2005 BCSECCOM 561

Statik Sports Inc. and Glenn Anthony Rosen, also known as Anthony G. Rosen and Glenn Anthony Carl Rosen

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

Hearing

Panel	Robin E. Ford	Commissioner
	Marc A. Foreman	Commissioner
	Roy Wares	Commissioner
Dates of Hearing	December 1, 3 and 6, 2004	
Date of Decision	August 31, 2005	
Appearing		
Ralph Sahrmann	For the Executive Director	
Submissions on Sanctions by		
Ralph Sahrmann Kristine Mactaggart Joseph A. Bernardo	For the Executive Director	

Decision

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Introduction

¶ 1 On November 15, 2004, the Executive Director issued a notice of hearing to the respondents Statik Sports Inc and Glenn Anthony Rosen alleging that from May 8, 2003 the respondents had conducted illegal trading in securities, made misrepresentations and committed fraud, contrary to the *Securities Act*, RSBC 1996, c. 418.

¶ 2 The Executive Director also made temporary orders that:

1. under section 161(1)(a) of the Act, Statik and Rosen comply with and cease contravening the Act and the regulations;

2. under section 161(1)(b) of the Act, Statik and Rosen cease trading in and be prohibited from purchasing any securities or exchange contracts; and

3. under section 161(1)(d) of the Act, Rosen resign from any positions he may hold as, and be prohibited from becoming or acting as, a director or officer of any issuer, and Statik and Rosen be prohibited from engaging in investor relations activities,

for a period ending on November 30, 2004.

¶ 3 On May 7, 2003, a notice of hearing had been issued to Sniper Sports Ltd, 592087 BC Ltd and Glenn Anthony Rosen (also known as Anthony G Rosen and Glenn Anthony Carl Rosen). The Executive Director alleged that they had conducted illegal trading in securities, made misrepresentations and committed fraud, contrary to the Act. The matter was set for hearing on November 17, 2004.

¶ 4 On November 17, 2004:

1. we decided to hear both matters together and adjourned both hearings to December 1, 3 and 6, 2004; and

2. considering it to be necessary and in the public interest, we extended the temporary orders until December 6, 2004.

¶ 5 At the conclusion of the hearing on liability on December 6, we asked the Executive Director to file written submissions on sanctions.

¶ 6 On December 6, 2004, we also ruled orally that the evidence supported a *prima facie* case of breach by Statik and Rosen of sections 34(1)(a), 61, 50(1)(d) and 57 of the Act and that the conduct of the respondents was contrary to the public interest. Under section 161(3), we ruled that it was necessary and in the public interest that we extend the temporary orders against the respondents until we rendered our decision.

¶ 7 Commission staff filed submissions on sanctions on December 9, 2004, and a bill of costs on April 15, 2005 (which was also sent to the respondents).

¶ 8 On January 27, 2005, as directed by us in the hearing, staff filed the affidavit of Larry Galvin, sworn on December 16, 2004, of service on Statik (through Rosen as director of Statik) and on Rosen of:

- the Executive Director's submissions on sanctions, and
- our ruling of December 6 extending the temporary orders against Statik and Rosen.

We enter the affidavit as exhibit 17.

¶ 9 On May 30, 2005, we wrote to the parties asking for further submissions on several issues. Staff provided submissions dated June 20, 2005. They sent their submissions by registered mail to Rosen at his last known address. Rosen and Statik have not provided submissions in response, although we invited them to do so.

¶ 10 Rosen was indicted on November 19, 2003. On January 11, 2005, the British Columbia Supreme Court convicted Rosen of theft. An individual had given $6,000 to Rosen with the direction that Rosen use the money to purchase shares of Sniper Enterprises Inc. The Court found that Rosen intentionally, and contrary to

the terms of the direction, used the money instead to buy "Tire Glo" product. Rosen received a six-month conditional sentence and the Court ordered him to pay restitution of $6,000.

¶ 11 This is our decision in the matter of Statik Sports Inc and Rosen. We issue our decision in the matter of Sniper Sports Ltd, 592087 BC Ltd and Rosen separately (see *Sniper Sports Ltd* 2005 BCSECCOM 560).

Facts

¶ 12 We heard from 3 witnesses: a Commission investigator, and Wendy Betts and Claudio Martins, both investors in Statik. Neither of the respondents appeared at the hearing although properly served, and neither provided written submissions on sanctions, although we invited them to do so.

Rosen

¶ 13 In the period May 8, 2003 to November 15, 2004, Glenn Anthony Rosen, also known as Anthony G Rosen and Glenn Anthony Carl Rosen was a resident of British Columbia. He has never been registered under the Act.

