

BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Sand, Achs, Gulston, 2022 BCSECCOM 332

Date: 20220808

John Sand, Karol Achs, Jolyon Charles Christopher Gulston

Panel	Gordon Johnson	Vice Chair
	Audrey T. Ho	Commissioner
	James Kershaw	Commissioner

Hearing dates January 17, 21, 24 and 25, 2022

Submissions Completed February 22, 2022

Date of Findings August 8, 2022

Appearing

Chris Cairns For the Executive Director

John Sand For himself

Karol Achs For himself

Jolyon Charles For himself
Christopher Gulston

Findings

I. Introduction

- [1] This is the liability portion of a hearing under sections 161, 162 and 174 of the *Securities Act*, RSBC 1996, c. 418 (Act).
- [2] In this proceeding the executive director alleges that John Sand (Sand), Karol Achs (Achs) and Jolyon Charles Christopher Gulston (Gulston) participated in conduct which perpetrated a fraud in breach of section 57(b) of the Act, and that Gulston made misrepresentations to potential investors in breach of section 50(1)(d) of the Act.
- [3] The fraud allegations all arose from efforts made by the respondents to induce two investors, Investor K and Investor P, into investing money to build capacity to manufacture a new type of battery. Those efforts included statements about the existence of purchase orders for the batteries and about how invested funds would be used.
- [4] The Notice of Hearing alleges that the respondents engaged or participated in fraudulent conduct in two ways. First, by making statements to the investors which were not true,

and second, by using the invested funds for purposes inconsistent with how the funds were intended to be used.

- [5] The Notice of Hearing also alleges that Gulston made certain false representations to two potential investors regarding the nature and extent of purchase orders which existed for the batteries, the expected time frame for the start of production of the batteries and the existence of an assembly plant for the batteries in Washington State.
- [6] The Notice of Hearing in this matter was issued on October 26, 2020. All respondents were provided notice. Sand and Gulston were initially represented by counsel and later represented themselves. Achs represented himself to the extent he participated in this proceeding. The hearing was initially set to begin November 8, 2021. That date was adjourned at the request of Gulston, who provided medical evidence that he was injured at the time. A new hearing date was set for Monday January 17, 2022. On that morning Achs sent an email to the hearing office before the start of the hearing stating that he was ill. The hearing commenced on the morning of January 17 with a focus on how to respond to Achs' email regarding his medical issues. Given the prevalence of concerns about Covid-19 at the time and given the recognized difficulties any respondent would encounter in documenting a medical concern on short notice an adjournment was granted to Thursday January 21, 2022. None of the respondents attended on January 21. None of the respondents requested a further adjournment. None of the respondents participated in the balance of the hearing.
- [7] The executive director called three witnesses, an investigator for the Commission and the two investors (Investor K and Investor P) who alleged they had suffered losses as a result of the conduct of the respondents.

II. Factual Background

A. Investors' Evidence

- [8] We base the following summary of events primarily on the evidence of the investors who testified as well as on the documents introduced as exhibits. Where it is available, we include related explanations given by the respondents in their interviews with Commission investigators. Further below, we provide a more general summary of key elements arising from the respondents' interviews with Commission investigators.
- [9] Investor K is an insurance broker. Over the years, some of his clients have needed investment advice, so Investor K took some training as a financial planner. For a period of time, Investor K was registered to sell mutual funds.
- [10] Over the years Investor K has made some personal investments in smaller businesses and in some real estate ventures. Investor K had met Investor P socially, and together they had made some real estate investments.
- [11] In the fall of 2014, Investor K was approached by Gulston regarding the possibility that Investor K would invest in a new venture to produce a new zinc based battery. Gulston arranged a meeting at Investor K's home. While there, Gulston created the impression

that he was well connected in financial circles. Gulston suggested that he traveled frequently to London for business purposes. Gulston described how the venture had a good technology and had purchase orders for the new battery but could not capitalize on the orders without building a manufacturing facility.

- [12] Investor K met with Gulston more than once and then arranged a meeting to which Investor P was also invited. There is some doubt about the location of the first meeting attended by Investor P. Investor P recalled his first meeting being at Investor K's home, Investor K recalled that Investor P first attended a meeting at a coffee shop. Investor P recalled that his first meeting relating to the battery was attended only by Sand, Gulston and Investor K. According to Investor K, both investors were present as well as Sand and Achs but not Gulston. Investor P was able to provide a clear recollection of being shown certain documents confirming the existence of orders for the battery. Specifically, he recalled being shown a letter from a government department of an African country (but he could not recall which country) that showed the respondents had a purchase order for the battery. He also recalled being told what would be needed to begin operation of a demonstration plant to produce the batteries and the expected cost of that, which was \$600,000. Investor K recalled being shown several documents, both in the early meetings and also during later discussions, confirming that there were firm orders for the new battery, provided it could be manufactured. Investor K was able, from memory, to describe the essence of some of those documents. Although it is not certain that the documents presented to the investors at this time included what is defined below as the Kongalend Letters, the substance of what Investor P and Investor K described as being shown to them was very similar to the content of the Kongalend Letters.
- [13] The evidence of Investor P and Investor K is consistent in that there was more than one meeting, investors were told that the battery venture had significant purchase orders for the batteries and the investors were told by the respondents in the course of the meetings that an investment by them in the amount of \$600,000 would be enough to start production and that invested funds would be used for that purpose.
- [14] Investor K and Investor P described some of the details of discussions which occurred prior to their investment decision. At the coffee shop meeting, Achs produced a blue plastic box which looked somewhat like a standard lunch bucket. This was purported to be the battery and, after an electrical device was plugged into the box, it appeared, to the investors, that the box stored energy in the same way that a battery would. There was some discussion of the technology employed inside the battery. It is not clear that the investors understood how the battery worked, but it was clear that they believed the box was a representation of the battery, the underlying technology was new and effective and that the new venture had rights to the technology.
- [15] According to the investors, the respondents explained that Achs was the scientist for the battery business, Sand was responsible for sales and Gulston was an investor who was seeking to attract other investors. According to Investor K, Gulston explained that he had been financing the business to that point in time but the venture now needed a demonstration plant to begin to manufacture batteries to fill current orders. Once the

