in 2008. The balance then outstanding was approximately $1.7 million.

[131] Although the total investor proceeds for the joint venture units were sufficient to pay off the vendor-take-back mortgage, Wong testified that these proceeds were used to first pay LCco for the purchase of Rocky View lands. She said they had to do so because there was a contractual obligation to pay LCco.

[132] In September 2008, the vendor-take-back mortgage was repaid and discharged. The funds to repay the mortgage came from several Wong and Soo family companies.

[133] In February 2009, 1300302 and D&E Arctic obtained a $1.65 million mortgage loan from Farm Credit Canada.

[134] The sisters used the Farm Credit Canada mortgage proceeds to pay various Soo and Wong family members and family companies, but not the same ones that funded the repayment of the vendor-take-back mortgage.

[135] Wong testified that the payments of the Farm Credit Canada mortgage proceeds to Soo and Wong family members and family companies were not misappropriations because the total of their family loans to Rocky View (to repay the vendor-take-back mortgage and other Rocky View expenses), exceeded the $1.65 million Farm Credit Canada mortgage proceeds. Wong did not provide corroborating evidence. The amounts she did identify as family loans to Rocky View from bank account statements indicate that the amount advanced under the $1.65 million mortgage exceeded the outstanding loans owed to the Wong and Soo families by the Rocky View joint ventures at any one time.

[136] The Rocky View bare trust agreements prohibit any mortgaging of the Rocky View lands other than in the ordinary course of business, without the investors' prior written approval.

[137] The investor witnesses testified that the sisters did not seek or obtain approval from the investors. Three investor witnesses testified that they first learned of the Farm Credit Canada mortgage loan in 2010 from Rocky View's accountant. The accountant told these investors that the Farm Credit Canada loan was the sisters' "own matter" and the sisters "would deal with that themselves".

[138] When asked if she obtained investors' consent for the $1.65 million Farm Credit Canada mortgage, Wong testified that investors knew from the outset there was a $2.77 million vendor-take-back mortgage, and they should not have been surprised by the $1.65 million Farm Credit Canada mortgage since it was to repay family funds used to pay back the vendor-take-back mortgage.

[139] Wong testified that she did not specifically tell investors she would apply for the $1.65 million Farm Credit Canada mortgage but when investors called, she and Soo told investors that they were trying to get a mortgage from someone. She could not recall which investors she or Soo spoke with and there was no corroborating evidence.

[140] As at October 30, 2014, the Farm Credit Canada mortgage had an outstanding balance of $1.5 million.

7. Selling units while rezoning was speculative

[141] The sisters retained the engineering firm IBI to work on the Rocky View rezoning. Wong dealt with IBI but kept Soo apprised of her dealings with IBI.

[142] Periodically in 2007, IBI sent memos to Wong regarding the development of Rocky View. From late June 2007, four IBI memos referenced potential delays in the rezoning of Rocky View lands.

> <u>June 27 memo</u>
> IBI said there could be delays in the development of the Rocky View lands due to the lack of a definitive growth management strategy with the Municipal District of Rocky View. The memo states, in part:
>
> > **Summary**
> > In the absence of a definitive growth management strategy which is slated to be completed between late 2008 and 2009, there needs to be a consistent position with respect to ongoing growth within the MD.
> >
> > Consequently, we are seeking appropriate direction to assist developers in rationalizing both acquisition and development aspirations in the MD of Rocky View.

July 10 memo
IBI told Wong of potential delays due to land development issues currently being addressed by MDRV. The second last paragraph of the memo, which relates to Rocky View lands, states:

> … a functional studies for the Glenmore and Highway 791 corridors may cause significant changes to the context in which this subdivision is reviewed. Access may be required from alternate locations, and the timing of development may also require access to change in phases overtime. We suggest we give the MD some time to resolve some of the transportation issues, and that we check with them from time to time every 4 months or so to determine the status of their reviews.

December 12 memo
This memo states:

> Debbie,
> Until we have a clear direction from the MD of Rockview on possible planning entitlements, we would prefer not to meet with groups of investors where we are seen to be promoting development. Our job is to produce plans and to secure land use approvals. Currently, there is no clear planning framework in place in this area of the MD and water servicing has still not been determined. Consequently, at this time, land acquisition and development in the MD is purely speculative. We have stated this fact on a number of occasions. (Emphasis added)
>
> We are awaiting a response from the MD on the conceptual scheme applications we have recently submitted. Once these are in hand, we will be in a better position to advise on planning matters and the possible timing of future developments. While we value our current relationship with your organization, and will attempt to assist you in any way possible, we appreciate your consideration in this matter.

December 21 memo
Enclosing a December 17 letter from the Municipal District, IBI told Wong:

> Essentially, the M.D. wishes to put a hold on the application until the completion of a number of initiatives which will provide a framework for evaluation of the Conceptual Scheme. The M.D. has not provided a potential timeframe for this, only that they will endeavor to work collaboratively with IBI Group to integrate the evolving Municipal strategic initiatives.

[143] The lands remain undeveloped at the time of the hearing before us.

[144] The sisters continued to sell Rocky View units without informing investors of the content of these memos. Wong claimed that she told some investors but she could not name any one in particular. Investor witnesses denied they were told about any delays in rezoning.

[145] In any event, Wong testified it was not necessary to inform investors because she had told investors from the outset that this would be a very long term investment, that rezoning inevitably came with delays, and that she made no representation to investors about how long it would take to rezone these lands. In other words, she said the delays in these memos were consistent with what she had told investors before they invested.

[146] All but one distribution was fully paid for before the December 12 memo. One investor (JZ) made two payments for her subscription after the December 21 memo.

[147] We find that JZ was not informed of the potential delays in rezoning before she made her investment. JZ testified that she met with Soo after December 27 but Soo did not tell her about the development being delayed. JZ testified that she would not have paid the balance of her subscription price if she had been advised of the delay.

II. ANALYSIS AND FINDINGS

A. Law

1. Standard of proof

[148] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall* 2008 SCC 53, the Supreme Court of Canada held (at paragraph 49):

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

[149] The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

[150] This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, para. 35.

2. Prospectus requirements

[151] The relevant provisions of the Act are as follows:

a) Section 1(1) defines "security" to include "(b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person ...", and "(l) an investment contract".

b) Section 1(1) defines "trade" to include "(a) a disposition of a security for valuable consideration" and "(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e)".

c) Section 61(1) says "Unless exempted under this Act, 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.

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

3. Exemptions from prospectus requirements

[152] National Instrument 45-106 *Prospectus and Registration Exemptions* sets out a number of specific prospectus exemptions.

[153] Section 2.3 removes the prospectus requirement where the purchaser purchases as principal and is an "accredited investor". This exemption does not apply if the purchaser is a company created or used solely to take advantage of this exemption.

[154] An accredited investor is a defined term. For an individual, that individual must satisfy one of a number of income or asset tests. For a company, that company must have net assets of at least $5 million as shown on its most recently prepared financial statements. Alternatively, all of the owners of interests in that company, with minor exceptions, must be persons that are accredited investors.

[155] Section 2.5 of NI 45-106 removes the prospectus requirement if the investor is a family member (from a specified list), close personal friend or close business associate of a director, executive officer or control person of the issuer.

[156] Section 2.10 of NI 45-106 removes the prospectus requirement if the purchaser is not an individual, purchases as principal and the security purchased has an acquisition cost to the purchaser of not less than $150,000 paid in cash at the time of the distribution. This exemption does not apply if the purchaser was created or used solely to take advantage of this exemption.

[157] Section 1.8 of the companion policy to NI 45-106 referring to the "accredited investor" and the "minimum amount invested" exemptions and the prohibition on syndicates, gives the following illustration:

> [Sections 2.3(5) and 2.10(2)] of NI 45-106 specifically prohibit syndications. A distribution or a trade of securities to a person that had no pre-existing purpose and is created or used solely to purchase or hold securities under exemptions (a "syndicate") may be considered a distribution of, or trade in, securities to the persons beneficially owning or controlling the syndicate.
>
> For example, a newly formed company with 15 shareholders is set up with the intention of purchasing $150 000 worth of securities under the minimum amount investment exemption. Each shareholder of the newly formed company contributes $10 000. In this situation the shareholders of the newly formed company are indirectly investing $10 000 when the exemption requires that they each invest $150 000. Consequently, both the newly formed company and its shareholders may need to comply with the requirements of the minimum amount investment exemption, or find an alternative exemption to rely on.
>
> Syndication related concerns should not ordinarily arise if the purchaser under the exemption is a corporation, syndicate, partnership or other form of entity that is pre-existing and has a bona fide purpose other than investing in the securities being sold. However, it is an inappropriate use of these exemptions to indirectly distribute or trade securities when the exemption is not available to directly distribute or trade securities to each person in the syndicate.

[158] Section 1.10 of the companion policy to NI 45-106 states that the person distributing securities is responsible for determining, given the facts available, whether an exemption is available.

[159] In *Solara*, the Commission confirmed that it is the responsibility of a person trading in securities to ensure that the trade complies with the Act. The Commission also said that a person relying on an exemption has the onus of proving that the exemption is available. The Commission said:

> 37 The determination of whether an exemption applies is a mixed question of law and fact. Many exemptions are not available unless certain facts exist, often known only to the investor. To rely on those facts to ensure the exemption is available, the issuer must have a reasonable belief the facts are true.

> 38 To form that reasonable belief, the issuer must have evidence. For example, if the issuer wishes to rely on the friends exemption, it will need representations from the investor about the nature of the relationship… If the issuer wishes to rely on the accredited investor exemption, it will need evidence about the details of the investor's financial circumstances that make the investor an "accredited investor".
>
> 39 Accordingly, a representation that merely asserts, with nothing else, that the investor is a close personal friend, or an accredited investor, is not sufficient to determine whether the exemption is available.

