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

Citation: Re Durkin, 2023 BCSECCOM 37 Date: 20230123

Timothy Craig Durkin and SHH Holdings Limited

Panel	Gordon Johnson	Vice Chair
	Judith Downes	Commissioner
	Karen Keilty	Commissioner
Hearing dates	May 16 – 19, 2022	
Submissions Completed	July 22, 2022	
Date of Findings	January 23, 2023	
Appearing		
Jorie Les	For the Executive Director	
Timothy Craig Durkin	For himself and SHH Holdings Limited	

Findings

I. Introduction

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

[2] In this proceeding the executive director alleges that:

(a) Timothy Craig Durkin (Durkin) and SHH Holdings Limited (Holdings) (the Respondents) defrauded a BC investor (Investor), who invested $1 million in Holdings.

(b) Between December 2015 and March 2016 the Respondents raised $1 million from the Investor through a distribution of Holdings' securities.

(c) The Respondents deceived the Investor by falsely representing that Holdings, through a subsidiary, owned the Sooke Harbour House hotel (Hotel) when, in fact, Holdings had no ownership interest in the Hotel.

(d) By engaging in this conduct, the Respondents contravened section 57(b) of the Act.

(e) As a director of Holdings, Durkin authorized, permitted, or acquiesced in Holdings' contravention of section 57(b) the Act and therefore also contravened this provision by operation of section 168.2 of the Act.

[3] The executive director called one witness, an investigator for the Commission. Mr. Durkin appeared for himself and for Holdings. He conducted a cross-examination of the investigator, testified and provided written submissions.

II. Factual Background, Nature of Alleged Misrepresentations

[4] The Hotel is a well-known tourist destination in Sooke, British Columbia. The Hotel was owned by a corporation, the shares of which (Hotel Shares) were owned by the family which had operated the Hotel for many years and had made it popular (Original Shareholders). By 2014 the Hotel was showing some signs of decline. By that time the revenues earned at the Hotel had diminished significantly from the Hotel's peak years and the mortgage on the Hotel property had fallen into arrears. By spring of 2014 the Original Shareholders were considering the option of selling the Hotel Shares.

[5] Durkin is a resident of Sooke, BC.

[6] In the spring of 2014 Durkin and his business associate spoke with the Original Shareholders about the potential that they would act as brokers to find a buyer for the Hotel. Durkin conducted some due diligence related to the value of the Hotel and what changes would be required to the Hotel's facilities and operations in order to improve the financial performance of the Hotel. In the course of their inquiries Durkin and his business associate became interested in buying the Hotel themselves. They incorporated Holdings as a BC company with a view to potentially buying the Hotel. They developed plans for physical and operational changes to the Hotel, including renovations and the addition of a spa. They described the planned improvements to an appraiser who prepared an appraisal assessing the value of the Hotel as it would exist after certain improvements were added. After some negotiations with the Original Shareholders, Holdings entered into an agreement executed October 15, 2014 (Share Purchase Agreement) to buy the Hotel Shares.

[7] The Share Purchase Agreement required Holdings to make a number of payments: within 5 business days of the date of execution of the Share Purchase Agreement, Holdings would pay $182,135 to cover the Hotel's mortgage arrears; 5 days prior to the closing date or November 15, 2014, whichever was earlier, Holdings would pay $100,000 as a deposit and on the closing date Holdings would pay a further $1,900,000 and issue $375,000 in shares of Holdings and become the owner of the Hotel Shares.

[8] Holdings did not make any of the payments required under the Share Purchase Agreement. Durkin reported to the Original Shareholders that the mortgagee insisted on payment of the principal amount of the mortgage in full and would not accept a partial payment to bring the mortgage into good standing. Based on various requests and explanations given by Durkin the Original Shareholders extended the closing date multiple times. However, Holdings never made any payments and never owned the Hotel Shares.

[9] Another company of which Durkin was a director, SHH Management Limited (Management), was utilized by Durkin to operate the Hotel and to implement improvement plans. Through Management, Durkin and his business associate assumed operational control of the Hotel. They made a number of changes to how the Hotel was operated. Some improvements to operational results followed and Durkin advanced plans to develop physical improvements to the Hotel.