Statik Sports

¶ 14 Statik Sports Inc is a British Columbia company incorporated on April 1, 2004. According to records with the Registrar of Companies, Gino Stramacchia was the incorporator and sole director at that time. He resigned, and Rosen became sole director of Statik on September 10, 2004. The registered and records office is in Burnaby, BC. It appears to be a post office box.

¶ 15 Statik is not a reporting issuer and has never been registered under the Act.

¶ 16 Statik Sports purported to be in the business of manufacturing and selling hockey sticks.

The Investors

¶ 17 In the period from May 8, 2003 to November 15, 2004, Rosen promoted and issued, or caused to be issued, shares in Statik to at least two British Columbia residents (and one Alberta resident) in exchange for money. The investors:

- Ian (Dusty) Evansen (the son of Ed Evansen and the Betts' son-in-law to be) invested $17,000 in December 2003;
- Claudio Martins (an Alberta resident) invested about $60,000 in total in April, May and June 2004 (including a "fee" of $1,200 US);
- Ed Evansen invested a total of $33,000 in March and May 2004; and

- Michael and Wendy Betts (BC residents) invested a total of $18,695 (including amounts purportedly for attorney's fees and incorporation costs) in May and July 2004.

¶ 18 All paid $0.25 Cdn per share. Rosen provided share certificates to them, signed by him, which disclosed a share value of $0.70 US per share. Rosen also asked them to solicit other persons to invest in Statik. On the evidence before us, none of these investors has been repaid.

Prospectus

¶ 19 No prospectus has ever been filed with the Commission in respect of any of the Statik shares promoted, and issued, by Rosen and Statik. None of the investors was provided with offering documents such as a prospectus or an offering memorandum.

Representations

¶ 20 In connection with the promotion and issue of Statik shares, Statik (through Rosen) and Rosen represented, among other things, that:

1. a "merger" between Statik and a US company "Cal-Pro" was to take place and it was a "done deal";

2. as a result of the purported merger, the share price of Statik would materially increase "within a few weeks"; and

3. Statik would be listed on the NASDAQ OTC or AMEX.

Wendy Betts

¶ 21 We found Betts to be a very clear and credible witness. She testified to us that she was not a relative or close personal friend of Rosen. She had not invested in shares before her investment in Statik.

¶ 22 Betts and her husband Michael met Rosen at their daughter's wedding reception on April 17, 2004. Betts and her husband had first heard of the opportunity to invest in Statik through their son-in-law to be Dusty Evansen. Evansen had invested in Statik at $0.25 per share. He told the Betts there was going to be a merger with Cal Pro and the shares would then be worth $0.75.

¶ 23 Clay Issell, who was working for Rosen, told Betts that:

- 50,000 shares in Statik were available because they had been allocated to another investor who had not acted quickly enough,

- a merger was about to take place between Statik and a California company "Cal Pro Sports" which was a done deal, and
- as a result of the merger, the share price of Statik would be $0.75 US within a few weeks.

Rosen confirmed this information in a telephone conversation with the Betts.

¶ 24 Rosen told the Betts that:

- he owned the patent for the hockey stick produced by Statik,
- Statik was currently manufacturing about 1,600 hockey sticks per week, which were being sold in Britain,
- he was making arrangements with Spalding for distribution of the sticks in North America,
- Wal-Mart wanted to buy the sticks, but Statik did not have enough production capacity to meet their requirements, and
- the merger with Cal Pro would enable Statik to go to the next level.

¶ 25 Betts and her husband are hockey fans and they were keen to invest. On May 6, 2004, Betts and her husband invested $12,500 to purchase 50,000 shares at $0.25 per share. By letter dated May 8, 2004 to her husband, hand delivered to them by Issell, Rosen confirmed receipt of the payment, signing as President and CEO of Statik. Issell also delivered a share certificate dated May 8 and signed by Rosen that stated that the shares had a par value of $0.70 US.

¶ 26 In addition, the Betts gave $1200 US to Issell to comply with Rosen's request, made through Issell, that the shareholders pay their share of the fees of a US tax attorney who was to handle the tax aspects of the merger.

¶ 27 The merger did not take place. By letter dated July 14, 2004 and delivered by Rosen personally to the Betts on July 15, Rosen wrote to "all shareholders of Statik" to tell them that the merger would not go ahead. Instead, he was taking Statik public by purchasing a shell company. The letter states: "By going public everyone's shares will triple bringing your share count to 3 times the amount and you will be able to sell them whenever you want and as many as you want". Rosen told Betts that Statik was "going to be listed on the AMEX".