4. Liability under section 168.2(1)

[160] Section 168.2(1) of the Act states that if a corporate respondent contravenes a provision of the Act, an individual who is an employee, officer, director or agent of the company also contravenes the same provision of the Act if the individual "authorizes, permits or acquiesces in the contravention".

5. Fraud

[161] Section 57(b) says:

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

[162] In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, the British Columbia Court of Appeal cited the elements of fraud from *R. v. Theroux*, [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).

[163] The court also said, in *Theroux* (at page 19):

> The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence. …
>
> The personal feeling of the accused about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence.

[164] In *R. v. Currier*, [1998] 2 SCR 318, the court stated (at paragraph 116), that the element of dishonesty in fraud "can include non-disclosure of important facts".

B. Analysis

1. Prospectus requirements – violations of section 61

[165] The executive director alleges that the respondents distributed securities in the form of Wheatland and Rocky View joint venture units to non-exempt investors without filing a prospectus, in contravention of section 61 of the Act.

[166] The respondents (other than Wheatland) argue, firstly, that the Wheatland and Rocky View joint venture units are not "securities".

[167] In the alternative, if we find that joint venture units are securities, they say that many of the alleged Rocky View illegal distributions are statute-barred. They also purport to rely on the "minimum amount invested" and "accredited investor" prospectus exemptions for some of the Wheatland and Rocky View distributions.

a) Are Wheatland and Rocky View joint venture units "securities"?

(1) The parties' positions

[168] The executive director argues that an investment in joint venture units is an "investment contract" and therefore a "security" under the Act.

[169] "Investment contract" is not defined in the Act. The leading case on its definition is *Pacific Coast Coin Exchange of Canada* v. *Ontario Securities Commission,* [1978] 2 S.C.R. 112; 1977 CanLII 37 (SCC). There, the Supreme Court held that an investment contract is:

> … an investment of money in a common enterprise with profits to come solely from the efforts of others.

In doing so, the court adopted the reasoning from *S.E.C.* v. *W.J. Howey Co.*, (1946), 328 U.S. 293 (U.S.S.C.).

> In *Pacific Coast Coin Exchange*, the Court recognized that "common enterprise" means "one in which the fortunes of the investor are interwoven with and dependent upon the efforts of and success of those seeking the investment or of third parties", and "solely" means "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."

[170] The *Howey* test is broken into three elements:

1. Investment of money and intention to earn a profit,
2. Common enterprise, and
3. Expectation of profit produced by the effort of others.

[171] The only element disputed by the respondents is the third element. The respondents say that the efforts of the respondents are not the "undeniably significant" efforts in the Wheatland and Rocky View joint ventures.

[172] The respondents referred us to the decision of the Fifth Circuit Court of the United States in *Williamson v. Tucker*, 645 F. 2d. 404 (5th Cir. 1981), where that court developed another three-prong test when the investment is structured as a joint venture. The court held (at page 424):

> A general partnership or joint venture interest can be designated a security if the investor can establish, for example, that:
> (a) An agreement among the parties leaves so little power in the hands of the partner or venture that the arrangement in fact distributes power as would a limited partnership; or
> (b) The partner or venture is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or
> (c) The partner or venture is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

[173] The respondents say that applying the *Williamson* test, the third prong of the *Howey* test is not satisfied on the facts of the Wheatland and Rocky View bare trust and joint venture agreements.

[174] The executive director says that we must focus on the economic reality and on substance over form. He says the respondents' reasoning is based on form over substance and ignores the totality of the evidence.

[175] To that, the respondents argue we need to respect the different natures of legal structures, and that *Pacific Coast Coin Exchange* does not dislodge the legal framework that is created by the legal documentations.

(2) Our analysis

[176] In *Pacific Coast Coin Exchange*, the court had this to say about interpreting the meaning and scope of the definition of "security" in the Ontario Securities Act, at page 127:

> Such remedial legislation must be construed broadly, and it must be read in the context of the economic realities to which it is addressed. Substance, not form, is the governing factor.

[177] The following comments (at page 132) from the court are instructive:

> At the invitation of the parties, I have examined the facts in the sole light of the *Howey* and *Hawaii* tests. Like the Divisional Court, however, I would be inclined to take a broader approach. It is clearly legislative policy to replace the harshness of *caveat emptor* in security related transactions and courts should seek to attain that goal even if tests carefully formulated in prior cases prove ineffective and must continually be broadened in scope. It is the policy and not the subsequently formulated judicial test that is decisive.

[178] The executive director cites *(Re) Land Development Co.*, 2002 LNABASC2008, where the Alberta Securities Commission adopted the same approach:

> In searching for the meaning and scope of the word "security" in the Act, form should be disregarded for the substance and the emphasis should be on economic reality.

(3) The form over substance argument

[179] The respondents say that the investors retained significant legal powers under the bare trust and joint venture agreements, such that their expectation of profits was not dependent on the undeniably significant efforts of the respondents.

[180] In the circumstances of this case, we agree with the executive director that focusing on the rights set out in these agreements, over economic reality and the investors' understanding of their rights and entitlement, would give priority to form over substance.

[181] The reality is that there was no serious dialogue or deliberation among the parties on the legal structure of their investment and the allocation of rights and roles between the respondents and the investors as set out in the documentation. Wong could not adequately explain why the respondents used a bare trust. The sisters used templates for the bare trust and joint venture agreements but Wong could not recall specifically where they came from. The sisters inserted the pertinent investor and land information into the templates without changes. Investors signed these agreements, in many cases without any meaningful opportunity to review or understand them prior to signature.

[182] We find the discussions between the sisters and the investors during the capital raising efforts to be more reflective of economic reality and the parties' understanding of their rights and efforts than the words in the legal documents, and those discussions support our finding of the economic reality set out in the paragraphs that follow.

[183] Some of these investors were very unsophisticated while some had general business and real estate experience, but none stood out as particularly powerful investors. They expected to play no part in the management or development of the lands other than following its progress. Their expectation was that once they paid their subscription amounts, they would wait passively for the respondents to develop the lands and collect their share of the profits.

[184] Some investor witnesses testified that they had specific conversations with the respondents that they need not do anything or pay anything once they paid their subscription amounts.

[185] We find that the economic reality is that people invested in the Wheatland and Rocky View joint ventures because they were led to expect profits from the efforts of the respondents (in particular, the sisters) and the people that they would hire on behalf of the joint ventures such as IBI.

[186] The respondents asked us to apply the *Williamson* test. That decision is not binding on us, it is not the law in Canada and we do not find it necessary to adopt it.

[187] Accordingly, for the reasons indicated, we conclude that investments in the Wheatland and Rocky View joint venture units are "investment contracts" and therefore "securities" within the meaning of the Act.

b) Wheatland distributions - availability of exemptions

[188] Given our finding that Wheatland joint venture units are securities, Wong and Soo do not dispute that Wheatland had sold the units to investors, that the sales were distributions under the Act, and that no prospectus was filed in connection with the distributions. The only issue is whether exemptions from the prospectus requirements were available for all the distributions.

[189] The executive director alleges that distributions totalling approximately $2,000,000 to 25 investors did not qualify for exemptions.

[190] As noted earlier, Wheatland conceded that it made approximately $2,000,000 in illegal distributions to 25 investors, in contravention of section 61 of the Act.

[191] Wong and Soo do not dispute the executive director's contention that the investments did not quality for exemptions, except for distributions to two corporate investors.

[192] It is well established that the person who trades in securities has the onus of proving that an exemption is available. That person must demonstrate a reasonable basis for believing that an exemption is available. See: *Solara*.

[193] In this instance, Wong testified that she and Soo did not even know that the Act applied to the Wheatland distributions. There is no evidence that they, or Wheatland, took any effort or conducted any due diligence at the time of the distributions to comply with the prospectus requirements or verify that prospectus exemptions were available. On the contrary, there is evidence that the respondents encouraged smaller investors to form syndicates to make their investments.

[194] With respect to the two distributions that the respondents say qualify for exemptions:

1. One was to a corporate investor who purchased one unit for $85,000. The respondents relied on the "accredited investor" exemption.

   Although the executive director conceded that the principal in this corporate investor was an accredited investor, we have no evidence that the corporate investor itself was an "accredited investor" as defined in NI 45-106. We have no evidence as to the net assets of this corporate investor or whether the accredited investor was the only owner of this company.

   Accordingly, the respondents have not met the burden of establishing on a balance of probabilities that an exemption is available for the distribution to this corporate investor.

2. The other was to a corporate investor who purchased 4.5 joint venture units for $382,500. The respondents relied on the "minimum amount invested" exemption.

   Wong testified that all of the respondents' dealings with this corporate investor at the time of distribution indicated that only two individuals were involved in this company. Wong said she did not discover there were more individuals in this company until two years later.

Evidence provided by the executive director indicates that there were several more individuals involved in this investor company and each had invested less than $150,000.

We do not have evidence that this distribution met the requirements for the minimum amount invested exemption. Specifically, we have no evidence to indicate that the $382,500 corporate investor invested as principal. We have no evidence that it was not created or used for the purpose of taking advantage of the minimum amount invested exemption. Therefore, the respondents have not met the burden of establishing on a balance of probabilities that an exemption is available for the distribution to this corporate investor.