[10] In or around the late spring of 2015 Durkin met the Investor when the Investor visited the Hotel. The Investor was a citizen of China who was seeking to immigrate to Canada. The Investor had invested funds in a spa business in the Sooke area and the Investor was considering making further investments in the region. The Investor was hoping to structure her investments to support her application under an immigrant investor program. Durkin identified that the Investor's spa business might collaborate with the Hotel as the potential operator of the spa facility planned for the Hotel. He also recognized that the Investor was a potential investor in the Hotel.

[11] There is a dispute about the details of what discussions took place between the Investor and Durkin during their initial discussions. The Investor did not speak English well. Much of the discussion between Durkin and the Investor was translated between them by the Investor's realtor. In any event by the summer of 2015 the Investor was considering making an investment in the Hotel. Discussions followed between the Investor's representatives and Durkin towards that outcome.

[12] In the course of the discussions towards a possible investment by the Investor into the Hotel Durkin made the following representations:

(a) In an email to the Investor's realtor on June 30, 2015, Durkin stated that Holdings "… owns 100% of the outstanding and issued share capital of Sooke Harbour House Inc., the operating company (June 30, 2015 Representation).

(b) In an email to the Investor's accountant on September 1, 2015, Durkin stated that "[o]n an asset equivalency basis Holdings paid $6.4 million in November of 2014" for the purchase of Sooke Harbour House Inc. (September 1, 2015 Representation).

(c) In an email to the Investor's lawyer on October 13, 2015, Durkin stated that Holdings had "[a]lready acquired" the shares in Sooke Harbour House Inc. (October 13, 2015 Representation).

[13] Durkin sent an email to the Investor's realtor on August 28, 2015. That email indicates, and Durkin testified that the email attached a draft of what became the December 9, 2015 subscription agreement outlined below in paragraph [15], and an unsigned memorandum of understanding indicating that Holdings had "entered into an agreement" to acquire the Hotel Shares.

[14] On December 9, 2015 the Investor's company entered into a subscription agreement with Holdings. The subscription agreement provided that the Investor's company would purchase 40,000 shares in Holdings at a price of $50 per share for a total purchase price of $2 million. The subscription agreement, which defined Holdings as "the Corporation", contained the following provision which is referenced below as the December 9, 2015 Representation:

> **3.3 Subsidiary**
>
> The Corporation holds legal and beneficial interest in all issued and outstanding shares in the capital of Sooke Harbour House Inc. (the "Subsidiary"), which owns and operates a 28 room hotel located at 1528 Whiffin Spit Road, Sooke, British Columbia, Canada.

[15] Durkin drafted the subscription agreement and Durkin signed the subscription agreement on behalf of Holdings. The Investor signed that agreement on behalf of her company.

[16] The Investor's company entered into a promissory note agreement with Holdings dated December 9, 2015, which provided that it would immediately pay $500,000 towards the purchase price of the Holdings shares, and would pay the remaining $1.5 million by way of a promissory note due on February 28, 2016.

[17] Holdings issued two share certificates in the name of the Investor's company dated December 9, 2015: certificate #004 for 10,000 shares and certificate #005 for 30,000 shares. Durkin signed both share certificates.

[18] The Investor's company advanced a total of $1 million of the purchase price due under the subscription agreement as follows:

- $250,000 by bank draft to Management on December 12, 2015;
- $250,000 by cheque to Management on December 18, 2015; and
- $500,000 by cheque to Management on March 1, 2016.

[19] The funds of the Investor's company were deposited into one of Management's bank accounts. The funds were subsequently spent and were not recovered by the Investor or her company.

[20] Various litigation followed between the Original Owners, Holdings, the Investor and some third parties. In the course of the litigation, the British Columbia Supreme Court in separate proceedings made some findings of fact and some determinations regarding credibility which were highly unfavorable to Durkin and Holdings.

III Determinative Issue

[21] The executive director submits that each of the June 30, 2015 Representation, the September 1, 2015 Representation, the October 13, 2015 Representation and the December 9, 2015 Representation was a misrepresentation and was fraudulent. Neither Durkin nor Holdings deny making those representations or suggest that those representations were accurate in terms of who owned the Hotel Shares at the moment the representations were made. Durkin's evidence, in summary, is that the Investor's primary interest was to ensure that her investment in the Hotel would support her application under the immigrant investor program and that many of the steps taken by Durkin were designed to assist the Investor to meet the requirements of that immigration program. Durkin asserts that at all relevant times he made it clear to the Investor, especially by delivery of the unsigned memorandum of agreement sent to the Investor's advisors, that Holdings did not yet own the Hotel Shares. Durkin says it was clear that any representation about ownership of the Hotel Shares reflected the situation which would exist at the time of closing of the Share Purchase Agreement. Durkin argues that the Investor was not misled and that Durkin had no intent to mislead her.