¶ 28 Rosen also gave the Betts the Statik Business Plan 2004. The 15-page plan is in large part a copy of the Sniper Business Plan 2000 which Rosen and Sniper Sports used in an earlier promotion - see *Sniper Sports Ltd* 2005 BCSECCOM 560. The photograph on the front is the same and two photographs used in the body of the Statik Plan were also used in the Sniper Plan. Both plans refer to an endorsement

by Alexander Mogilny, a star ice hockey player (whose picture is on the front cover). To provide some examples of the repetition in, and the content of, the plans, both say:

- Manufacturing of the unfinished extruded 6000 Series Junior hockey shafts and insert are carried out by Indalex, a division of Caradon Limited, located in Port Coquitlam, BC.

- SSI [in the Sniper Plan, SMI (ie, Sniper Manufacturing Inc)] has estimated its financial needs on the basis of three major levels of investment risk, and, as a result, is determined to enlist funding support in three stages over the next 24 months. Ideally, the first stage financial partner will have the capability of funding the second stage, preparation for market penetration into the United States by mid 1998. The full funding third stage will be tied to the public offering and listing of STATIK on the NASD OTC Stock Exchange…

- At the opening of 2003 [in the Sniper Plan, 1997], STATIK [in the Sniper Plan, Sniper] began securing distribution to generate orders.

- At the national level, several trips have been made. In 2003 [in the Sniper Plan, 1996], STATIK [in the Sniper Plan, Sniper] displayed at the Montreal Sporting Goods Show and most recently there were several meetings with the buyers for the Source For Sports Group, Wal-Mart and Canadian Tire in Toronto.

¶ 29 On July 16, 2004, the Betts received handwritten and typewritten notes from Rosen offering them the opportunity to acquire an additional 100,000 shares in Statik at what appeared to be a substantial discount. The handwritten note mentioned a possible employment position for Betts' husband, and asked the Betts to solicit other investors. The note is two pages long and includes the following:

> I want yourselves to have a bigger part of it all especially if you become [the] Plant Executive Manager. The company will buy and pay for the 100,000 shares @ $.25, I rather you have them than someone else that just want's the Fast Buck! For every allotment of $5,000 worth of shares you will only have to pay the Share Cert Fee and Filing Fee of $340.00 Cnd. And you will only to pay back the cost of the shares ONLY when we are Trading Publicly and we hit the $1.45 Cnd Mark. I can do this for Potential Employees and Current Employees, this is a no brainer for yourselves, you will receive on Monday a Share Cert for 100,000 shares that is worth $25K and will be worth $55K on Tuesday. For the fee cost

> of only in Total 5 X $340.00 = $1,700. … I need an answer very soon this AFTERNOON. … It is going to be a great one!

¶ 30 The typewritten note from Rosen, setting out the agreement for the issue of 100,000 shares, was delivered by Issell later that day. Betts signed it on the spot.

¶ 31 Betts paid the $1,700 partly by bank draft ($1,540) payable to Rosen personally, and partly in cash ($160) given to Issell, in accordance with Rosen's request that some cash be given to Issell, so that (he said) the corporate records could be updated immediately.

¶ 32 On July 23, 2004, the Betts received another typewritten note from Rosen in which Rosen stated "everything is going awesome" and that it would be best if the Betts' shares were put into an incorporated company in order to "save over paying 22% in capital gains tax". Rosen further stated that he had already asked someone to incorporate a company on the Betts' behalf which had cost $480.00. He asked them to pay that amount to Issell.

¶ 33 A later typewritten note (undated) told the Betts that Rosen had made a mistake about the cost of incorporating the company, and asked them to give Issell another $130 to pay for the name reservation. The Betts gave a total of $610 in cash to Issell to pay for the purported costs of incorporation.

¶ 34 For the incorporation of the recommended company, Betts' husband signed a Form 1 (Memorandum) and a Form 3 (Notice of Officers). The new company was to bear the name "M and W Marketing Inc.".

¶ 35 Staff searched the Registrar of Companies' records, but found no company under that name and no company in which Michael or Wendy Betts were directors or officers. Betts told us that they never received any filed incorporation documents. It appears that a company was not incorporated for the Betts.

¶ 36 During the period July 15-25, 2004, there were many telephone conversations between Rosen or Issell and Betts or her husband. They were, in Betts' words, Rosen's "new best friends". There was considerable discussion about Rosen's offer of employment for Betts' husband who delivered his resume to Rosen at Rosen's request.

¶ 37 Toward the end of the July 15-25 period, the Betts repeatedly told Rosen they wanted to drive by the warehouse of Statik where Betts' husband would supposedly work. Rosen avoided disclosing to the Betts the location of the warehouse or plant where the hockey sticks were purportedly manufactured. Rosen remained, however, in Betts' words, "very smooth and convincing".