[195] We find that Wheatland distributed securities and raised $2,000,000 from 25 investors in contravention of section 61.

c) Wheatland distributions - direct contraventions of section 61 by Wong and Soo

[196] Wong and Soo were in charge of Wheatland and its capital-raising activities. They set up, promoted and brought in the Wheatland investments. Both Wong and Soo introduced investors to Wheatland, set the investment terms, arranged to have prepared the joint venture agreement, signed investor forms and accepted investments by investors, received and handled the investors' subscription payments. Each kept the other informed on key events relating to joint venture sales and land development. We find they were equally involved and responsible for Wheatland's capital raising efforts and they acted jointly in these activities.

[197] By doing so, Wong and Soo each acted in furtherance of all the Wheatland distributions.

[198] Therefore, we find that Wong and Soo also breached section 61 with respect to distributions of Wheatland securities totalling $2,000,000 to 25 investors.

d) Wheatland distributions - contraventions attributable to the sisters under section 168.2(1)

[199] The executive director alleges that, as directors and officers of Wheatland, each of Wong and Soo is indirectly liable for the breaches of section 61 by Wheatland, under section 168.2(1).

[200] As we have found them to be directly liable under section 61, we do not need to make further findings under section 168.2(1) with respect to these distributions. Had we not been satisfied that the sisters directly contravened section 61 with respect to all the Wheatland distributions, we would have found that they, as directors and officers of Wheatland, authorized, permitted and acquiesced in Wheatland's contraventions of section 61 and are each liable under section 168.2(1).

e) Rocky View illegal distributions

[201] The executive director alleges that distributions totalling $2,785,000 to 44 investors in 1300302 and $1,105,000 to 19 investors in D&E Arctic did not qualify for exemptions.

[202] Giving our finding that the 1300302 and D&E Arctic joint venture units (collectively, the Rocky View joint venture units) are securities, the respondents do not dispute that they had sold those units to investors, that the sales were distributions under the Act, or that no prospectus was filed in connection with the distributions.

[203] However, the respondents say some of the illegal distributions are statute-barred pursuant to section 159. The respondents also say that prospectus exemptions were available for some of the alleged illegal distributions.

(1) Are allegations of Rocky View illegal distributions statute-barred?

[204] Section 159 of the Act states that "proceedings under this Act … must not be commenced more than six years *after the date of the events that give rise to the proceedings*." (emphasis added)

[205] The executive director first made allegations with respect to the Rocky View distributions in the Amended Notice of Hearing issued September 25, 2013. That was the date on which the proceedings relating to Rocky View distributions began. Six years before that date would be September 25, 2007 (the limitation date).

[206] We have already found that all of the D&E Arctic distributions were made after September 25, 2007 and clearly are not statute-barred. We also found that only one 1300302 distribution took place within the limitation period, on September 27, 2007.

[207] Therefore, the only issue before us is whether the 1300302 distributions made before September 25, 2007 are statute-barred.

Parties' positions

[208] The respondents say that all illegal distributions that took place before the limitation date are statute-barred. They cite the dissent in *Re Wireless Wizard*, 2015 BCSECCOM 100.

[209] The executive director says these distributions are not statute-barred, on the basis that they were a series of separate distributions that constituted a continuing course of conduct which extended the limitation period. He relies on the majority decision in *Re Wireless Wizard*.

[210] In *Re Wireless Wizard*, the panel applied the common law concept of "continuing course of conduct", also known as "continuous contraventions", to interpret section 159. The majority of the panel set out its views on when a series of separate distributions could constitute a continuing course of conduct, as follows:

> 70. We are of the view that a series of separate distributions, whether legal and/or illegal, could constitute a continuing course of conduct that would span a limitation period if the evidence established that there were continuing elements of the offence within the limitation period. For instance, evidence of acts in furtherance of the distributions throughout the period in issue, such as advertisements of the offering, marketing

> presentations to potential investors or other ongoing efforts to solicit investors could form the basis of a finding of a continuing course of conduct that would include distributions that took place outside the limitation period.

[211] In his dissent, the Vice Chair concluded that it is difficult to conceive how contraventions of section 61(1) could be alleged as continuing contraventions. His reasoning is summarized in paragraph 98 of the decision:

> The purpose of section 61(1) is to ensure that investors receive a prospectus at the time of the purchase of securities in order to assist them in making an informed investment decision. It is critical that the information be provided at the time of the purchase. The breach is the failure to provide an investor with information, before he or she invests. A respondent can do nothing after a contravention of section 61(1) to rectify the failure to provide the require prospectus at the time of the trade. It is a past event. Failure to provide a prospectus at the time of a trade is, in the words of *Sadolims*, a "single, discrete event". It does not give rise to a continuous breach of the law.

"Continuing course of conduct" concept

[212] The "continuing course of conduct" concept originated in common law, and has been applied to interpret limitation periods in a securities regulatory regime. As explained by the British Columbia Supreme Court in *British Columbia (Securities Commission) v. Bapty* 2006 BCSC 638:

> [36] … A "continuing contravention", a "continuing violation", a "continuing offence", or a "continuing course of conduct" results in the commission of such an offence not being complete until the conduct has run its course. These terms are most often used to describe a succession of separate illegal acts of the same character which, in their entirety, make up a single, continuing transaction …Where there is a finding that there is a continuing contravention, the limitation period does not begin until the entire "transaction" is complete and discrete activities that occur outside of the limitation period are not statute-barred if they form part of the same transaction as events falling within the limitation period: *Re Dennis*, 2005 BCSECCOM 65 at paras. 23 and 30.

[213] In our view, that concept is a helpful tool for the analysis in cases such as fraud where the nature of the contravention often involves conduct that continues over a period of time and easily fits within the common law concept. The Commission had consistently applied the concept of "continuing course of conduct" to interpret section 159, in cases involving fraud or misrepresentations. See: *Re Dennis* 2005 BCSECCOM 65, *Re Maudsley* 2005 BCSECCOM 463, *Re Barker* 2005 BCSECCOM 146, and *Re Nelson* 2016 BCSECCOM 50.

[214] However, starting with *Saafnet Canada Inc.* 2013 BCSECCOM 442, the Commission applied the concept to interpret section 159 in an illegal distribution case, and held that a series of contraventions of section 61(1) in connection with ongoing financing could well constitute a "continuing contravention" and a "continuing course of conduct".

[215] The majority decision in *Re Wireless Wizard* followed *Saafnet Canada Inc.*

[216] As illustrated by the different views of the panel in *Wireless Wizard*, in cases of illegal distributions, we find the "continuing course of conduct" concept a less helpful tool for the analysis, as each section 61(1) contravention is assessed on a trade-by-trade basis and does not easily fit within the common law concept. In our view, assessing the contraventions on a trade-by-trade basis for the purpose of section 159, as the dissent did in *Wireless Wizard*, is overly limiting and does not adequately reflect the economic reality of capital financing and advance the objective of investor protection.

[217] In illegal distribution cases, we find it more helpful to focus on interpreting section 159, and specifically the phrase "events that give rise to the proceedings", by applying the general principles of statutory interpretation, in the specific context of our securities regulatory regime and with regard to the purpose of limitation periods.

Statutory interpretation and interpretation of limitation periods

[218] Section 8 of the *Interpretation Act*, RSBC 1996, c. 238 states:

> Enactment remedial
>
> 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[219] Regarding the principles of statutory interpretation, the Supreme Court of Canada has stated the following:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 British Columbia Ltd. v. Canada, 1999 CanLII 639 (SCC), [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in

> all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, ¶10

[220] Regarding interpretation of limitation periods specifically, the Supreme Court of Canada stated, in *McLean* [2013] SCC 67:

> 68. While it is true that the application of s. 159 to the secondary proceeding provisions such as s. 161(6)(d) will have the effect, as a practical matter, of extending the period under which the cloud of potential regulatory action hangs over a person, that, of itself, is not offensive to the legislative purpose of limitation provisions. Limitations periods are always "driven by specific policy choices of the legislatures" (*Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 230, per Rothstein J., dissenting), as they attempt to "balance the interests of both sides" (*Murphy* v. *Welsh*, [1993] 2 S.C.R. 1069, at p. 1080).

Purpose of limitation periods

[221] In *McLean*, the Supreme Court of Canada said the following regarding limitation periods:

> 63. ….. Limitations periods exist for good reasons, two of which deserve mention here. First, "[t]here comes a time ... when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 29). Second, at some point "[i]t is better that the negligent [plaintiff], who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation" (*Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, at p. 577; see also *M. (K.)*, at p. 30).

[222] In *Re Dennis*, the Commission stated (in paragraph 41) that:

> The purpose of the limitation period is to provide some certainty and finality to respondents while nevertheless allowing the regulator to pursue a course of conduct which may extend over a considerable period of time. That purpose is not achieved (and certainty and finality is not prejudiced) by cutting a continuing course of conduct in two so that events falling before the six year period are not caught.

Purpose of securities legislation and section 61of the Act

[223] The Securities Act is a regulatory statute with a public interest mandate. Its over-arching purpose is to ensure investor protection, capital market efficiency and public confidence in the system. See: *Fairtide Capital Corp. (Re)* 2002 BCSECCOM 993 (paragraph 17),

referring to: *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 589; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at 26; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494.

[224] The Commission has consistently held that section 61 is one of the Act's foundational requirements for protecting investors and preserving the integrity of the capital markets. It requires those who wish to distribute securities to file a prospectus with the Commission. This is intended to ensure that investors receive the information necessary to make an informed investment decision. Hence, contraventions of section 61 are inherently serious. See: *Re HRG Healthcare* 2016 BCSECCOM 5 (paragraph 14).

Interpretation and analysis

[225] Section 159 of the Act states:

> Limitation period
> 159 Proceedings under this Act, other than an action referred to in section 140, must not be commenced more than 6 years after the date of the events that give rise to the proceedings.