demonstration plant was operational, there was supposedly interest from major financiers who would build mass production facilities to meet further demand. The potential market for the new battery was represented to be enormous.

- [16] Investor K and Investor P had a pre-existing shared interest in making joint real estate investments. Investor K had helped develop the commercial building in which Investor P's medical practice had been located. Since the battery venture was searching for a building to lease to house manufacturing and laboratory activities, the investors decided to buy a building and lease it to the battery venture, which they then did through a corporation which the investors owned together.
- [17] Investor K recalled being told that if he and Investor P invested \$600,000 in the battery venture the invested funds would be used to alter the new building to accommodate the needed battery production line, laboratory and storage and to buy manufacturing equipment for the batteries.
- [18] The investors, through a company they jointly owned, invested \$600,000 into the business to fund the uses which had been identified as necessary to build the manufacturing capacity. Investor P and Investor K were led to believe that the new manufacturing capacity would be used to fill the existing orders, and, prove the viability of the business. The investors testified that they did not know prior to investing that some of the funds would be used for personal purposes by the respondents or that, with the approval of the other respondents, \$100,000 of the invested funds would be paid to Gulston.
- [19] The details of the investment were:
 - (a) The first investment amount was \$20,000, paid by cheque to a corporation called Marketwise Investments Inc. (Marketwise) and deposited to Marketwise's bank account on December 12, 2014; and
 - (b) The second investment amount was \$580,000 paid by cheque to Marketwise on April 30, 2015.
- [20] After the investment the investors became increasingly concerned about a number of things. There was minimal to no progress on the development of the production line at the new facility, in fact according to Investor K the building was being damaged with modifications but no progress was being made towards manufacturing capability. In addition, an acquaintance of Investor K who had the capacity to make a very significant investment in the battery company was given a presentation by some of the respondents but eventually went away unsatisfied. That acquaintance expressed to Investor K that he experienced an inability to obtain written, technical specifications for the battery. After a year, the investors demanded their investments be returned.
- [21] The investors were given a series of cheques for the return of the amount invested. The investors were able to cash cheques representing \$200,000 of their \$600,000 invested.

The other cheques were dishonored. None of the balance of the investment made by the investors has been recovered by them.

B. Other Evidence Gathered During the Investigation

[22] Commission investigators obtained the banking records of the battery venture and of related parties. An analysis was made of the use of funds. That analysis revealed that some of the investors' funds were initially paid to companies which were in the alternative energy business and which were connected in one way or another to one or more of the respondents. It is not alleged that these initial payments to related companies were inherently improper because it is possible that the related companies might have assisted in the development of the production facility. However, the banking records of the related companies were also analyzed and the subsequent use of the funds on a cumulative basis included:

- (a) \$100,000 paid to a company controlled by Gulston by way of a bank draft arranged by Sand with the knowledge of Achs;
- (b) \$120,000 paid by Sand to a woman who was described by Sand as his girlfriend and a previous investor. Sand said this was a loan repayment to her;
- (c) \$63,485 paid by Achs to a relative to repay funds which Achs owed to that relative;
- (d) \$22,953.76 used by Marketwise to repay pre-existing bank loans;
- (e) \$107,772.25 in cash withdrawals primarily by Achs or Sand on behalf of Achs, without any evidence of how this money was spent;
- (f) \$36,762.99 on credit card obligations of Achs and a relative of Achs in circumstances where the charges paid for indicated no purpose connected to the production facility;
- (g) \$30,781.65 on law firm invoices when no legal services were required for the construction of the production facility;
- (h) \$3,527.39 in cellular phone bills;
- (i) \$6,761.44 in grocery bills;
- (j) \$21,635.44 in other personal expenses (such as cable bills and auto service bills) paid by Marketwise on behalf of the respondents;
- (k) \$620.76 in restaurant charges;
- (l) \$36,708.96 in business expenses which had no connection to the production facility; and

(m) \$2,021.80 in BC Hydro and Fortis Gas invoices for services provided to addresses unrelated to the production facility.