[22] Durkin's factual position, properly placed in the appropriate legal context, focuses this proceeding on one primary issue: were the representations in question deceitful? We provide our conclusion on that primary issue, and on some related sub-issues, below.

IV Applicable Law

A. Standard of Proof

[23] 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.

[24] The Court also held that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

Definition of Security

[25] 66. Section 1(1) of the Act defines "security" to include:

> (a) a document, instrument or writing commonly known as a security,
> (b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person,
> (c) a document evidencing an option, subscription or other interest in or to a security, and
> (d) a bond, debenture, note or other evidence of indebtedness, share, stock..."

Fraud

[26] At the relevant time (December 2015), Section 57(b) stated:

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

[27] In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, the Court cited the elements of fraud from *R. v. Theroux*, [1993] 2 S.C.R. 5 at paragraph 27:

> …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).

[28] As outlined in *Theroux* at para.43[1], the requisite *mens rea* for fraud can be inferred from the circumstances and is not negated by an honest belief that the conduct is not dishonest, a hope that no deprivation will occur, or a belief that it will all work out in the end.

Liability under Section 168.2

[29] 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

[1] R. v. Theroux, [1993] 2 S.C.R. 5

also contravenes the same provision of the Act, if that individual "authorizes, permits, or acquiesces in the contravention."

[30] There have been numerous Commission decisions that have considered the meaning of the terms "authorize, permit or acquiesce." In sum, these decisions require that the respondent had the requisite knowledge of the corporate contraventions and the ability to influence the actions of the corporate entity through action or inaction.

IV. Positions of the Parties

A. Respondents' Position

[31] The Respondents assert that when Durkin and his associate took over management of the Hotel, the Hotel was run down and failing. The Respondents assert that they took measures, including costly measures, to improve the Hotel and its financial prospects.

[32] The Respondents assert that many events beyond their control hindered their efforts to improve the Hotel and to complete the purchase under the Share Purchase Agreement. Among the events they allege were hindrances were unreasonable positions taken by the lender, the commencement of legal claims by third parties claiming an ownership interest in the Hotel, bad conduct by the Original Shareholders and bad conduct by the Investor. Durkin's oral testimony and many of the exhibits introduced by him document some aspects of the events he described.

[33] Turning specifically to the alleged misrepresentations, Durkin's explanations in his testimony and submissions were to the effect that when he first met the Investor at the Hotel there was a discussion of the operation of the spa and the Investor was seen as one of many potential investors in the Hotel. Durkin testified that, contrary to the affidavit evidence of the Investor, he made no effort at that initial meeting to solicit an investment from the Investor. Negotiations followed which addressed various elements of the proposed investment and involved various advisors of the Investor over a period of many months.

[34] Durkin's evidence regarding the June 30, 2105 representation is that the entire communication, when read in context, reflected what the ownership situation would become upon the closing of the Share Purchase Agreement. Durkin asserts that when read in that manner the representation he made was not false and he did not believe it would mislead the Investor.

[35] Durkin's evidence regarding the subsequent representations is that they all must be read in light of the terms of the memorandum of understanding which Durkin emailed to the Investor's realtor on August 28, 2015. That document includes the statement that "the Company (Holdings) has entered into an agreement to acquire 100 percent of the issued and outstanding share capital of…" the company which owned the Hotel. Durkin argues that this disclosure clarified the true situation regarding ownership of the Hotel Shares and confirmed that all subsequent representations about ownership were representations about the situation as it would exist after the Share Purchase Agreement closed.

[36] Durkin also testified that the Investor's lawyer negotiated the detail of the subscription agreement on the basis that that agreement would be a "closing document", meaning that the representations within the document were intended to be true at the time of closing of the Share Purchase Agreement and not necessarily before.