[226] We interpret "proceedings", in the context of enforcement proceedings, to mean a matter brought in a notice of hearing (or amended or further amended notice of hearing). Proceedings are commenced when the executive director issues that document.

[227] The next issue is: what are the events that give rise to a proceeding?

[228] The ordinary meaning of the word "event" is very broad. The Canadian Oxford English Dictionary defines "event" to include "a thing that happens or takes place, especially one of importance". Nothing in the ordinary meaning or the Oxford definition imports any element of illegality in the "thing that happens or takes place".

[229] In our view, use of the broad term "events" in section 159 shows a legislative intent that the limitation period is not restricted to specific acts or conduct. In contrast, section 140(a) and (b)(ii) of the Act refer to a limitation period relating to the date of a specific "transaction".

[230] The term "events" would include a series of events, and the phrase "6 years after the date of the events" means the date when the events end.

[231] Although it was in the context of interpreting the scope and meaning of the term "security" in the *Ontario Securities Act*, the statement of the Supreme Court in *Pacific Coast Coin Exchange* quoted in paragraph 176 above applies equally here:

> Such remedial legislation must be construed broadly, and it must be read in the context of economic reality to which it is addressed.

[232] In the capital markets, a common event is the raising of capital through a course of financing over a period of time. Issuers typically have a targeted amount of capital they plan to raise within a specified time, and specific purpose(s) for which the capital will be used. They typically engage in promotional and sales activities continuously to raise the capital. They consider the entire financing as a single activity, and each distribution of security is one step taken within that activity to achieve their capital raising objective.

[233] Reflecting that reality, we conclude that a financing may be an "event" for the purpose of section 159, and that the distributions made in the course of the financing are part of a series of events that constitute the financing. Because the term "event" does not connote any element of illegality, we conclude that the distributions that make up "the event" can include both legal and illegal distributions. This means it is possible to extend the limitation period to catch illegal distributions preceding the limitation date even if all the distributions after the limitation date were compliant with section 61(1), provided that the distributions were all part of the same course of financing.

[234] This interpretation is "fair, large and liberal", as required by section 8 of the *Interpretation Act*, and best ensures the attainment of the objects of the *Securities Act*, which are investor protection, capital market efficiency and public confidence in the system. It holds issuers accountable for all misconduct during the entirety of the course of a financing, consistent with the market reality of how financing is typically conducted.

[235] This interpretation is also consistent with the Commission's past decisions, including specifically, *Saafnet Canada Inc.* and *Wireless Wizard*.

Application to the facts

[236] Turning to the facts of this case, what were the events that gave rise to the proceeding on the alleged illegal distributions of 1300302 units?

[237] To answer that question, we start with the Further Amended Notice of Hearing where the allegations were first made. Paragraphs 23, 27 and 28 of the Further Amended Notice of Hearing described the allegations:

> 23. Between June 2007 and January 2008, Wong and Soo promoted and sold shares, primarily to B.C. residents, in the Rocky View Land. These shares entitled investors to an ownership interest in the Rocky View Land based on one share per acre of land.
>
> 27. At least 76 individuals and corporate entities purchased shares in the Rocky View Land at $65,000 per share. For approximately 63 investors who purchased 58 shares for $3.9 million, there was no exemption to the prospectus requirement in the Act.

28. By distributing securities to non-exempt investors without filing a prospectus, Wong, Soo, 1300302 Alberta, and D&E Arctic contravened section 61 of the Act.

[238] The evidence established that the 1300302 distributions were made between June 2007 and September 27, 2007. The September 27 distribution was in contravention of section 61 (see paragraph 244 below). All the 1300302 distributions were made in the course of one continuous financing over a number of months to raise money for one purpose.

[239] Taken together, we conclude that the events that gave rise to the proceeding with respect to the 1300302 distributions were the sale of 1300302 units in the course of a financing to raise capital for the 1300302 joint venture, without filing a prospectus, between June 2007 and September 27, 2007, and the events ended on the date of the last distribution in the financing, September 27, 2007.

[240] Certainty and finality to the respondents are not prejudiced in this case. The financing by 1300302 took place over a short time period of several months. 1300302, Wong and Soo continuously promoted and sold 1300302 joint venture units within that period. The last illegal distribution was within the limitation period. All the other illegal distributions took place not more than four months before the last illegal distribution. They are not "ancient obligations" relative to the last illegal distribution, and the respondents should not have any reasonable expectation that they would not be held accountable for the earlier distributions.

[241] In our view, this interpretation is consistent with the ordinary meaning of the phrase "events that give rise to the proceeding", and balances the interests of both sides, as noted in *McLean, supra*. It holds the respondents accountable for all misconduct during the entire financing at a time before the respondents should have any reasonable expectation of finality. By doing so, we achieve the purpose of investor protection without prejudice to the purpose of limitation periods.

[242] On that basis, a proceeding with respect to all the 1300302 illegal distributions in the financing can be brought until September 27, 2013. Since the proceeding commenced on September 25, 2013, the date of the Further Amended Notice of Hearing, we find that the 1300302 distributions made before September 27, 2007 are not statute-barred.

(2) Availability of exemptions for Rocky View distributions

[243] The respondents do not dispute the executive director's contention that the Rocky View investments did not quality for exemptions, except for the following distributions to five corporate investors and two individual investors, totalling $1,170,000:

1. With respect to two corporate investors in 1300302 joint venture units who each invested $65,000, Wong testified that one of them is owned by an individual that the executive director accepts was an accredited investor, and the other is owned by that individual's wife. Based on the investor questionnaire completed by the husband, we are satisfied that both he and his wife were accredited investors. But we have no

evidence that their companies, who were the actual investors in the joint venture, met the test for being "accredited investors" as defined in NI 45-106. Specifically, we have no evidence that either company had a net worth of at least $5 million or did not have other owners who were not accredited investors.

For that reason, we are not satisfied that an exemption applies to either distribution.

2. With respect to a third corporate investor in 1300302 joint venture units totalling $520,000, the respondents relied on the "minimum amount invested" exemption. Wong said all of her dealings with this investor at the time of distribution indicated that only two individuals were involved in this company. Wong said she did not know there were more individuals in this company.

   Evidence entered by the executive director indicates that there were several more individuals involved in this investor company and each had invested less than $150,000.

   We therefore find that this exemption was not available for this distribution.

3. With respect to two other corporate investors in 1300302 joint venture units, the respondents say an exemption is available as they each invested more than $150,000. Each corporate investor signed one subscription form for the entire 2.5 units and each payment it made for the subscription covered all 2.5 units.

   Similar to Wheatland, we have evidence that some investors grouped together in a corporation to invest in Rocky View. We do not have any evidence that either corporate investor in question invested as principal and was not created or used for the purpose of taking advantage of the "minimum amount invested" exemption.

   The respondents have not met the burden of establishing, on a balance of probabilities, that the minimum amount invested exemption was available for the distributions to the two corporate investors described in this subparagraph. We therefore find that this exemption was not available for those distributions.

4. Finally, Wong said that two individual purchasers of D&E Arctic joint venture units had initially agreed to acquire sufficient units exceeding $150,000 each, but ultimately invested amounts that fell below that threshold. The respondents argue that these investors' failure to subscribe for the initial agreed amounts should not be visited upon the respondents.

   It is the issuer's responsibility to ensure that exemptions are available for the actual distribution made to an investor. The "minimum amount invested" exemption is clearly worded, and the relevant time is the time of the distribution.

> If an investor changes their mind and actually invests at a level below the "minimum amount" threshold, "the acquisition paid in cash at the time of distribution" is no longer $150,000 or more, and the issuer must again comply with prospectus requirements or find another available exemption.
>
> To hold otherwise could offer an easy way to avoid the prospectus requirements and compromise the protection of investors and the market that is the purpose of those requirements.
>
> We therefore find that this exemption was not available for this distribution.

[244] We find that 1300302 distributed securities and raised $2,785,000 from 44 investors in contravention of section 61. We also find that D&E Arctic distributed securities and raised $1,105,000 from 19 investors in contravention of section 61.

f) Rocky View distributions - direct contraventions of section 61 by Wong and Soo

[245] Wong and Soo were the ones who set up, promoted and brought in the Rocky View investments. Wong and Soo both found and introduced investors to Rocky View, and promoted and negotiated the terms of the investment with investors. They were equally involved and responsible for Rocky View's capital raising efforts and they acted jointly in these activities.

[246] For instance, an investor in 1300302 testified that the two sisters were present and explained to her the Rocky View investment at Soo's Vancouver home. An investor in D&E Arctic testified that it was primarily Soo who spoke about the Rocky View investment during her visit to Soo's family home.

[247] In doing so, Wong and Soo each acted in furtherance of all the 1300302 distributions and D&E Arctic distributions.

[248] Therefore, we find that Wong and Soo also breached section 61 with respect to distributions of 1300302 and D&E Arctic securities totalling $3,890,000 to 63 investors.

g) Rocky View distributions - contraventions attributable to the sisters under section 168.2(1)

[249] The executive director alleges that Wong, as a director and officer of D&E Arctic, is liable under section 168.2(1) for the contraventions of section 61 by D&E Arctic. Similarly, he alleges that Soo, as a director and officer of 1300302, is liable under section 168.2(1) for the contraventions of section 61 by 1300302.

[250] As we have found Wong and Soo to be directly liable under section 61 with respect to all the Rocky View distributions, we do not need to make further findings under section 168.2(1) with respect to these distributions.