[23] Commission investigators reviewed records obtained from Investor K, Investor P and the respondents. The review included looking at the metadata attached to two specific documents which are referred to collectively as the Kongalend Letters. The circumstances surrounding those documents were as follows:

- (a) On July 24, 2014, Achs emailed a letter from the Namibian Ministry of Trade and Industry at 12:51 pm and a letter from Kongalend at 12:53 pm to Sand and Gulston.
- (b) The Ministry of Trade and Industry letter was dated July 18, 2014. It was addressed to PN, and stated that DN, a Ministry representative, met with Achs and P “numerous” times and affirmed “authority to sign order to Canadian manufacturer of zinc air fuel cells”.
- (c) When Achs was asked by investigators if he had met with PN, he said that he had not. When it was pointed out that the first sentence of the letter states that there were “numerous meetings” with Achs, Achs responded that he was “probably on some conference call”.
- (d) The Kongalend letter was dated July 22, 2014. It was addressed to P and Achs and stated that Kongalend received approval from the Ministry of Trade and Industry to order 10,000 batteries “within 90 days after ordering and full order of 100,000 12 Volt Zinc Air Fuel Cells should be ready for delivery within 18 months.”
- (e) A commission investigator analyzed the metadata of both letters. He testified that the metadata of these letters showed that they were actually created on July 24, 2014, at 12:29 pm and 12:34 pm by Adobe Photoshop, approximately 20 minutes before they were sent to Sand and Gulston. This is after the date each such letter was represented to have been written.
- (f) In his interview, that investigator asked Achs if he wrote the Ministry and Kongalend letter. Achs stated:

If you -- no. If that -- like, I don't remember. If you want, I can give you -- I definitely have somewhere on the stick all these letters what I received from P.
- (g) The investigator requested that Achs provide the original emails from P. Achs sent a different letter from the Ministry of Trade and Industry. That letter was written by DN and was addressed to PN. It was dated April 27, 2012.
- (h) The investigator compared the Ministry letter that Achs sent to Sand and Gulston to the one that Achs emailed to the investigator later. He noted:

- (i) The text in both letters was different
- (ii) PN's first name was spelled differently in each letter
- (iii) There was no date stamp on the letter Achs sent to Sand and Gulston but there was one on the April 27, 2012 letter
- (iv) DN's signature was different on both letters.

[24] Commission investigators also obtained other documents produced by the respondents. For example, the documents included a letter from an individual (VH) who claimed to have been working with the battery in question for over three years, had promoted them in Southeast Asia, and confirmed that he was ready to order 8,000 batteries. A Commission investigator spoke to VH who said he had not sent the letter.

[25] Commission investigators tendered evidence that Gulston had made a number of representations to potential investors. In particular:

(a) On November 16, 2014, Gulston sent an email to Y with the subject line: "Update (3 attachments)". Gulston said to Y that he was attaching copies of the letters that they received from the Namibian government and Kongalend, "the company for whom we are producing the batteries," as well as an 11 page document.

(b) Gulston told Y that:

- (i) The deputation from Kongalend has been to visit the facility here (last month) as well as the materials which we have to hand and are satisfied that we are able to fulfil the order. At present they are in London but will be returning next week.
- (ii) We now have a deadline to start delivering the first order (the 10,000 units) by January next year and are at present gearing up for the full automated production by the beginning of January.
- (iii) Incidentally, we have sufficient orders for the next 4 years so will have to set up another facility.
- (iv) Also we will need to establish a recharging station in Namibia (and wherever the batteries are sent to) as these cost the consumer less money as well as costing us less to produce.

(c) Commission investigators asked Gulston about this email in his compelled interview. Gulston said that:

- (i) The information in the email about Kongalend visiting the facility was from Sand who would have gotten it from Achs
 - (ii) He agreed that he was relaying the information about Kongalend as if it was firsthand knowledge
 - (iii) He had never met anyone from Kongalend but Sand had told him they visited North Vancouver
 - (iv) The original North Vancouver facility was only for designing the batteries and could only make prototypes
 - (v) They would have to get a manufacturing facility to fulfill the orders but that was not what he told Y
- (d) On January 9, 2015, Gulston emailed TH with the subject line: "Re: Business in the UK." Gulston's email includes the following language:
- (i) At present there is one [assembly plant] set up in Washington state (just south of the border here). It is a business funded by people who have invested approximately \$1.5m for a facility (approx. 5000 square feet) with the assembly machinery supplied to them as well as the first three months of training.
 - (ii) They receive (purchase) the components to assemble the battery and then sell the completed product. Both purchase and selling prices are fixed although they are free to sell to another party. They are responsible for paying the property rental and the staff (about 10 bodies).
 - (iii) Thus there is a guaranteed profit from the outset. There is about four years worth of purchase orders. There is a 5% royalty to pay (on the gross sales) as well as 40% of the profits go to the supplying company. So their take is around 57% of the net sales. As an indication their purchase price is \$85 per unit and their guaranteed sale price is \$135. (However the buyers are expecting to pay in excess of \$200.)
 - (iv) They can produce 7000 units per month (on a single shift). It's a bit like buying something from IKEA, assembling it and then selling it - except that your product is sold before it's assembled!
 - (v) We are duplicating this plant here in Vancouver and will be assembling next month.
 - (vi) The website will be going up in about a month. We have all the patents and can market the battery anywhere in the world.
 - (vii) We have interest/orders from Africa, India, Croatia, USA (including military), Canada (oil companies), Philippines, China and other parts of Asia.