¶ 38 On July 25, 2004, the Betts received another handwritten note from Rosen. In it, Rosen said he was busy with "the Texan's". (Rosen had previously told the Betts that Texans were going to provide money to set up the new manufacturing operation of Statik.) Rosen also asked the Betts to help with soliciting buyers for Dusty Evansen's shares. The Betts declined. Betts told us that it was becoming apparent to them that Evansen and Rosen were having a falling out.

¶ 39 By August 24, 2004, Betts and her husband had concluded that Statik Sports was a sham. They demanded, by letter faxed to Rosen, the return of their money. Rosen, who was, he said, "too busy" to meet them at their home, asked to meet them closer to his residence in Burnaby. The Betts met with Rosen on August 25, 2004 at a restaurant in Surrey. The meeting lasted about 15 minutes. During the meeting, Rosen told them:

- Statik would be listed on the NASDAQ OTC through Ship Island, a shell company, in ten days [Betts did not believe this];
- he was aware of a notice of hearing issued by the Commission against him. He told the Betts that he had "all his ducks in a row" and there were two sides to every story; and
- he agreed to give the Betts their money back in 10 days.

¶ 40 On September 7, 2004, Rosen wrote to the Betts proposing revised repayment timing. The Betts agreed to this by letter of the same date.

¶ 41 On September 13, 2004, Rosen wrote to the Betts to say that repayment would again be delayed, but he would have the money to repay them soon. The Betts replied on September 13 and 14 to suggest one final repayment on September 23, 2004.

¶ 42 Rosen did not reply to the letters of September 13 and 14, 2004, and did not, from then on, return phone messages from the Betts. The Betts faxed Rosen follow-up letters on October 7 and 14, and November 8, 2004, but received no reply. At the time of the hearing, they had not received any repayment of their investment. Needless to say, the job offer from Rosen to Betts' husband never materialized.

Claudio Martins

¶ 43 Martins was also a credible witness. He resides in Alberta. He is not a close personal friend of Rosen. He is not an experienced investor. He purchased the other investments he holds on the advice of a financial adviser.

¶ 44 He told us that he first heard about Statik from his friend Ed Evansen. He met Rosen and Stramacchia in Vancouver in April 2004 when he went to Vancouver to meet Evansen and to attend the wedding reception of Dusty Evansen, Ed Evansen's son. (Rosen and Stramacchia also attended the reception.)

¶ 45 At the reception, Rosen told him about Statik and that Statik was to merge with an unnamed California company. He said 300,000 shares were available and had to be purchased in advance of the merger if Martins wanted to take advantage of a tripling or quadrupling in value of the shares. Rosen told Martins he had only a few days to decide. Dusty Evansen had already given Martins a copy of the Statik Business Plan 2004 which Martins then reviewed before deciding to invest. (It was the same plan that Rosen later provided to the Betts.) While still in BC, he agreed to invest $37,500 at $0.25 per share. The share certificate later provided by Rosen to Martins showed the shares as having a value of $0.70 US.

¶ 46 In a letter to Martins dated April 24, 2004, Rosen said there would be a buyout of Statik shares at $0.55 US, but he would make a counter-offer. If the company accepted the offer, Statik shareholders would triple their money. He said 150,000 shares were still available and asked Martins to find other people to buy the shares, offering him a 20% finder's fee.

¶ 47 In a letter dated April 28, Rosen told Martins he was awaiting a reply to his counter-offer of $0.90 US which he expected on April 30. Meanwhile, he was "getting feedback from everyone that they would like to see us continue going public on the stock exchange instead of merging". Rosen offered Martins a role as director in exchange for shares at no cost other than "filing fees" of $3,800 US. Martins declined the offer.

¶ 48 In a letter dated May 18, 2004, Rosen told Martins that Statik was "going ahead with the merger that will commence on May 28". Martins made a further investment of $5,000 at $0.25 per share.

¶ 49 Rosen asked Martins to give him his share certificates. Rosen told Martins that he would receive payment for his shares within days. Martins did not receive any payment.

¶ 50 Martins also paid Rosen a "fee" of $1,200 US that, Rosen told him, was for an incorporation in Nevada. Martins told us that he was not sure what this was for, except he thought it had something to do with the US merger. He did not receive any documents from Rosen relating to this incorporation. It appears that no incorporation was carried out.

¶ 51 In June, Martins made an additional investment for a total investment of about $58,000. Although by this time Rosen and Stramacchia had explained that certain difficulties had arisen with the merger and the US authorities, everyone was so, as Martins described it, "hyped up" about the company, he continued to feel it was a good investment.