[251] Had we not been satisfied that the sisters directly contravened section 61 with respect to all the Rocky View distributions, we would have made findings under section 168.2(1) against Wong and Soo as requested by the executive director.

C. Fraud – general findings

[252] We are persuaded that Wong genuinely believed that there was nothing wrong with the respondents' actions even when they were objectively dishonest. But, as stated in *Theroux*, that is not a defence to fraud.

[253] Based on Wong's testimony and admission in this regard, we are satisfied that each sister informed the other of key events relating to the purchase of the Wheatland and Rocky View lands, the financing and development of these lands, the sale and distributions of joint venture units, and payments involving the Wong and Soo families. We find that the sisters acted jointly in the activities that are the subject of the Further Amended Notice of Hearing and we can attribute the knowledge that one sister had to the other sister.

[254] We find that Wong and Soo routinely treated family money as a single pool that could be used for any family purpose, without any regard to the fact that the family companies had different businesses or beneficial owners. They moved money around according to who needed it at the time. They did the same with the Wheatland and Rocky View joint venture funds and assets. This is best illustrated by the following exchange between counsel for the executive director and Wong during her cross examination:

> Q: There was a company that was looking for funding for you in the fall of 2008, right?
> A: I don't remember the dates, because there was quite a few financing applications.
>
> Q: Right. You had quite a few financing applications because you needed money?
> A: Of course, for the development of Wheatland, it required more than $10 million.
>
> Q: But you just paid out 4 times 440,000 to the four companies owned by your children.
> A: Yes. Because sometimes when our companies needed money, Bonnie and I can guarantee it. However, after we got involved in the Wheatland project, we lost the power to guarantee.
>
> Q: And that was -- was that because, Mrs. Wong, that you signed a personal guarantee with respect to Wheatland financing?
> A: Yes.
>
> Q: And which financing was that?
> A: We guarantee every financing.

Q: And because of those guarantees, it's your evidence that you couldn't obtain financings on other projects?
A: Correct. It's difficult.

Q: Difficult. And so, in other words, because you were unable to obtain financing on other projects, you thought it was okay to just use Wheatland's money to sort of substitute for that?
A: I used Wheatland's money. However, when Wheatland needed help, I also helped Wheatland.

Q: Is it the case, Mrs. Wong, where it's like I asked you yesterday, where there is a number of companies in the Wong and Soo families --
A: Yes.

Q: -- and money is moved from one company to the other depending on who needs the money and who has money?
A: Yes.

Q: Is it sort of like one big pot of money that gets moved around from here to there, depending on who needs it?
A: When money is needed urgently, we will try our best to help.

Q: And so money is just sort of moved around?
A: What do you mean "moved around"?

Q: Well, for example, with the four children, they needed money and so Wheatland just gave them the $440,000 each?
A: No. Not give money to them, they requested to back out. Not gave money to them.

Q: Well, they requested to back out, but their shares -- their names remain on the shares.
A: It was my mistake. So when the calculation was being done, I'm not sure what to do, so I said that, whenever they have money, they have to return it.

[*Commission hearing transcript July 17, 2015*, pp. 94-96]

D. Fraud – respondents' general arguments

[255] The respondents made several arguments that apply generally to all the allegations of fraud respecting Wheatland and Rocky View. We address them first before dealing with the specific fraud allegations.

1. Allegation of a single fraud versus multiple frauds

[256] The respondents argue that, with respect to Wheatland, the executive director has only alleged one fraud allegation consisting of three separate parts. Therefore, to prove this allegation, the executive director is required to prove all three parts. If the panel finds that any one part is not proven, then the entire fraud allegation respecting Wheatland activities must fail.

[257] Similarly, they argue that the executive director has only alleged one fraud allegation consisting of four separate parts with respect to Rocky View.

[258] The sisters rely on paragraphs 18 and 42 of the Further Amended Notice of Hearing, which state:

> *Summary of Wheatland fraud allegations*
> 18. By:
> - Misappropriating funds from the Joint Venture,
> - Transferring Joint Venture shares without consideration to the benefit of their adult children, and
> - Inflating the purchase price and lying about this to investors
>
> Wong and Soo perpetrated a fraud contrary to section 57(b) of the Act.
>
> *Summary of Ricky View Land fraud allegations*
> 42. By:
> - Inflating the purchase price and lying about this fact to investors,
> - Obtaining an unauthorized mortgage contrary to the Bare Trust,
> - Using the mortgage proceeds for purposes other than the development of the Rocky View Lands, and
> - Withholding information about potential delays in the development from investors.
>
> Wong and Soo perpetrated a fraud contrary to section 57(b) of the Act.

[259] In reply, the executive director argues that a notice of hearing is not a criminal indictment or a civil statement of claim, and the strict technical rules of drafting that apply to those pleadings do not apply in an administrative law context. He says the purpose of the notice of hearing is to give notice to the respondents of the nature of the allegations against them; it does not contain "elements" of an office.

[260] The executive director cites three cases in support of these submissions: *Re YBM Magnex International Inc.*, 2000 LNONOSC 830; *Re Ironside*, 2003 LNABASC 685; and *Histed v. Law Society of Manitoba*, 2006 MBCA 89.

[261] We do not find these cases on point. They deal with the issue of particulars, and what degree of particularity must be provided a respondent. That is not the issue before us.

[262] However, we do agree with the principles set out in these cases, that a notice of hearing should not be treated as a pleading in a criminal or civil proceeding, and is not required to follow strict or technical rules of drafting.

[263] The test a notice of hearing must meet is whether it provides sufficient notice to respondents to know the case they have to meet. This Commission has stated that principle in previous cases. In *Blackmont Capital Inc.*, 2011 BCSECCOM 490, the Commission stated (at paragraph 24):

> A notice of hearing is the foundation of hearings before … this Commission. It identifies the alleged misconduct that the respondent has to meet. It establishes the issues to be determined at the hearing. It follows that a panel does not have jurisdiction to determine matters not alleged in the notice of hearing. (Particulars need not be in the notice of hearing, but must relate to an allegation that is in the notice.)

[264] In this case, the respondents argue for an overly strict or technical interpretation of the Further Amended Notice of Hearing. Although the Further Notice Amended Notice of Hearing should have been drafted more clearly, we find the respondents received sufficient notice of the case they had to meet.

[265] First, it is clear from their headings that paragraphs 18 and 42 are summaries of the fraud allegations set out in the Further Amended Notice of Hearing. Details of the individual fraud allegations are set out, under corresponding headings, in paragraphs 9 to 17 in the case of Wheatland, and paragraphs 31 to 41 in the case of Rocky View.

[266] Second, in their opening statements, counsels for the executive director made it clear that they were alleging multiple frauds, not two frauds consisting of multiple parts.

[267] Regarding the allegations relating to Wheatland, in his opening statement counsel stated the following:

> The executive director alleges that by concealing the fact that they transferred these shares for no consideration, Ms. Wong and Soo perpetrated a fraud on investors contrary to section 57(b) of the Act.
>
> By using joint venture funds for their own business endeavors, the executive director alleges that Ms. Wong and Soo perpetrated a fraud on investors in the Wheatland project.
>
> When they were promoting the joint venture to investors, Ms. Wong and Soo made several representations to investors about the cost of the land. They told investors that they calculated the price of a share to investors, $85,000, based on the cost to them, $65,000, plus an additional 23 or so thousand dollars per share for the development.

> The executive director says this was a lie, that Ms. Wong and Soo both knew that it was a lie and the actual consideration for the land was $9.1 million. As a result, they sold shares in the Wheatland project to investors at an inflated price. The executive director alleges *the final count of fraud* against Ms. Wong and Ms. Soo based on these facts. (Emphasis added)
>
> [*Commission hearing transcript February 23, 2015*, pp. 17 and 18]

[268] Regarding the fraud allegations relating to Rocky View, in his opening statement counsel stated the following:

> In addition to that, there's an -- there are allegations of fraud. First of all, there's the allegation of fraud in relation to an inflation of the purchase price of the Rocky View land...
>
> The executive director says that by inflating the purchase price and lying about this fact to investors, the respondents perpetrated fraud contrary to section 57(b) of the Act.
>
> Moving now to the unauthorized mortgage. As mentioned above, the bare trust agreements required that Mrs. Wong and Mrs. Soo obtain written approval of the beneficial owners prior to mortgaging the property.
>
> The executive director alleges that by obtaining an unauthorized mortgage contrary to the bare trust agreements and by using the mortgage proceeds for purposes other than the development of the Rocky View land, they perpetrated fraud contrary to section 57(b).
>
> Further, with respect to the actual development of the land, when promoting the investment, Mrs. Wong and Mrs. Soo withheld key information from investors about potential delays in the development of the Rocky View land.
>
> We say that by withholding information about potential delays from investors, Mrs. Wong and Mrs. Soo perpetrated a fraud contrary to section 57(b).
>
> [*Commission hearing transcript February 23, 2015*, pp. 9, 11-13]

[269] Immediately following the executive director's opening statement, the respondents did not raise an issue with the fraud allegations in the Further Amended Notice of Hearing. Notably, they have not alleged any prejudice flowing from their understanding of the fraud allegations.

[270] We are satisfied that the executive director has made allegations of multiple frauds and is not required to prove each alleged fraud before we can make any finding of fraud.

2. Conduct relating to securities

[271] A finding of fraud under section 57(b) of the Act can only be made if a respondent has engaged in conduct that is "conduct relating to securities".

[272] The sisters argue that even if we conclude that they had misappropriated Wheatland joint venture funds, transferred Wheatland joint venture interests without consideration to their family's benefit, or inflated the Wheatland purchase price and lied about it to investors, we still cannot find a contravention of section 57(b) as those acts are not "conduct relating to securities".