- (viii) So there's no research and development required, the investor can produce his own business plan, company structure and even develop his own market.
 - (ix) I know that the initial investment price will increase soon because there is such a demand for the finished product.
- (e) In his interview, Commission investigators asked Gulston about this email. Gulston said that:
- (i) He believed there was a plant in Washington State
 - (ii) The information that Gulston told TH was an outline that Sand provided “for how we would do it once we get going”
 - (iii) The production of 7,000 units was “if we ever got a facility going”
 - (iv) In January 2015, there were no shifts to produce the batteries. “There was nothing.”
- (f) Gulston contacted a number of other potential investors and repeated the same claims he told Y and TH:
- (i) In an email to CH dated June 6, 2014, he stated that “they are setting up a manufacturing plant in Namibia” and that they were going to do the same in BC “... as we have an initial order for 50,000 units for Selco in India”
 - (ii) In an email to RP dated July 22, 2014, he said “ ... we have an order from the Namibian government/private leasing company in Africa as well as a letter of interest from a company in India who have tested the product extensively and now wishes to place an order.”
 - (iii) In an email to MM dated July 25, 2014, he said “...we have the commitment letter from the Namibian government to substantiate the guarantee of three years of purchase orders, although the (salesman to be provided as one of the 10) assures us that he will get purchase orders for us of around \$250 per unit.”
 - (iv) In an email to MH dated August 18, 2014, he said they “presently have 2 letters (1 from a government body and the other from USA) which alone would give us 4 years of work.”
 - (v) In an email to IC dated September 5, 2014, he said that “...we presently have orders which would keep us busy for 4 years.”
- (g) When asked about the July 25, 2014, email to MM in his interview with Commission investigators, Gulston said that:

- (i) The email to MM was “my trying to get money.”
 - (ii) That a “commitment letter from the Namibian government to substantiate the guarantee of three years of purchase orders” was “beating about the bush”
 - (iii) He used words like "commitment," "substantiate," and "guarantee" because that’s what he was told by Sand but had not remembered up until that point in the interview
- (h) When asked about the June 6, 2014, email to CH in his interview with Commission investigators, Gulston said that:
- (i) The Marketwise team was not involved in African manufacturing
 - (ii) Sand told him that they had the Selco order
 - (iii) He did not verify if there was an order from Selco.

C. The Respondents’ Evidence

- [26] Each respondent was interviewed under oath by Commission investigators and those transcripts were entered into evidence at the hearing. We have reviewed their transcripts in order to include the material portions of their evidence in our analysis of what happened.

i. Sand Interview

- [27] Sand stated in his interview that he was acquainted with Achs, who had obtained world-wide rights to the zinc air battery technology. Sand said Marketwise held those rights.
- [28] As between Sand and Achs, Sand provided financing, partly from his own resources and partly through money which he borrowed. Gulston had also provided investment funds through one of his companies.
- [29] Initially, only Sand had cheque signing authority for the bank account of Marketwise. As investment funds were received into Marketwise, such funds would later be transferred to the bank account of the alternative energy company when funds were needed for the production facility. At times, Achs requested that Sand arrange to pay certain bills and to obtain cash from the Marketwise account for Achs. Sand did as he was asked. When initially asked about smaller cash amounts Sand indicated that they were used to pay a contractor for the production facility, without a request for a receipt. When later pressed about the significant amount of cash paid out, Sand noted that Achs was arranging to have a production facility built in Bellingham, Washington and a volume of materials were being stockpiled there, so funds were needed for that purpose.
- [30] Sand indicated that, after a period of time, Achs took over control of the banking activities. Sand said he was consulted about significant payments from the bank accounts

but Achs made most of the decisions. Sand said that Gulston was not involved in decisions about expenditures from the various accounts of Marketwise and the related companies.

- [31] Sand said he met Investor K and Investor P after Gulston reported that he had located potential investors who wanted Sand and Achs to demonstrate the battery. Sand said that all 5 of them met. He said that at the first or second meeting there was a discussion of the basis on which Investor K and Investor P would invest \$600,000. He said that documents had been prepared for those investors to obtain a share of the company in return for the investment, but they did not like that approach. They wanted a share of revenues, and a verbal agreement was reached to that effect. Sand could not remember the exact agreed percentage.
- [32] Sand was very clear that Investor K and Investor P were told that the funds invested would be used “for developing the location for fabricating and manufacturing” the batteries.
- [33] Around the time Investor K and Investor P agreed to invest, Gulston had a serious medical issue. Gulston’s involvement diminished thereafter. One of the first payments made from the funds collected from the investors was a payment of \$100,000 to one of Gulston’s companies. Gulston requested the payment, Sand arranged it and Achs was aware those steps were being taken. Sand offered various explanations for the payment, including that the funds were being returned to the prior source of the investment, that Gulston needed to be compensated for his time and effort and that Gulston was entitled to a commission for bringing in the funds from Investor K and Investor P. Sand agreed that those investors were not told of the payment to Gulston from the invested funds until after the payment was made.
- [34] Sand was asked about the details of many of the payments alleged to have been made contrary to the arrangement made with the investors. Sand’s responses were vague. His answers indicate that he was aware of most of the amounts paid.