[37] Durkin testified that a further copy of the memorandum of understanding referencing the true situation regarding ownership of the Hotel Shares was emailed to the Investor's realtor on December 14, 2015 at a moment when the Investor was collecting documents related to her qualification for recognition as an immigrant investor. Durkin points to his re-delivery of the memorandum of understanding to reinforce his position that, regardless of what the Investor said later, the Investor was aware of the true picture. Implicitly, Durkin argues that the Investor would have objected at the time if the substance of the memorandum of understanding had been a surprise to the Investor.

B. Executive Director's Position

[38] The executive director relies on the evidence of the Investor, given both in affidavits sworn in the course of various litigation in the Supreme Court of British Columbia and during the Investor's interview with Commission investigators, to the effect that the Investor had been told verbally by Durkin that Holdings owned the Hotel at all relevant times. The Investor denies having seen the memorandum of understanding or any documents which indicated otherwise.

[39] The executive director addresses Durkin's evidence to the effect that the Investor and her advisors knew the true ownership structure by questioning why Durkin would incorrectly describe the ownership of the Hotel Shares except to create a false impression for the Investor. Further, the executive director notes that the October 13, 2015 Representation by Durkin to the Investor's lawyer that the Hotel Shares had already been acquired was in response to a question from that lawyer about the status of the Hotel Shares. The executive director argues that this contradicts any suggestion Durkin could have believed there was a shared view that his statements about ownership of the Hotel Shares should reflect the situation which would exist after the Hotel Share Purchase Agreement closed.

[40] The executive director asserts that all elements of fraud have been established against both Respondents and that Durkin, as the individual who directed all steps taken on behalf of Holdings and as a director of that company, should be personally liable under section 168.2 of the Act.

[41] The executive director asserts that the extensive review provided by Durkin of the history of his relationship with the Hotel was intended to distract from the specific allegations made against Durkin and Holdings in the notice of hearing. The executive director asserts that very little of Durkin's evidence actually explained why Durkin said what he said to the Investor's advisors at the relevant times.

[42] The executive director asserts that in assessing Durkin's credibility in this proceeding we should rely upon the credibility findings against Durkin which have been expressed in the decisions which have emerged to date in the various litigation which has occurred in relation to the Hotel.

VI. Analysis and Conclusions

[43] Durkin introduced into the record a considerable body of evidence about the conduct of others and about the events which occurred long after the period when the alleged misrepresentations were made. Some of that evidence was useful as context but in general the evidence was not relevant to the allegations in the notice of hearing. For example we do not find it necessary or even helpful to determine whether the Investor was primarily motivated by a desire to qualify for the immigration program she was applying under, whether Holdings had good justifications to breach the Share Purchase Agreement or whether the Original Shareholders should have conducted themselves differently. Our focus is on the specifics of what is alleged in the Notice of Hearing.

[44] Evidence was introduced about the findings of Justices of the British Columbia Supreme Court in separate proceedings relating to Durkin's conduct and credibility. Durkin suggests that those findings, which are quite critical of him, might have been different if he had been permitted to properly prepare his case for court and to introduce as exhibits all of the documents he had hoped to introduce. It is not our role to second guess the fairness of the proceedings before the Court or the findings of Justices of the Supreme Court of British Columbia. At the same time, we agree with Durkin that we need to make our own findings regarding the allegations made in the notice of hearing and we should do so based upon the evidence introduced in this proceeding. We also accept that a finding that someone has acted improperly in one situation does not establish that the same person committed the particular misconduct alleged in this particular proceeding.

[45] While it may be appropriate for us to be influenced by strong comments made by Supreme Court Justices about Durkin's credibility, for reasons set out below it was not necessary for us to rely on these credibility findings in order to reach our conclusions here. We find that we have sufficient clear, contemporaneous written evidence to make all necessary factual findings without delving into the relative credibility of Durkin and the Investor or her advisors. Where, below, we do not accept Durkin's explanations it is not because we are preferring the evidence of other witnesses which was provided to us by way of affidavit or interview transcript. Instead, our focus is on what Durkin must have known from the context at the time the representations were made and the words which Durkin chose to use in response. By doing so in the context of the requirement for proof on a balance of probabilities we are able to properly reach findings regarding what intention accompanied the making of the representations alleged in the Notice of Hearing.

[46] Durkin and the Investor had some early discussions in the late spring of 2015. Durkin testified that during those discussions he informed the Investor that Holdings did not at that moment own the Hotel Shares. The Investor's evidence is to the contrary.