[273] They make a similar argument with respect to the fraud allegations involving Rocky View.

[274] They cited the Commission's recent decision in *Re Inverlake*, 2015 BCSECCOM 348, where the Commission said:

> [90] Further, a contravention of section 57(b) of the Act requires that the conduct in question is "conduct relating to securities".
>
> [91] The executive director says that the deceit relates to the securities of Inverlake in that a share in Inverlake entitled the investor to a beneficial interest in the Inverlake Land and the foreclosure took away that interest.
>
> [92] We do not agree that the meaning of "conduct relating to securities" can be stretched as broadly as the executive director suggest. This deceit occurred years after the involvement in securities by Inverlake investors and it relates to the conduct of Inverlake's business, not to the distribution or other aspects of its securities. We therefore find that it is not conduct relating to securities for the purpose of the Act.

[275] In reply, the executive director argues that section 57 is broadly worded and there is no reference to any temporal aspect. He says we must take a broad, purposive approach to our interpretation, taking into account that one of the primary purposes of the Act is to protect investors.

[276] Whether any conduct is "conduct relating to securities" is a fact-driven determination. We have made this determination as we considered the merits of each fraud allegation.

[277] Having addressed the general arguments raised by the respondents, we now deal with each fraud allegation made by the executive director.

E. Fraud with respect to Wheatland

[278] The executive director alleges that Wong and Soo perpetrated three frauds on the Wheatland investors, as set out in paragraph 5(1)(c) above, contrary to section 57(b) of the Act.

1. First fraud allegation – sale of Wheatland units at inflated price

a) Prohibited act

[279] The executive director alleges that the offer to sell the Wheatland lands by Bob Cavendish Holdings to Wheatland was a sham and the sisters did not pay $19.278 million for the lands. He alleges that the sisters acquired the lands for $9.1 million, lied to investors about the true cost of the lands used to calculate the joint venture subscription price, and sold the joint venture units at an inflated price.

[280] A finding of fraud requires that the executive director prove, as one element of the contravention, that Wong and Soo had committed a deceitful or other prohibited act.

[281] The evidence is clear that one or both of the sisters told at least some investors that they were selling the joint venture units at the sisters' cost of buying these lands.

[282] But to prove deceit or a prohibited act, the executive director must also prove that it was a lie, namely, that the transaction between Bob Cavendish Holdings and Wheatland was a sham, that the sisters did not pay the $19.278 million or that they received some of the $19.278 million.

[283] We do not find credible the following aspects of Wong's testimony if the sisters really believed that they were buying lands from an arms-length third party owner they did not know:

1. Wong did not ask HY why he did not want to buy the Wheatland lands himself when it was "so fast and good".

2. She did not ask HY about his role in helping her procure these lands or what benefits he would get out of it.

3. She made no enquiries about the owner with whom she was negotiating this purchase, albeit indirectly through HY.

4. She made a binding no-subject offer involving a significant sum of money to an arms-length third party with minimal due diligence on the accuracy of the offer, including verification of the legal description of the lands being purchased.

5. Although the sisters did not have enough money for the purchase, they made a binding no-subject all-cash offer to an arms-length third party with minimal assurance on funding. She said that Soo had many friends wanting to invest but they did not discuss actual amounts and Wong did not have a list of potential investors and potential amounts to come up with the $19.2 million purchase price.

6. An arms-length owner agreed to drop a $7.5 million non-refundable deposit and change an all-cash deal to one with a take-back mortgage, all without much negotiations or any consideration paid.

7. Even though she was worried about having enough investor funds to close the purchase, and the elimination of the third deposit was documented, she did not ask to document the change to a vendor-take-back mortgage.

8. She accepted a $17.5 million joint and several vendor-take-back mortgage registered against the entire Wheatland lands when Wheatland was only responsible for less than $3 million.

9. She did not know about the flip even though she and Wong signed various closing documents referencing it.

[284] In this instance, we conclude that it is more likely than not that Wong and Soo were aware of:

(a) the 1264065 offer to Cavendish Investing and the lower purchase price in that offer
(b) the flip, and
(c) that the people behind Bob Cavendish Holdings were associated with the Isle of Mann principals.

That would explain the casual way the sisters dealt with Wheatland's purchase of these lands.

[285] However, we do not have sufficient evidence to conclude that Wheatland's purchase from Bob Cavendish Holdings was a sham or that Wheatland did not pay $19.278 million for the lands.

[286] On the contrary, the executive director entered into evidence the affidavits of the two Isle of Mann principals, filed in BC court proceedings, attesting to the existence of that transaction. One of the principals swore in his affidavit that Wheatland paid the purchase price under that transaction, although his and Wong's testimony differed on which Isle of Mann company received that money.

[287] In addition, the law firm's client ledger for Wheatland during this time shows that $19.278 million in purchase proceeds, less various adjustments and the vendor-take-back mortgage, were deposited into their trust account and held by them "in trust for Bob Cavendish" upon closing.

[288] There is no evidence on who ultimately received the Bob Cavendish Holdings funds from the law firm's trust account. There is no evidence that the sisters received any of this money. There is no evidence that the sisters were principals in Bob Cavendish Holdings.

[289] The fact that the sisters and the Isle of Mann principals were business associates at the time does not necessarily mean that the sisters were involved in Bob Cavendish Holdings or that the transaction was a sham.

[290] The fact that the agreement between Bob Cavendish Holdings and Wheatland was a pre-incorporation contract does not necessarily mean that it was fraudulent and a sham. It is not unheard of for sophisticated business people to enter into contracts using legal entities that were not yet set up.

[291] The fact that Bob Cavendish Holdings never held title to the Wheatland lands or any other real estate in Alberta is irrelevant. The nature of a flip is that the "flipper" does not take title to the flipped lands.

[292] The executive director bears the burden of proof. Although the circumstances are suspicious, we simply do not have sufficient evidence to conclude that it is more likely than not that the transaction between Bob Cavendish Holdings and Wheatland was a sham, or that Wheatland did not pay Bob Cavendish $19.278 million for the lands, or that the sisters received any of the $19.278 million.

[293] Accordingly, we find that the executive director has not established, on a balance of probabilities, that there was a prohibited act with respect to this fraud allegation, and we dismiss this allegation.

2. Second fraud allegation – transfer of joint venture units without consideration

a) Prohibited act

[294] The executive director alleges that the sisters transferred 33.5 Wheatland joint venture units to related companies (owned by their husbands and adult children), worth approximately $2.8 million, without consideration and without the knowledge and permission of investors.

[295] The sisters denied the executive director's allegation.

[296] With respect to the 20 units allocated to the children's companies, we do not find credible Wong's evidence that the children's companies had paid in full for their 20 joint venture units, but later received a refund when they needed money.

[297] Firstly, the respondents did not provide any evidence of the initial payments.

[298] Secondly, Wong portrayed her and Soo's children as adults making independent decisions to invest in Wheatland and other projects, and testified that the children were the ones who asked for refunds to finance their other investments. But the Wong and Soo children were young adults in 2007 and either full-time college students or working. We are not persuaded that they had such independent roles.

[299] Furthermore, Wheatland's financial statements for 2008 to 2010 continued to reflect these family companies holding their joint venture interests without any reference to a repayment.

[300] More significantly, Wong's explanation was contradicted by Soo's daughter who testified at the hearing. We find Soo's daughter to be credible and we prefer her testimony over Wong's.

[301] Thirdly, the court in the BC proceedings stated that the sisters admitted to transferring joint venture units to the benefit of their adult children without consideration.

[302] We also do not find credible Wong's evidence that the husbands' company was shown as the owner of 13.5 units at the suggestion of their accountant so that he could finalize the financial statements. There was no corroborating evidence and we do not see how having unsold units could prevent the completion of the joint venture's financial statements.

[303] We have only Wong's evidence that she never intended to give the 13.5 units to the husbands' company without consideration. We do not find her credible on these points.

[304] We conclude that the sisters allocated 33.5 joint venture units to family companies without consideration.

[305] As stated in *R. v. Currier*, the element of dishonesty in fraud can include the non-disclosure of an important fact.

[306] The fact that joint venture units would be allocated without consideration to related parties to the sisters (who were effectively the promotors of these distributions) was, in our view, an important fact for any reasonable investor to know before they make their decision to invest. The sisters did not disclose to potential investors that important fact before they invested.

[307] That, in our view, was deceitful and a prohibited act for the purpose of fraud.

b) Deprivation

[308] The respondents say the investors were not exposed to any risk of economic loss, since no securities (i.e. certificates) were transferred to the family companies so they were in no position to have transferred the interest, whatever it was, to a third party. The respondents say the fact that the husbands' company never advanced any funds to Wheatland nor received anything in return from Wheatland establishes there was never a risk of economic loss to either Wheatland or the investors.

[309] We disagree. We find that the evidence establishes deprivation. Investors invested with the belief that a payment of at least $63,000 was required to obtain one joint venture unit, and that funds from all unit holders were available to develop the property. Wheatland did not have the use of the $2.8 million that should have been paid by the family companies for their units.

[310] In *R v. Abramson* [1983] B.C.J. No. 1305, which was followed in *Re Streamline Properties* 2014 BCSECCOM 263, the British Columbia Court of Appeal confirmed that the payment of money as part of an investment upon deceit was sufficient to establish deprivation, regardless of any subsequent repayment. Similarly, in this case, we find that investors were deprived, for the purpose of fraud, when they made their investments.