ii. Achs’ Interview

- [35] Achs described how, during the relevant period, he had interests in several businesses, including a fuel cell business, a business focused on generating solar power to charge batteries and a new battery technology.
- [36] According to Achs, as between himself and Sand the roles evolved to the point where Achs was “more on the technical side” and Sand was responsible for financing and the paperwork. Achs said that when Gulston became involved Gulston was to run the manufacturing process. Others were involved over the years, for limited periods of time.
- [37] When asked about the investment funds received from Investor K and Investor P, Achs said those funds were to be used “to bring the technology to life.” Achs went on to explain that the rented warehouse space needed to be improved and there was a need for production equipment such as industrial and design molds.

- [38] Achs was aware of the \$100,000 payment to Gulston from the funds invested by Investor K and Investor P. Achs said he did not fully understand the reason for the payment to Gulston, but he was told by Sand that the funds needed to be paid and he (Achs) thought “okay, if it is needed.” Achs said he did not know if Investor K and Investor P were aware that invested funds were being used to pay \$100,000 to Gulston.
- [39] Achs recalled that Investor K and Investor P were to be paid a share of the profits of the business.
- [40] When asked about activities in Washington State, Achs said that they looked into operating a manufacturing facility in Blaine in order to minimize costs relative to operating in North Vancouver, but they never did sign a lease or open a facility in Blaine. He said they stored some materials, mainly zinc, in a friend’s home garage in Blaine.
- [41] Achs acknowledged the payments that he was asked about from the relevant bank accounts into which investment funds had been paid. Achs did not suggest he was unaware of any payment. He agreed that he and Sand were responsible for the operation of the accounts. He said that he and Sand would make spending decisions mutually, after discussion.
- [42] Achs was asked many questions about cash expenditures. His answers were often vague. He said that generally he would not obtain receipts. He mentioned some uses of cash which he said were related to the battery production process. For example, he mentioned a “glove box,” used to handle sensitive chemicals safely, which would have cost \$25,000 but only cost half that amount because he paid cash. He mentioned a freezer unit as another expensive item bought with cash. He said he occasionally paid cash for the monthly rent on the warehouse in North Vancouver and he mentioned a number of other, small items such as business cards which were purchased with cash. Achs acknowledged that funds from the accounts into which investor funds were deposited were used by him to repay a loan he owed to his wife.
- [43] Achs said that the business never sold a battery. Asked if the business ever had orders for batteries, he said “we had lots of opportunities for orders, but nothing was coming to finish”.

iii. Gulston’s Interview

- [44] Gulston is an engineer. He became involved in the battery project sometime before 2014. According to Gulston, the objective of the business at the time was “to get enough money to set up a plant, you know, ideally in Vancouver or North Vancouver, to produce the things and build a stockpile on it”.
- [45] Gulston said that his role was to sell the idea of the business and “to get some money”.
- [46] Gulston recalled meeting Investor K and speaking to him about the battery. Gulston asked Investor K if he would like to put some money into the business. Gulston was very

unclear about when Investor P came into the picture, how many times he met with the investors, who was present at particular meetings and what the terms were of the agreement for Investor K and Investor P to invest. Gulston remembered that the investors did not want shares, they wanted something else, but Gulston could not describe what they wanted.

- [47] Gulston was also unclear about what the investors were told about the intended use of invested funds. Gulston initially said that the funds were to be used to “set up a plant.” When questioned further, Gulston indicated he did not remember what the investors were told other than that the funds were to be used in the battery business.
- [48] Gulston was asked whether the investors were told that the business had purchase orders. Gulston replied “I think we did have orders at the time.” Gulston then clarified that what orders they had were contingent on building a production facility and producing batteries.
- [49] Gulston was also asked about a number of statements he made in emails sent to potential investors other than Investor K and Investor P. Gulston was shown statements he had made to potential investors mentioning orders and using words such as “confirmed” and “commitments” to characterize the orders. Gulston acknowledged those were not references to contingent orders. Gulston explained his statements by saying he was passing along information which had been given to him by Sand.
- [50] Gulston was asked about the \$100,000 paid to a related company. Gulston gave contradictory answers regarding whether he personally benefited from those funds, eventually admitting that he did receive some of the money. Gulston was also somewhat contradictory about the justification for the payment, at times suggesting that the funds represented repayment for expenses, at times saying that he was being paid for his time and at times agreeing that the funds could be called a commission for fundraising.
- [51] Gulston was asked if Investor K or Investor P were aware of the \$100,000 payment, Gulston said “I think so. I am pretty certain.” However, Gulston did not suggest that he had told the investors that information or that he was present when anyone else passed along that information.

III. Applicable Law Standard of Proof

- [52] The Executive Director must prove the allegations on a balance of probabilities. In *F.H. v. McDougall*, the Supreme Court of Canada held:

[49] ... 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.
- [53] The Court also held that the evidence “must always be sufficiently clear, convincing and cogent” to satisfy the balance of probabilities test.