[47] The June 30, 2015 Representation stating that Holdings owned 100% of the Hotel Shares followed shortly after that early discussion. The June 30, 2015 Representation is embedded in a larger exchange of questions and answers exchanged between Durkin and the realtor for the Investor. Some of the information provided by Durkin is information about the then current status of the Hotel and the proposed transactions, some of the information provided by Durkin is prospective. The question asked by the realtor which led to the June 30, 2015 Representation was "for the different stages of investment, what would her percentage ownership be and how is it calculated". The relevant portion of Durkin's response is that "she would receive 40,000 class A voting shares in (Holdings) who in turns owns 100% of the issued and outstanding share capital of (the company which owned the Hotel). The reference in the email to different stages and use by Durkin of prospective language such as "she would receive" is notable and can be read consistently with Durkin's explanation that, in his mind at least, the representation related to a future stage and therefor there was no intention to deceive the Investor.

[48] We did not receive any evidence from the Investor's realtor regarding how she personally understood the June 30, 2015 Representation or how she explained Durkin's answer to the Investor. Given Durkin's sworn evidence, the fact that the Investor had limited skills with the English language and would have looked to her advisors for explanations, and the absence of evidence from witnesses who could have explained further we are unable to conclude that the executive director has proven this allegation to the required standard of proof. In our view it is equally likely as not that Durkin believed all parties to the June 30, 2105 Representation understood that representation referred to a future state and not to the ownership status of the Hotel Shares at the moment the representation was made.

[49] On August 28, 2015 (a Friday) Durkin sent the email which we have described and on which Durkin places so much emphasis. Durkin testified that the draft subscription agreement and the memorandum of understanding were attached to the email. The email was sent to the Investor's realtor and although the Investor asserts that she did not see the memorandum of understanding which Durkin says was attached, there is no evidence which contradicts Durkin's evidence about having sent the email or about what documents were attached. As we have noted, the memorandum of understanding indicated that Holdings intended to acquire the Hotel Shares and the draft subscription agreement indicated that Holdings owned the Hotel Shares.

[50] Some of the detail contained in the memorandum of understanding and the subscription agreement which Durkin delivered is relevant to an understanding of what happened next. As outlined in paragraph 4, the subscription agreement contemplated that the Investor's company would pay $50 per share for 40,000 shares of Holdings ($2 million in total) and would become a 40% shareholder. Also the Original Shareholders and an associate of Durkin and SHH Management Limited were shown in schedules as shareholders but not in proportions which would correspond to owning the remaining 60% of ownership of Holdings which should follow if the Investor's company was to own 40%.

[51] On August 31, 2015, the Monday following Durkin's email, the Investor's accountant wrote by email to the Investor's realtor and expressed considerable confusion about the nature of the transaction. The first substantive paragraph of that email expresses some confusion about what shareholdings were already in place or how to reconcile the proportionate ownership interests. The next paragraph reads as follows:

> The deal still does not make too much sense to me as I do not see anyone else putting up cash other than our client. As I have said to Thomas previously, what have the current owners done to "earn" their 60% ownership in the business? I note that they paid $2,375,00 (sic) for 94.31% and now want $2,000,000 for 40%, but I don't see how any "value" has been created. Lastly the assessed value is only at $2.8 Million for 100% of the property. This does not tie in with the $2,000,000 asking price for the 40%.

[52] It is clear from this paragraph that the Investor's accountant had reviewed the materials attached to Durkin's August 28, 2015 email and had concluded that Holdings had already acquired ownership of the Hotel, which is inconsistent with Durkin's suggestion at the hearing that it was commonly understood the Original Shareholders would retain ownership until the Share Purchase Agreement, the subscription agreement and likely other related financings would occur simultaneously at some future moment.

[53] Durkin was forwarded the email from the Investor's accountant and he replied to the accountant with an email which addresses various topics over 6 paragraphs and 2 charts. The email does refer to the share structure of Holdings after future phases. However, in the only place whether the email addresses whether Holdings then owned the Hotel Shares Durkin chose not to correct the inaccurate understanding about ownership of the Hotel Shares which had been expressed by the Investor's accountant. Instead Durkin made the September 1, 2015 Representation to the effect that, at a previous date, Holdings had paid $6.4 million for the purchase of the Hotel. Durkin's explanation that he thought the recipients of September 1, 2015 Representation understood the correct facts is directly contradicted by the words used at the time by the individuals involved.