[311] In addition, there was a risk of deprivation to the investors. By allocating joint venture units to the family companies without consideration, the family companies became entitled to a share of the joint venture assets and income and the investors' proportionate interests were diluted. The risk of deprivation arose as soon as the family companies were allocated the joint venture units. When the time comes to distribute the Wheatland assets or profits, the investors would be entitled to receive less than their true proportionate entitlement based on the equity paid.

[312] The fact that the subscription price for the related company units was paid later with interest does not mitigate the deprivation or risk of deprivation at the time of the prohibited act. See: *Re Streamline Properties.*

c) Sisters' subjective knowledge

[313] The sisters had subjective knowledge of the prohibited act. The sisters prepared the joint venture agreement and allocated the 33.5 joint venture units to their family companies. They knew their families had not paid for the 33.5 joint venture units. They knew they did not tell investors their family companies were given or would be given units without any consideration.

[314] The sisters had subjective knowledge that the prohibited act could have as a consequence the risk of deprivation. The sisters knew that the joint venture did not have the use of the $2.8 million that was the subscription price for the 33.5 units. They applied for mortgage financing. They directed the use of joint venture funds and mortgage proceeds. They knew better than anyone the funding needs for Wheatland's development and the

additional money Wheatland had to borrow without the $2.8 million their family should have paid for their units.

[315] The sisters would have known that by allocating joint venture units to their family without consideration, the investors would be entitled to less than their true proportionate share.

[316] As stated in *Theroux*, the fact that the sisters may have hoped the deprivation would not take place, or may even have felt there was nothing wrong with what they were doing, provides no defence.

d) Conclusion

[317] By transferring Wheatland joint venture units to related companies without consideration, without the knowledge and permission of investors, we find the sisters perpetrated fraud, contrary to section 57(b) of the Act.

3. Third fraud allegation – using investors' money for own benefits

a) Prohibited act

[318] The executive director alleges that the sisters took joint venture money to make at least $5.2 million in loans to themselves and related companies, for purposes unrelated to the Wheatland joint venture, without the prior knowledge or permission of investors.

[319] The sisters admit that they took loans in excess of $5.3 million from Wheatland to fund their non-Wheatland investments. They did not have investors' approval to make these loans.

[320] The purpose of an investment and the use of funds obtained in a financing are important facts for any reasonable investor to know before making their decision to invest. When the sisters marketed the Wheatland joint venture units, they told investors that the purpose of the joint venture and their investments was to buy and develop the Wheatland lands. Wheatland investors bought joint venture units on that basis. To then use the investors' money or joint venture assets for the sisters' personal benefit fell outside of that purpose and was deceitful.

[321] The sisters say that those loans made before the September 2008 credit market meltdown were not objectively dishonest because they were at interest rates higher than bank rates and Wheatland did not need the cash at that time. Therefore, the sisters cannot be said to have the requisite dishonest intention as required by *Theroux* when they believed that they were making the loans to advance the interest of Wheatland.

[322] We do not accept that reasoning. It is not appropriate to compare the related company loans' interest rates to bank rates since the related company loans would have been more risky than bank deposits. Furthermore, Wheatland obtained a $5 million mortgage loan in February 2008 while $2.3 million in related company loans were outstanding. That mortgage loan could have been reduced if the related loans were repaid.

[323] That the sisters could not finance other projects because they had personally guaranteed Wheatland's financing, even if true, is not relevant to fraud under section 57(b).

[324] As we have concluded, to use investors' money or joint venture assets for the personal benefit of the sisters, without investors' permission, was deceitful. But was it "conduct relating to securities" as required by section 57(b)?

[325] The respondents say that the loans made "years after the joint venture units were distributed" do not amount to "conduct relating to securities". They cited the Commission's decision in *Re Inverlake* 2015 BCSECCOM 348.

[326] The respondent Inverlake held certain lands as bare trustee for investors. Inverlake stopped making mortgage payments at some point in the years following its acquisition of the lands and the mortgagee foreclosed on the lands. Inverlake did not tell investors about the foreclosure of the lands, which was a breach of Inverlake's obligation under the bare trust agreement.

[327] The executive director alleged that such failure was fraud by Inverlake's director under section 57(b). He said the deceit related to the securities in Inverlake in that a share in Inverlake entitled the investor to a beneficial interest in the lands and the foreclosure took away that interest. The panel found that the deceit was not "conduct relating to securities" for the purpose of section 57(b). The panel said the deceit occurred years after the investment in securities by investors and it "relates to the conduct of Inverlake's business, not to the distribution *or other aspects of its securities*". (emphasis added)

[328] The ordinary meaning of the words "relating to" in section 57(b) is very broad. These words do not refer to any moment in time or to any transaction (such as a trade) in relation to securities. In contrast, other sections of the Act (such as section 151(1)(c)) refer to matters "relating to *trading* in securities" (emphasis added).

[329] We conclude that "conduct relating to securities" is not limited to conduct relating to the distribution of securities and could refer to conduct relating to other aspects of securities. This interpretation is consistent with the *Inverlake* decision.

[330] In this case, we have concluded that the source of funds for two of the related company loans was investors' subscription proceeds.

[331] Using investors' subscription proceeds from the purchase of Wheatland joint venture units for a different purpose than represented to investors was clearly conduct that directly related to those joint venture units. Therefore, it was conduct relating to securities.

[332] We find the making of the two related company loans totalling $1,208,000 to be a prohibited act for the purpose of fraud.

[333] We do not have sufficient evidence to make a finding on the source of funds for the remaining related company loans. As a result, we do not have sufficient evidence to determine if the making of those loans was conduct relating to the Wheatland joint venture units. We find the source of funding is relevant, in the circumstances of this case, to making a determination of whether the misappropriation was conduct relating to any aspect of the Wheatland joint venture units. We do not agree with the executive director that "conduct relating to securities" is so broad such that the misappropriation of any joint venture money would be automatically "conduct relating to securities". For example, if the source of the misappropriated funds had been a loan to Wheatland unsecured by the Wheatland lands, we have difficulty seeing how that is conduct relating to the Wheatland joint venture units.

[334] We therefore dismiss the allegation of fraud with respect to those remaining related company loans.

b) Deprivation

[335] As stated earlier, the payment of money as part of an investment upon deceit is sufficient to establish deprivation. See: *Re Streamline Properties Inc.*, 2014 BCSECCOM 263, paragraph 41.

[336] There was also a risk of deprivation with respect to the two related company loans. Wheatland investors would suffer a loss if these loans were not repaid. The fact that these loans were interest bearing did not reduce the risk of deprivation. The fact that these loans were subsequently repaid with interest did not reduce the risk of deprivation when the loans were made.

[337] There was actual deprivation. Wheatland itself needed financing while these loans were outstanding. Wheatland's mortgage loans could have been reduced if these loans were not made. Wheatland had to pay higher interest costs and incremental mortgage fees, as estimated by Grant Thornton. The investors' pecuniary interests were directly tied to the financial fortunes of Wheatland.

c) Sisters' subjective knowledge

[338] The sisters had knowledge of the prohibited act and that a consequence was the risk of deprivation. They made the related company loans for their other projects and they obtained mortgage financing for Wheatland. They told investors that the purpose of their investment was to buy and develop the Wheatland lands. The sisters knew they used investors' proceeds for an unrelated purpose. They knew that if these loans were not repaid, Wheatland would lose money and its investors would be deprived since the investors' pecuniary interests were directly tied to the financial fortunes of Wheatland.

d) Conclusion

[339] By using investors' subscription proceeds for personal benefits, we find the sisters perpetrated fraud, contrary to section 57(b) of the Act.

F. Fraud with respect to Rocky View

[340] The executive director alleges that, contrary to section 57(b) of the Act, Wong and Soo committed fraud in four instances on the Rocky View investors as set out in paragraph 5(2)(d) above.

1. First fraud allegation – sale of 1300302 and D&E Arctic joint venture units at inflated price

a) Prohibited act

[341] The executive director alleges that Wong and Soo sold 1300302 and D&E Arctic joint venture units to investors at an inflated price.

> In particular, he alleges that Wong and Soo, using LCco as their nominee, acquired the right to purchase the Rocky View lands at $5,540,000 from an unrelated third party owner. They then caused LCco to sell the Rocky View lands to 1300302 and D&E Arctic at an "inflated" price of $10,271,300 in an artificial transaction. The executive director alleges that Wong and Soo promoted the 1300302 and D&E investments based on the higher price and lied to investors that it was the true cost of the lands when the actual cost was $5,540,000.

[342] We find the evidence from investors in this regard to be consistent and credible, and we prefer their testimony over that of Wong's. We find that the sisters led investors to believe that the sisters had acquired the Rocky View lands for $10,271,300 and they were transferring the lands to the Rocky View joint ventures at their cost.

[343] Firstly, Wong claimed that the sale from LCco to the Rocky View nominees was a real transaction and LCco was paid the $10,271,300. However, we do not have any corroborating evidence of such payment.

[344] Secondly, in buying and then selling the Rocky View lands, LCco at all times acted as a nominee for the sisters and their families. Therefore, it was the sisters and their families who bought the Rocky View lands from the third party owner for $5,540,000 and sold the lands to the Rocky View nominees for $10,271,000. We find that the true cost to the sisters of the Rocky View lands was $5,540,000 and not $10,271,000.

[345] By directing LCco and the Rocky View lands to enter into a sale and purchase of the lands at $10,271,300, the sisters created a "notional price" that they then used to support the sale of joint venture units at the higher price. In doing so, the sisters inflated the purchase price and lied to investors.

[346] That was deceitful and a prohibited act for the purpose of fraud.

b) Deprivation

[347] The respondents say there was no evidence of deprivation because they say the Rocky View lands were worth $65,000 per unit at the time.