¶ 52 In a letter dated July 10, 2004, Rosen told Martins that he had removed Stramacchia from the board of directors and he asked Martins again to "sit on the Board of Directors with Me". (Betts gave evidence that Issell had told her that the SEC had discovered that Stramacchia had a criminal record and so wanted him removed as director.) Martins again refused Rosen's request.

¶ 53 In a letter dated July 14, 2004 to "all shareholders of Statik" (the same letter that was provided by Rosen to the Betts), Rosen told Martins that the merger was not going ahead, and that he would take Statik public.

¶ 54 In October, Rosen telephoned Martins to say that Statik was getting registered in the United States and was going to obtain a listing on the NYSE, through a shell company. By this point, Martins had decided he wanted his money back. On or around November 18, 2004, in a telephone call, Rosen tried to reassure him, saying that a shell company had now been registered in the US, but Martins was not reassured. Rosen asked him to come to Vancouver to discuss how his money could be returned to him. After that, Rosen and Stramacchia no longer returned Martin's calls.

Evansens

¶ 55 Ed Evansen and Dusty Evansen each told staff that Rosen told them initially that Statik would merge with a California company and the shares would soon be worth $0.70 per share. Later Rosen told them that Statik would be trading on the OTC-BB. They told staff that they were not close personal friends of Rosen or Stramacchia. Dusty Evansen told staff he did not become a director of Statik.

¶ 56 Betts provided staff with a copy of an extraordinary memo from Rosen to Dusty Evansen dated June 2, 2004 (which Evansen had given to her) which we quote at some length:

> … I am just so busy trying to put the final preparations on this deal it is now pending on the manufacturing set up in Alberta, we just received the proposal for manufacturing, it goes like this:
>
> Cal Pro has put up a letter of credit for the sum of $250,000 cdn and this is to go toward manufacturing, raw materials, lease space, machinery and a small overhead.

…

> I just got granted permission by the Securities commission to release another 300,000 shares at the price of $.25 @ to sell to make up another $70,000 to get our total to $250,000. I am in dire straights and need help, I need yourself along with Claudio and your dad to solicit people out there … and help sell some of these 300,000, let me tell you how important this is, this is to be in place no later than Monday, June 7, 2004 by 10:00 am so the securities commission can do their review and give us their stamp of approval so the monies to us can and will be released on June 8, 2004.
>
> I need help, everyone is watching me under a microscope making sure I follow the guidelines under the Insider trading clause, please tell and let Claudio the severity and timing of this transaction, IF THIS IS NOT DONE BY THE TIMELINE WHICH I HAVE MENTIONED ALREADY WE WILL HAVE TO WAIT 30 DAYS FOR THE COMMISSION TO REVIEW OUR MERGER AGAIN, everything is in place and I am trying to seek more investors …, can you please put the fire under your dad and Claudio and sell some stock or we are f -- d for 30 days. … Time to get to work, say hi to your wife, your dad and Claudio. Sincerely, A-RO

Follow-up

¶ 57 Staff searched the EDGAR database and found no filings by or for Statik, as would be expected of a company planning to have its securities listed or quoted on a stock exchange or an over-the-counter quotation system.

¶ 58 Staff told us they were able to locate only one entity named Cal Pro Sports, which operated a store in California. The owner told staff he had never heard of Rosen or Statik.

¶ 59 Attached to the Statik Business Plan 2004 was an undated sheet headed "Sports Business Stock Watch" which consisted of columns listing exchanges, companies traded on those exchanges, and prices and P/E ratios. It shows a "Cal Pro" as trading on NASDAQ. Staff provided us with a Bloomberg search which showed that this Cal Pro was "California Pro Sports Inc". Cal Pro had changed its name to Imaginon in January 1999 which meant that the sheet had to have been issued prior to that date. Imaginon is a software company.

Analysis and Findings

¶ 60 The Executive Director alleges that the respondents, by engaging in the conduct described above, breached sections 34(1)(a), 61, 50(1)(d) and 57 of the Act, and acted contrary to the public interest.

Law

Trading without registration

¶ 61 Section 34(1)(a) says: "A person must not . . . trade in a security . . . unless the person is registered in accordance with the regulations . . .". A "trade" is defined in section 1 to include "a disposition of a security for valuable consideration" and "any act, … solicitation, conduct or negotiation directly or indirectly in furtherance of [that activity]". Shares in a company are a "security" as defined in section 1.

Distributing without a prospectus

¶ 62 Section 61(1) says: "Unless exempted under this Act or the regulations, a person must not distribute a security unless . . . a preliminary prospectus and a prospectus respecting the security have been filed with the executive director". "Distribution" is defined in section 1 to mean "a trade in a security of an issuer that has not been previously issued".