[54] Based on the words used and the context which existed we conclude that Durkin made the September 1, 2015 Representation knowing it was false and with a clear intention to deceive the Investor and her advisors.

[55] What followed later in the fall of 2015 was the creation of the single most compelling piece of evidence in this case. That evidence is the exchange of correspondence between Durkin on behalf of Holdings and the Investor's lawyer on behalf of the Investor. That correspondence was created as the parties negotiated the formal terms under which the Investor later advanced the funds which she invested through her company. Whether as a result of some perceived ambiguity in communications which had been previously been exchanged or for some other reason the lawyer for the Investor asked a very clear and simple question. That question related to the nature of Holdings' interest in the Hotel Shares. The question, and Durkin's answer, are included in the extract from the October 13, 2015 email which is below:

10. Is Holdco already the sole shareholder of Opco, or will it be acquiring all of Opco's shares concurrently with GB's purchase of Holdco's shares?
11.
12. Already acquired.

13. Our office will need to see a Central Securities Register of Opco showing Holdco to be the sole shareholder, and we will need to see the current Central Securities Register of Holdco showing who are the current shareholders at this point in time, and the Register of Directors of Holdco showing who are the current Directors at this point in time . We will also need to see the Articles of Holdco and of Opco including the Special Rights and Restrictions attached to each class of shares including rights to dividends etc., as set out in those Articles, and GB has instructed us to temporarily obtain from you the Records Books of both Opco and Holdco so that we can look through them for GB.
14.
15. Of course!

[56] This exchange of question and answer is very clear. It contradicts all of Durkin's evidence and submissions to the effect that he believed the Investor understood that Holdings did not then own the Hotel Shares. The exchange of question and answer negates any argument by Durkin to the effect that Durkin assumed at that time and afterwards that the Investor's realtor had passed on to the Investor a correct understanding of the share ownership in the Hotel, whether derived from the memorandum of understanding or otherwise. We conclude that when Durkin made the October 13, 2015 Representation to the effect that Holdings had already acquired the Hotel Shares he knew that statement was false and his intention was to deceive the Investor and her advisors.

[57] Turning to the December 9, 2015 Representation (which, obviously, followed after the October 13, 2015 communications between Durkin and the lawyer for the Investor), that Representation related to the content of the share subscription agreement. The initial language of Section 3.3 of the share subscription agreement was as follows:[2]

3.3 Subsidiary

The Corporation holds legal and beneficial interest in Sooke Harbour House Inc., which owns and operates a 28 room hotel located at 1528 Whiffin Spit Road, Sooke British Columbia, Canada.

[58] Durkin testified that the Investor's lawyer had previously suggested that the language be modified to state that Holdings holds legal and beneficial interest in the shares of Sooke Harbour House Inc., as follows:[3]

Subscription Agreement
-In 3.3, where it says that Holdco holds "legal and beneficial interest in Sooke Harbour House Inc.", it should instead state that Holdco holds "legal and beneficial interest in all issued and outstanding shares of Sooke Harbour House Inc."

[59] The Respondents submit "the parties eventually agreed that it was semantics given that everything was to close concurrently." Durkin did not substantiate this submission by reference to any particular document or discussion with the Investor's lawyer. Durkin did not offer any explanation for the clear inconsistency between this submission and his representation to the Investor's lawyer on October 13, 2015 that Holdings had already

[2] DUR000028 Exhibit E, page 7 of the Share Subscription Agreement.
[3] Exhibit 374 [BCSC1879], p. 16.

acquired the shares of Sooke Harbour House Inc. We read the December 9, 2015 Representation in light of the request from the Investor's lawyer for changed language as indicating that the Investor was relying on the October 13, 2015 Representation in the course of drafting the eventual subscription agreement. Durkin's evidence and submission to the contrary contradicts the clear words used and we reject Durkin's evidence and submission.

[60] Further, in a October 13, 2015 email responding to a question from the Investor's lawyer regarding documentation of the BDC mortgage, Durkin stated:

> The BDC is being taken out and replaced with $3.5 million private debt financing which will be part of the overall transaction financing package and will take place concurrently to the equity financing. The debt financing package will be made available for review on completion which we anticipate will be in the coming days.