Definition of Security and Trade

[54] Section 1(1) of the Act defines security and trade:

"security" includes

(d) a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription...

(f) an agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person,

(g) a profit sharing agreement or certificate

(l) an investment contract

"trade" includes

(a) a disposition of a security for valuable consideration ...

Fraud

[55] At the relevant time, section 57(b) of the Act stated:

57 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.

[56] 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:

... 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).

[57] The Court of Appeal also stated at paragraphs 24 and 26, that section 57(b) widened the prohibition against participation in conduct:

[24]... It creates a statutory prohibition which may extend to persons who ought to be aware of the fraud even though they may not be participants in it, but it does not dispense with the requirement that there must be a fraud involved in the transaction, which requires a guilty state of mind as well as an act.

...

[26]... Section 57(b) simply widens the prohibition against participation in transactions to include participants who know or ought to know that a fraud is being perpetrated by others, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof of subjective knowledge of the facts constituting the dishonest act, by someone involved in the transactions.

[58] In *Theroux*, the majority noted that the principles for the *actus reus* of fraud are:

- i. the offence has two elements: dishonest act and deprivation;
- ii. the dishonest act is established by proof of deceit, falsehood or "other fraudulent means";
- iii. the element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.

Misrepresentation

[59] Section 50(1)(d) of the former Act states:

A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not ... (d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation

[60] Section 1(1) of the former Act defines

“Investor relations activities” as including:

...any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer...

“Misrepresentation” as:

- (a) an untrue statement of a material fact, or
- (b) an omission to state a material fact that is

- i. required to be stated, or
- ii. necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made

[61] The test for materiality under section 50(1)(d) is outlined in *Canaco Resources Inc. (Re)*, 2013 BCSECCOM 310 as an objective market impact test, assessed from the point of view of the reasonable investor, without the benefit of hindsight.

[62] The principles of materiality summarized in *Canaco* at para. 84 are:

1. The test for materiality is objective -- would the fact or event reasonably be expected to significantly affect the market price or value of the securities?
2. The test for materiality is a market impact test. As stated in *YBM*, [*YBM Magnex International Inc. (Re)* (2000), 23 OSCB 1171.] "The investor is an economic being and materiality must be viewed from the perspective of the trading markets, that is, the buying, selling or holding of securities."
3. The reasonableness of market impact is assessed from the point of view of the reasonable investor, that is, would a reasonable investor expect that the market price or value of the securities would be affected by the fact or event? (*Cornish*)
4. It is noteworthy that in some jurisdictions, the test for materiality is whether the fact or event is something that a reasonable investor would want to know. This is not the test under the Act. Information can be important to a reasonable investor without being "material". As stated in *Biovail*:

"If a statement would be reasonably expected to have a significant effect on the market price or value of a security, then that statement would clearly be important to an investor in making an investment decision. However, it does not necessarily follow that a statement that is important to an investor in making an investment decision would reasonably be expected to have a significant effect on the market price or value of a security."

5. Materiality is assessed in the context of the issuer's industry and the market. (*Cornish*)

[63] To prove that Gulston made misrepresentations contrary to section 50(1)(d) of the Act, the Executive Director must prove that Gulston:

- (a) engaged in investor relations activities (oral or written communications that promoted or reasonably could be expected to promote the purchase of the securities), or with the intention of effecting a trade in a security

(b) made statements that were false, or that omissions were necessary to prevent statements from being false or misleading; and

(c) The false statements or omissions were of material facts.

IV. Analysis and Conclusions

A. Findings on Section 57

- [64] The allegations in this proceeding are that all of the elements of fraud have been proven against each of Achs, Sand and Gulston. This is not a proceeding where it is alleged that one of them, or someone else, committed a fraud and the other respondents participated in that fraud when he should reasonably have known of the fraud.
- [65] The Investors' investment fits within two different definitions of "security" as defined in section 1(g) and (l) of the Act: It was either an oral agreement for a profit sharing agreement or an investment contract, or both. There was some evidence that the return which was contracted for by the investors was a share in profits. However, there was also evidence that they contracted to receive a share of revenues. If the return which was contracted for was a share of profits, then there was a profit sharing agreement created which constitutes a security under the Act.
- [66] In either case, it is clear that the role of the investors was to be a passive one and that whatever return they might earn would be dependent on actions taken by the respondents. The definition of "investment contract" as a security under the Act comes from the common law. The Investors' investment falls within the scope of that definition because, as outlined in *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 SCR 112 (SCC) it was an investment in a common enterprise from which the Investors expected to profit from the efforts of the respondents.
- [67] A common enterprise "exists when it is undertaken for the benefit of the supplier of capital (the investor) and of those who solicit the capital (the promoter). In this relationship, the investor's role is limited to the advancement of money, the managerial control over the success of the enterprise being that of the promoter; therein lies the community."
- [68] The Investors were passive in this enterprise. They advanced the investment to the respondents who had managerial control over the success of the battery business. The managerial control over the success of the enterprise was held by the respondents; therein lies the necessary community
- [69] The Investors were dependent on the respondents to build and sell the batteries. The only way the Investors could have realized a return on their investment would have been if the respondents produce the batteries and fulfil the alleged orders. If that had occurred, then the benefit of the investment would have accrued to the Investors and the respondents.