Misrepresentation

¶ 63 Section 50(1)(d) of the Act provides:

> A person, … with the intention of effecting a trade in a security, must not do any of the following:
>
> …
> (d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation.

¶ 64 "Misrepresentation" is defined in section 1 of the Act to mean:

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

¶ 65 "Material fact" is defined in section 1 of the Act to mean:

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

Fraud

¶ 66 Section 57(b) of the Act provides:

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

¶ 67 As set out in the BC Court of Appeal judgment in *Anderson v. BCSC*, 2004 BCJ 8, the elements of fraud under section 57(b) of the Act were summarized in *R v. Théroux*, [1993] 2 SCR 5 at 20, 100 DLR (4th) 624, 79 CCC (3d) 449 by Madam Justice McLachlin (as she then was) as follows:

> ... 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).

¶ 68 McLachlin J also cited with approval (at 23) the words of Taggart JA who stated in *R v. Long* (1990), 51 BCLR (2d) 42, 61 CCC (3d) 156 at 174:

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

¶ 69 The BC Court of Appeal in *Anderson* went on to say:

> Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal law standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.

¶ 70 We must base our finding of the mental element of fraud on our findings as to what Rosen actually knew. The evidence must be clear and convincing.

Findings

Trading without registration and distributing without a prospectus

¶ 71 Statik sold shares not previously issued. We find that Statik traded and distributed securities under the Act. On the evidence before us, Rosen was Statik's principal directing mind and will, and caused Statik to trade and distribute its shares. We find that Rosen traded in and distributed securities in that he acted, solicited and negotiated, directly or indirectly, to further "a disposition of a security for valuable consideration", namely the sale of Statik's shares for money to the investors.

¶ 72 From May 8, 2003 to November 17, 2004, Statik and, in relation to Statik, Rosen:

1. without registration under the Act, and without an exemption from the registration requirements, traded securities of Statik, by selling shares in the company for valuable consideration to the Statik investors, or acting in furtherance of such a sale, contrary to section 34(1)(a) of the Act; and

2. without filing a prospectus respecting the securities with the Executive Director, and without an exemption under the Act or the regulations, distributed securities of Statik, by selling shares in the company for valuable consideration to the Statik investors, or acting in furtherance of such a sale, contrary to section 61 of the Act.

Exemptions

¶ 73 The legislation provides exemptions from sections 34 (1) and 61(1). The onus of showing that any of those exemptions applies rests on the person who seeks to rely on the exemption (see *Bilinski* 2002 BCSECCOM 102). The respondents did not appear or present a defence, but staff nevertheless took us through the exemptions which might apply to show that they did not. The evidence before us shows that none of the exemptions applied.

¶ 74 None of the investments exceeded the minimum and neither Rosen nor Statik complied with any of the conditions attached to the exemptions that require a

minimum investment or an offering memorandum. (See former sections 45(2)(5) and 74(2)(4) of the Act and former sections 89(b), 128(b) and 128(c) of the *Securities Rules*, BC Reg. 194/97; these provisions have been superseded by *National Instrument* 45-103 Capital Raising Exemptions.)

¶ 75 The "private issuer" exemption (formerly sections 46(j) and 75(a) of the Act, now in NI 45-103) did not apply because the investors of whom we are aware (with the possible exception of Dusty Evansen) were, with respect to Statik, "members of the public". Three were friends or family of Dusty Evansen, who was not a director or officer of Statik. Staff told us that after asking the appropriate questions of the investors, they determined that the net worth of the investors did not meet the "sophisticated purchaser" test.

Misrepresentations

¶ 76 We find that, from May 8, 2003 to November 17, 2004, Statik and, in relation to Statik, Rosen, with the intention of effecting a trade in a security, namely the shares of Statik, made statements that they knew or ought reasonably to have known were misrepresentations, contrary to section 50(1)(d) of the Act.

¶ 77 Statik and Rosen made the following statements to Statik investors:

- a "merger" between Statik and a US company (Rosen told the Betts and Dusty Evansen the US company was "Cal-Pro") was to take place and it was a "done deal";
- as a result of the merger, the share price of Statik would materially increase "within a few weeks"; and
- Statik would be listed on the NASDAQ OTC or AMEX.

¶ 78 These statements were without foundation and false. They were also statements of material facts, namely facts that, where used in relation to the Statik shares proposed to be issued, could significantly affect, or could reasonably be expected to significantly affect, the market price or value of those shares. Therefore, they were misrepresentations.

¶ 79 Clearly the statements were false. The purported merger was a sham. The share price of Statik did not and could not increase within a few weeks. There was no prospective merger or public offering on any stock exchange or quotation and trade reporting system. The Statik Business Plan was no more than a recycled version of the Sniper Sports Business Plan used by Rosen in connection with the promotion of Sniper Sports Ltd and described in *Sniper Sports Ltd* 2005 BCSECCOM 560. It too was a sham.