[348] We disagree. As stated earlier, the payment of money as part of an investment upon deceit is sufficient to establish deprivation. See: *Re Streamline Properties Inc.*, 2014 BCSECCOM 263, paragraph 41. In this case, investors' payments to 1300302 and D&E Arctic for their investments, based in part on the sisters' statement that the actual cost for the Rocky View lands was $10,271,300, constitute deprivation for the purpose of fraud.

c) Sisters' subjective knowledge

[349] The sisters had subjective knowledge of the prohibited act and that it could have, as a consequence, a risk of deprivation to investors.

[350] They were in charge of all the real estate transactions, of LCco and the promotion and sale of Rocky View joint venture units. They knew what was paid for each transaction and what was said to investors. They knew the actual cost to them of the Rocky View lands was not $10,271,300 and investors were thereby deprived of their money.

d) Conclusion

[351] By selling 1300302 and D&E Arctic joint venture units at an inflated price and lying about it to investors, we find the sisters perpetrated fraud, contrary to section 57(b) of the Act.

2. Second and third fraud allegations – obtaining an unauthorized mortgage and using it for purposes other than Rocky View development

a) Prohibited act

[352] The executive director alleges that the sisters obtained a $1.65 million mortgage on the Rocky View lands, without obtaining investors' approval, and used the proceeds for personal purposes.

[354] Without question, the sisters obtained a $1.65 million mortgage without authorization and in contravention of the Rocky View bare trust agreements. The evidence is also clear that the sisters used the proceeds of that mortgage for purposes unrelated to the Rocky View lands.

[355] As noted above, the sisters argue that what they did was not inappropriate, since the amount of the mortgage proceeds was less than the vendor-take-back mortgage and Rocky View expenses paid by their family companies.

[356] But the amount advanced under the $1.65 million mortgage and used by the family exceeded the outstanding loans owed by Rocky View to the family at any one time. That means a portion of the Rocky View joint venture funds was used for the benefit of the sisters' family.

[357] The purpose of an investment and the use of funds obtained in a financing are important facts for any reasonable investor to know before making a decision to invest. When the sisters marketed the 1300302 and D&E Arctic joint venture units, they told investors that the purpose of the joint ventures and their investments was to buy and develop the Rocky

View lands. Investors bought joint venture units on that basis. Using the joint ventures' funds for a different purpose is therefore deceitful. But is it "conduct relating to securities" as required by section 57(b)?

[358] The Rocky View lands were the key (if not the sole) asset of the 1300302 and D&E Arctic joint ventures. It was what investors invested in when they bought joint venture units. The development of those lands was the joint ventures' only purpose. The respondents took the asset that was the very thing that investors invested in and used it (by mortgaging it and using some of the proceeds) for a completely different purpose. In our view, that conduct was directly related to the very purpose of the 1300302 and D&E Arctic joint venture units. It was conduct related to those securities.

[359] We therefore conclude that using mortgaged proceeds for the benefit of the sisters' family was a prohibited act for the purpose of section 57(b).

[360] To be clear, the amount of the fraud is the amount of mortgage proceeds that exceeded the amounts owed by Rocky View joint ventures to the sisters and their family at the time. Although it was unauthorized and a breach of the bare trust agreements to mortgage the lands, in our view, it was not a prohibited act under section 57(b) to do so and use the proceeds to repay the sisters and their family for money they had spent on Rocky View's development. That is because the sisters' and their family money repaid from those mortgage proceeds were used to pay expenses to develop the Rocky View lands, which was the purpose of the Rocky View joint ventures.

b) Deprivation

[361] As stated earlier, the payment of money as part of an investment upon deceit is sufficient to establish deprivation. See: *Re Streamline Properties Inc.*, 2014 BCSECCOM 263, paragraph 41.

[362] There was also a risk of deprivation. Rocky View investors would suffer a loss if the family loans were not repaid, since the joint ventures remained obligated to pay back the mortgage loan to the mortgagee. The investors' pecuniary interests were directly tied to the financial fortunes of the joint ventures.

c) Sisters' subjective knowledge

[363] The sisters had knowledge of the prohibited act. They were in control of the land development, the payment of joint venture expenses, the mortgaging and the use of joint venture funds and mortgage proceeds. They made all the decisions. They would have known the outstanding amounts owed by Rocky View to their family at any one time. They told investors that the purpose of their investments was to buy and develop Rocky View lands. The sisters knew they did not have investors' permission to mortgage the Rocky View lands and use the mortgage proceeds for their personal benefit.

[364] The sisters had subjective knowledge that a consequence of the prohibited act is the risk of deprivation to investors, since the sisters were the ones who made the family loans and obtained the mortgage financing. They knew that the joint ventures remain obligated to repay the mortgage loan even if the family loans were not repaid.

d) Conclusion

[365] By using mortgage proceeds for purposes other than the Rocky View development, we find the sisters perpetrated fraud, contrary to section 57(b) of the Act.

3. Fourth fraud allegation – withholding information about potential delays in development

a) Prohibited act

[366] The executive director argues that the sisters should have told investors of the potential delays alluded to in the IBI memos from June 27 onward.

[367] This was a longer term development that required rezoning. The projections given by the sisters to investors suggested that Rocky View was a five-year project. We expect an investor, even one who is unsophisticated, could reasonably anticipate some measure of delays associated with rezoning and timing cannot be guaranteed.

[368] In reviewing the IBI memos of June 27 and July 10, we are not persuaded that the potential delays referenced in them were so certain and significant that it required the sisters to inform investors.

[369] The December 12 memo, on the other hand, made clear that rezoning was speculative by that time. Not only did that call into question the timing of the project and how long an investor would have to commit funds before seeing a return, it called into question the entire viability of the development and the prospect of receiving a return on investment based on a rezoning envisaged by the respondents. The December 21 memo gave notice that applications were being put on hold. These were important facts that a reasonable investor would need to know before making an informed investment decision.

[370] As stated in *R. v. Currier*, non-disclosure of an important fact can satisfy the dishonest element of a fraud allegation.

[371] The December 12 memo indicates that IBI had told Wong of the speculative nature before December 12, but we have no evidence as to when they first told Wong of this. Therefore, we have only considered distributions made after December 12 for the purpose of this fraud allegation.

[372] JZ was the only investor who completed her subscription after the December 12 memo. She invested $65,000 in the D&E Artic joint venture after December 21. We therefore find that the sisters were dishonest to JZ with respect to her investment by failing to disclose the December 12 and 21 memos before JZ made the investment, which is a prohibited act for the purpose of fraud.

b) Deprivation

[373] JZ suffered deprivation when she paid money to invest in the D&E Artic joint venture. See *Re Streamline*, paragraph 41. There was also a risk of deprivation to JZ's investment, since an inability to rezone and develop the lands in the time frame or manner described to her could significantly affect the value of the lands and the value of JZ's investment.

c) Sisters' subjective knowledge

[374] Wong testified that she kept Soo apprised of important events in both the rezoning and sale of joint venture units. We therefore attribute Wong's knowledge to Soo. We find that Wong and Soo had subjective knowledge that the December 12 and 21 memos were not disclosed to JZ. They were the recipients of the IBI memos and were aware of its content. They sold the joint venture units to JZ and described the project to her, without informing her of the potential significant delays or speculative rezoning suggested by the two December memos.

[375] Wong and Soo had subjective knowledge that a consequence of the prohibited act was to put JZ's pecuniary interest at risk. Wong acknowledged that the IBI correspondence about potential delays was important, which is consistent with her testimony about the importance of rezoning potential when deciding to invest in land.

[376] The sisters explained to investors how the lands would appreciate as rezoning and development progress, and they would know that the inability to rezone and develop these lands as they described could significantly affect the value of the lands and the value of JZ's investment.

d) Conclusion

[377] By withholding information about potential delays in development, we find the sisters perpetrated fraud on investor JZ, contrary to section 57(b) of the Act.

III. SUMMARY OF FINDINGS

[378] We have found that:

1. with respect to contraventions of section 61,

    a) Wheatland, Wong and Soo breached section 61 with respect to distributions totalling $2,000,000 in Wheatland securities;
    b) 1300302, Wong and Soo breached section 61 with respect to distributions totalling $2,785,000 in 1300302 securities; and
    c) D&E Arctic, Wong and Soo breached section 61 with respect to distributions totalling $1,105,000 in D&E Arctic securities;

2. with respect to contraventions of section 57(b), Wong and Soo each breached section 57(b) and committed fraud when they:

a) with respect to Wheatland:
   - transferred Wheatland Joint Venture units without consideration to the benefit of their adult children and their husbands; and
   - misappropriated $1,208,000 from the Wheatland Joint Venture; and

b) with respect to Rocky View:
   - inflated the purchase price of the Rocky View lands and lied about it to investors;
   - used mortgage proceeds for purposes other than the development of the Rocky View lands without the consent of investors; and
   - withheld information about potential delays in Rocky View's development from one investor.

[379] We dismiss the executive director's allegations that Wong and Soo sold Wheatland joint venture units at an inflated price.

[380] Given our findings of direct contraventions of section 61 by Wong and Soo, we find it is not necessary to make further findings against them for the same contraventions of section 61 under section 168.2(1).

IV. SUBMISSIONS ON SANCTIONS

[381] We direct the parties to make their submissions on sanction as follows:

By July 21, 2016	The executive director delivers submissions to the respondents and to the secretary to the Commission.
By August 18, 2016	The respondents deliver response submissions to one another, the executive director and to the secretary to the Commission. Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).

By Sept. 1, 2016 The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

June 16, 2016

For the Commission

Audrey T. Ho
Commissioner

Judith Downes
Commissioner