- [70] Based on the above analysis, we conclude that the interests acquired by virtue of investments made by Investor K and Investor P were securities.
- [71] There is a significant body of evidence that all of the respondents participated in making representations to Investor K and Investor P that there were substantial purchase orders for the batteries. That evidence included:
- (a) The credible recollections of Investor K and Investor P regarding what they were told;
 - (b) The existence of multiple documents in the files of the respondents, or shown as having been emailed by or between the respondents, making statements confirming the existence of orders. Investor K and Investor P recalled being shown documents and, from their descriptions, the content of the documents shown was similar to the content of the documents circulated between the respondents, especially the Kongalend Letters. The fact that the respondents prepared and shared documents containing such content corroborates the recollections of the investors that they received representations containing that content.
 - (c) The various emails sent by Gulston to potential investors making extravagant and false (as is discussed below) claims about the battery business corroborates the recollections of the investors that they received representations that there were confirmed purchase orders;
 - (d) Given the circumstances surrounding the Kongalend Letters, we find that they were wholly fictitious and created by Achs. The fact that Achs created the back-dated Kongalend Letters and passed them off as authentic shows the extent to which he was willing to intentionally make false claims to investors of the nature testified to by Investor P and Investor K; and
 - (e) Notwithstanding the minor discrepancies between the various witnesses regarding the exact sequence of meetings regarding the investment made by Investor P and Investor K, there is general agreement between both investors and the transcripts of the respondents' interviews establishing that all of the respondents attended at least some of the meetings during which representations were made by each or some of them to Investor P and Investor K about the existence of purchase orders. It has been established that all of the respondents at various times during the investment decision making process made statements about having material purchase orders and were part of group presentations that included such representations.
- [72] Based on the evidence, we find that each respondent had told Investor P and Investor K, at or before the time of their investment in securities, that the enterprise they were investing in had significant purchase orders. There is no serious dispute that those statements were false because there were no orders. When pressed about orders during

their interviews none of the respondents suggest there were any firm orders at any relevant time. We accept the evidence of Investor P and Investor K that the false statements did induce their investment. We conclude that the statements were material to an investment decision, both objectively in terms of the expected impact of the representations made and subjectively in terms of what the investors believed.

- [73] The *actus reus* of fraud under s. 57 is an act of deceit or falsehood which places an investor's pecuniary interest at risk. The falsehoods told by all three respondents constitute a prohibited act as described in *Theroux*. There is no doubt that such conduct could put the investors' pecuniary interests at risk because the underlying business venture was inherently risky given the lack of purchase orders, the inexperience of management and the unproven nature of the battery technology. In this instance, the conduct of the respondents caused actual pecuniary loss.
- [74] The *mens rea* required is subjective knowledge of the prohibited act and subjective knowledge that the prohibited act could have as a consequence a deprivation to these investors. We find, based on the evidence, that each respondent knew both that there were no purchase orders in place, and that investors were told that there were purchase orders in place.
- [75] We find, based on the analysis above, that the prohibited conduct was carried out intentionally for the purpose of convincing Investor K and Investor P to invest their money for the benefit of the respondents. The respondents knew that there were no purchase orders and not having any reasonable prospects of revenue (especially for an untried technology) would put the investors' pecuniary interest at risk. The respondents told lies to gain access to funds of the investors. All of the elements of fraud under s. 57 of the Act have been proven.
- [76] The elements of fraud have also been proven regarding the alternate theory on which fraud has been alleged, which is that the respondents told Investor K and Investor P that the invested funds would be used to build a facility to produce batteries using a new technology, after which the respondents caused a large portion of the funds to be used for other purposes.
- [77] Again, the *actus reus* of the fraud is well established by the evidence regarding what Investor K and Investor P were told would be the use of their funds. The transcripts of the interviews of Sand and Achs confirm that part of the *actus reus*. The balance of the *actus reus* consists of the use of the funds for alternative purposes. The diversion of the funds commenced almost immediately after the investment was made and the respondents all benefited from the funds. Gulston insisted on payment of \$100,000 to a company related to him, and he was supported in that payment by Sand and Achs. Sand arranged for \$120,000 of the invested funds to be paid to a girlfriend of his. Achs arranged to use over \$50,000 of the invested funds to benefit himself by repayment of his debt to a relative. Sand wrote most of the cheques to make the funds available for alternative purposes, and Achs admitted that he and Sand controlled all spending decisions.