¶ 80 Each of these facts could have significantly affected the value of the Statik shares. Without a merger, there would be no additional capital investment or other support that would add substantial value to the business. If the shares were not to trade at the specified prices, then they would be significantly less valuable. Without the listing, the investors would be restricted in their ability to sell the shares on, and the investment would not have the credibility that comes with listing.

¶ 81 Rosen and (through Rosen) Statik must have known that these statements were misrepresentations. Rosen was in control of all of Statik's activities. The purported merger, public listing and Business Plan were shams of Rosen's making. The statements about shares increasing in value had no basis in fact. All the statements were designed to induce prospective investors to invest.

¶ 82 Statik and Rosen must also have known that these facts could significantly affect the value of the shares and the price investors were willing to pay - that was the whole point of the promotion.

Fraud

¶ 83 We find that, from May 8, 2003 to November 17, 2004, Statik and, in relation to Statik, Rosen, in British Columbia, engaged in or participated in a series of transactions relating to a trade in a security, namely shares in Statik, knowing that the transactions perpetrated a fraud on persons in British Columbia, contrary to section 57(b) of the Act. They did this by making the misrepresentations described above.

¶ 84 The *actus reas* of fraud is found in Statik's and Rosen's false statements of important facts which caused actual loss to Statik investors who lost their investment.

¶ 85 The *mens rea* of fraud is also established. Statik (through Rosen) and Rosen must have known that the statements were false and deceitful and that the falsehood and deceit could have as a consequence that the investor's economic interests were put at risk. Rosen solicited or directed the solicitation of the investors on behalf of Statik. He created the representations about Statik's business and its potential. The false statements were part of a wider web of deceit concocted by Rosen and, through Rosen, Statik, to lure investors into a scam.

¶ 86 The evidence is clear and convincing.

Conduct contrary to the public interest

¶ 87 We find that Statik's and Rosen's conduct, described above, was contrary to the public interest.

Orders

¶ 88 Staff say it is in the public interest that we make the following orders:

1. under section 161(1)(b) of the Act, that all persons cease trading in any securities of Statik Sports Inc;

2. under section 161(1)(c) of the Act, that any or all of the exemptions described in sections 44 - 47, 74, 75, 98 or 99, do not apply to Statik and Rosen;

3. under section 161(1)(d) of the Act, that Rosen resign any position he holds as a director or officer of any issuer, and that he be prohibited from becoming or acting as a director or officer of any issuer;

4. under section 161(1)(d) of the Act, that Rosen be prohibited from engaging in investor relations activities;

5. under section 162 of the Act, that the respondents each pay an administrative penalty; and

6. under section 174 of the Act, that the respondents each pay prescribed fees or charges for the costs of or related to the hearing.

Preliminary issues

¶ 89 The orders requested by staff were not set out in the notice of hearing. While we think this is a desirable practice, we do not think the omission has caused any unfairness to the respondents in this case. The conduct in the second matter is very similar to the conduct which is the subject of *Sniper Sports Ltd* 2005 BCSECCOM 560 which matter was heard together with this one. It was therefore to be expected, in our view, that staff would request similar orders in their submissions on sanctions, and that is in fact what happened. Rosen and Statik had the opportunity to respond to staff's submissions on sanctions, but chose not to do so.

¶ 90 There is another issue. The panel directed that the two matters be heard together for reasons of efficiency, having decided that this would not be unfair to the respondents. Staff did not apply for, and the panel did not direct, that the two matters be merged (or consolidated). The question is whether the matters should nevertheless be treated as merged for the purpose of deciding sanctions. In this case we were particularly concerned with the imposition of a second administrative penalty under section 162. We asked the parties for their submissions on whether we could impose a second penalty such that, taken together, the two penalties imposed on Rosen would exceed $250,000.

¶ 91 The two matters were heard together, but they have otherwise been treated as separate matters. The conduct alleged in the second matter was in many ways similar to that in the first matter and perhaps should be viewed as involving entirely the same respondent (that is, Rosen) since the corporate respondents were arguably themselves a sham. On the other hand, the conduct alleged in the second matter should not necessarily be viewed as a continuation of the conduct alleged in the first. Staff had by that time issued the notice of hearing with respect to the first matter and there was apparently a clean (and long) break between the conduct in the first matter and the conduct in the second.