[61] This statement differs from Durkin's assertion that the closing of the acquisition of the Hotel was to take place concurrently with the debt restructuring. Durkin's answer to the Investor's lawyer's question only discusses the debt restructuring. Durkin's statement is included in the same email to the Investor's lawyer in which Durkin stated that Holdco had already acquired the shares of Sooke Harbour House Inc.

[62] In conclusion, we find that at the time of the October 13, 2015 Representation and the December 9, 2015 Representation, Durkin and Holdings knew that the Investor's lawyer and, through him, the Investor was looking to Durkin and Holdings to explain the then current situation regarding whether Holdings owned the Hotel Shares. With that knowledge Durkin, on behalf of himself and Holdings, made the October 13, 2015 Representation and the December 9, 2015 Representation knowing that both of those representations were false and with an intention to deceive the Investor and her advisors.

[63] In summary, our key findings are that each of the September 1, 2015 Representation, the October 13, 2015 Representation and the December 9, 2015 Representation were made by Durkin on behalf of Holdings, that those representations were false and that Durkin knew at the time that the representations would be taken as representations about the then current situation and not about the eventual situation after the transaction closed.

[64] In terms of what we have described above as the determinative issue in this proceeding, our conclusion is that Durkin's conduct was deceitful in relation to the September 1, 2015 Representation, the October 13, 2015 Representation and the December 9, 2015 Representation.

[65] We do not find it helpful or necessary to rely on the credibility findings made by the Supreme Court of British Columbia to reach our conclusions. The key evidence regarding what the Respondent's did and what their intention was is written and comes from the Respondents. We have no difficulty interpreting that evidence.

[66] Turning specifically to the question of whether the elements of section 57(b) of the Act have been established, we begin by expressing our conclusion that the relevant conduct of the Respondents related to the purchase by the Investor's company of shares in Holdings. Those shares fall clearly within the definition of securities in the Act.

[67] The *actus reus* of fraud has been established regarding the September 1, 2015 Representation, October 13, 2015 Representation and the December 9, 2015 Representation. The Respondents deceived the Investor by making these representations which we have found to be false. The Investor, and more particularly her company, placed all of the invested funds at risk of loss as soon as those funds were advanced. As it has turned out the Investor and her company suffered actual loss as the funds have not been recovered. There was a deprivation, and the deprivation resulted from the deceit of Holdings and Durkin when they represented to the Investor that Holdings already owned all of the Hotel Shares when in fact Holdings did not own any of the Hotel Shares.

[68] The *mens rea* of fraud has also been established with respect to the September 1, 2015 Representation, the October 13, 2015 Representation and the December 9, 2015 Representation. As we have explained, it is clear beyond a balance of probabilities that Durkin knew that the Investor's lawyer was looking to Durkin and Holdings to clarify the then current ownership structure. The language used by the Investor's lawyer negates any suggestion that the Investor's lawyer was actually relying on other communications from Durkin to establish the true share ownership status. Durkin's equally unambiguous response contradicts any reasonable possibility that Durkin understood otherwise. We conclude that Durkin mislead the Investor through her advisor and he intended to do so expecting that his representations would lead the investor to place her invested funds at risk as he knew that Holdings did not have any ownership interest in the Hotel.

[69] We conclude that all of the elements of section 57(b) of the Act have been proven against both respondents.

[70] The executive director also alleges that because Durkin was a director of Holdings and because he directed all of the conduct of Holdings which breached section 57(b) of the Act, Durkin also breached that section by operation of section 168.2 of the Act. Given our conclusions that Durkin is personally liable for the breach of section 57(b) we do not need to consider the operation of section 168.2.

VII. Submissions on Sanctions

[71] We direct the executive director and the respondents to make their submissions on sanction as follows:

By February 13, 2023	The executive director delivers submissions to the respondents and to the Commission Hearing Office.
By February 27, 2023	The respondents deliver response submissions to the executive director and the Commission Hearing Office.

	Any party seeking an oral hearing of the issue of sanctions so advises the Commission Hearing Office. The hearing officer will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By March 6, 2023	The executive director delivers reply submissions (if any) to the respondents and to the Commission Hearing Office.

January 23, 2023

For the Commission

Gordon Johnson
Vice Chair

Judith Downes
Commissioner

Karen Keilty
Commissioner