- [78] The re-direction of the invested funds was clearly deliberate. The bank accounts of the businesses related to the battery business were essentially empty when the investment funds were received. The executive director submits that the first \$20,000 of the invested funds was used for the intended purpose. But as soon as the remaining \$580,000 of the invested funds were deposited into the bank accounts, improper payments began to flow, and that continued until the funds were nearly depleted. In contrast, whatever funds were expended on the intended purpose were limited and, in most cases, if made at all, undocumented despite the need of any legitimate business to document expenses for income tax purposes. It was largely admitted by Sand and fully admitted by Achs that the two of them controlled all spending decisions. We accept Achs' evidence to establish that both Sand and Achs approved of all improper expenditures. Gulston was not in control of how the invested funds were spent, although he did insist on payment of \$100,000 to a corporation in which he had an interest. All of that conduct was prohibited and placed Investor K and Investor P at risk of pecuniary loss. The *mens rea* of fraud under s. 57 is established in this respect as well, although in the case of Gulston the finding of fraud under this particular theory of fraud is limited to the \$100,000 payment made to the corporation to which he had a connection.
- [79] On the first of two theories presented by the executive director for why the conduct of the respondents was fraudulent, we find that the entire \$600,000 invested by Investor P and Investor K through their corporation was invested based on fraud.
- [80] It is not clear exactly how much of the \$600,000 invested by Investor P and Investor K was improperly diverted by Sand and Achs. The executive director alleged that it was \$429,625.05. It is possible, for example that some of the investment funds withdrawn as cash was spent for proper purposes. Achs, for example, identified some cash purchases which were made for the intended purposes and although some of Achs' explanations sounded vague and unlikely, other explanations have a plausibility to them, at least in an context such as this one where allegations must be proven on a balance of probability. Having said that, we do conclude that the majority of all cash withdrawn was used for the benefit of Achs, which in some cases was admitted. Even if we assume that as much as 50% of the undocumented and unexplained payments referenced above in paragraph 22(e) were spent on the intended purposes the amount fraudulently spent at the direction of Sand and Achs exceeds \$360,000.

B. Findings on Section 50(1)(d) Allegation Against Gulston

- [81] The evidence shows that Gulston emailed Y on November 16, 2014, and claimed that representatives from Kongalend had visited the Lower Mainland and had provided an order for 10,000 units to be delivered by January 2015.
- [82] The evidence further shows that Gulston emailed TH on January 9, 2015, and claimed that there that there was a production facility in Washington State that could produce 7,000 unit/month, that there was guaranteed profit, that there were four years' worth of orders for the batteries, and that there were "interest/orders from Africa, India, Croatia, USA (including military), Canada (oil companies), Philippines, China and other parts of Asia".

- [83] All these statements were false.
- [84] This Commission has stated that “promote” in the definition of “investor relations activities” includes “activity or communications that support, advance or encourage” the purchase of securities. (see *Alexander (Re)*, 2007 BCSECCOM 645 at para 468)
- [85] Gulston did this. He engaged in investor relations activities when he communicated information to Y and TH that promoted, or reasonably could be expected to promote, investment in the securities of the business of making and selling the batteries.
- [86] Gulston made statements that he knew, or reasonably ought to have known, were false or misleading statements of a material fact. In particular, Gulston knew that
- (a) there were no confirmed orders for the batteries.
 - (b) there was no battery manufacturing facility in Washington. In fact, Gulston was attempting to secure a lease to build one in North Vancouver around the same time.
- [87] The test for materiality is an objective one. The facts that Gulston misrepresented would, considered objectively, have a significant effect on the value of the security. This follows from the fact that at the time of the representations, the business had no purchase orders or capacity to fill orders for the batteries. If the business had confirmed orders for the batteries or the capacity to manufacture the battery, that would significantly enhance the prospects for the business. This in turn could reasonably be expected to significantly affect the value of the business and hence the market value of the securities.
- [88] Gulston made misrepresentations to Y and TH with the intent of getting money from them to invest in the battery business. Gulston told Y and TH false information about multiple years’ worth of orders for the batteries, visits to Vancouver from Namibian officials, and about an active production facility in Washington State. Gulston lied to Y and TH about material facts in an attempt to get investment in the securities of the business which was to manufacture the batteries. A reasonable investor would have thought that, if true, Gulston’s statements about multiple years of orders and an operational manufacturing plant would have a significant positive effect on the value of the securities Gulston was trying to sell.
- [89] We conclude that Gulston breached s. 50(1)(d) of the Act by making the misrepresentations alleged. The statements he made were untrue statements of material facts, and he made them while engaged in investor relations activities to promote the sale of securities.

V. Conclusions and Findings

[90] In conclusion, we find that:

- (a) Sand, Achs and Gulston participated in conduct which they knew perpetrated a fraud in breach of section 57(b) of the Act, in particular by inducing Investors P and K through their corporation to invest \$600,000 based on lies and false statements; and
- (b) Gulston breached s. 50(1)(d) of the Act. In particular, Gulston knowingly made untrue statements of material facts while engaged in investor relations activities to promote the sale of securities to Y and TH.

VI. Submissions on Sanctions

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

- | | |
|------------------------------|---|
| By August 30, 2022 | The executive director delivers submissions to the respondents and to the Commission Hearing Office. |
| By September 13, 2022 | <p>The respondents deliver response submissions to the executive director and the Commission Hearing Office.</p> <p>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).</p> |
| By September 20, 2022 | The executive director delivers reply submissions (if any) to the respondents and to the Commission Hearing Office. |

August 8, 2022

For the Commission

Gordon Johnson
Vice Chair

Audrey T. Ho
Commissioner

James Kershaw
Commissioner