¶ 92 If the conduct was continuing, then the proper course of action may have been to amend the first notice of hearing to pick up the new allegations. The Court might otherwise view treating the two matters separately as a colourable mechanism to avoid the requirements of section 162 of the Act. *Biller v. British Columbia (Securities Commission),* [2001] BCCA 208, although not precisely on point, may support that conclusion. To quote Mr Justice Low:

> [7] … [Section] 162 empowers the Commission to impose only one penalty per hearing…. Contravention of a provision of the Act or regulations is simply a minimum requirement for the imposition of a penalty.
>
> [17] … [The] penalty is related to the overall conduct of the person before the Commission and not to specific contraventions….
>
> [18] [It was suggested that the Commission would get around this limitation by conducting a separate hearing for each contravention.] That is so only theoretically. The Commission has to act in good faith. I would think that conducting separate hearings with respect to related conduct for the purpose of collecting more money through administrative penalties would be an abuse of process.

¶ 93 Would the Court view two separate sanctions decisions under section 161 of the Act as an abuse of power in this case?

¶ 94 Staff say that when they became aware of the conduct which led to the issue of the notice of hearing, they faced a problem. Amending the notice of hearing might have meant that Rosen, faced with entirely new allegations, would seek – and might well be entitled to – an adjournment to prepare defences to the new allegations. This would have further delayed enforcement action on the allegations in the Sniper Sports matter.

¶ 95 In addition, staff questioned whether it would have been appropriate to amend the notice of hearing. The Statik conduct was in respect of a new issuer and had occurred well after the Sniper Sports conduct. Furthermore, the Statik conduct raised strong grounds for temporary orders which had not been sought in the Sniper Sports matter. On balance, staff decided it was preferable to issue new process to account for new conduct. The result was the November 15, 2004 temporary orders and notice of hearing.

¶ 96 In the event, the respondents did not defend either proceeding and the matters were heard together in the interests of efficiency.

¶ 97 Staff say that the current situation is entirely distinguishable from that discussed in paragraph 18 of *Biller*. The critical distinction lies in the fact that the Statik Sports events did not occur until after the first notice of hearing had been issued. Although Rosen's misconduct is a common theme in both notices of hearing, the allegations in the first notice are concerned with events that ended in 2001, while the second notice is concerned with events in 2004. Staff say this was not a continuing course of conduct and two distinct sets of sanctions may properly be imposed.

¶ 98 We find that it is appropriate to treat the matters as separate courses of conduct. If we did not treat them as separate, it would be all too tempting for fraudsters to continue to take bites of the cherry after the Executive Director had issued a notice of hearing, but before the Commission had held a hearing and made a decision, knowing that any fine would be capped at $250,000.

Analysis

¶ 99 *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 contains a non-exhaustive list of factors that are usually relevant to making orders against a person under sections 161(1) and 162:

- the seriousness of person's conduct,
- the harm suffered by investors as a result of the person's conduct,
- the damage done to the integrity of the capital markets in British Columbia by the person's conduct,
- the extent to which the person was enriched,
- factors that mitigate the person's conduct,
- the person's past conduct,
- the risk to investors and the capital markets posed by the person's continued participation in the capital markets of British Columbia,
- the person's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,

- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

¶ 100 We have concluded that Rosen intentionally lied to investors. He preyed on inexperienced investors. He was following what by now was a pattern of deceitful behaviour to exploit the vulnerabilities of prospective victims and induce them to part with their money. His method of operation included the following:

- He offered shares which he said were soon to increase significantly in value on an impending merger or public offering;
- These shares had to be purchased quickly or the opportunity would pass, or they would be snapped up by another purchaser;
- Alternatively, the money was needed urgently or the valuable merger would not go ahead;
- He solicited the friends or family of his existing investors and used social contacts both for funds and to help him solicit other investors;
- Although he provided some documentation in the form of a business plan and share certificates, and repeated additional oral and written information to provide reassurance that matters were proceeding as expected (or to explain why they were not) the documentation was not of the nature or quality that an experienced investor would expect to receive.

¶ 101 As Wendy Betts said to us - "We would never have given him that money as a stranger." She also said of Rosen - "You have hurt people. You have hurt families."

¶ 102 Rosen's and Statik's conduct seriously harmed investors and damaged the integrity of the securities market in British Columbia. Neither Rosen nor Statik have accounted for the monies they took from investors, and Rosen has shown no remorse or intention to repay investors or that he accepts the consequences of his misconduct.

¶ 103 Although in this case Rosen appears to have victimized fewer investors than in *Sniper Sports Ltd* and taken less money ($128,700 as opposed to $311,659), this case has additional aggravating factors that justify a more significant sanction.

¶ 104 Conduct prior to the period relevant to the allegations in the notice of hearing may be taken into account in making orders and setting penalties (see *Diianni* 2001 BCSECCOM 918). We have taken into account the fact of the notice of hearing

issued to Sniper Sports Ltd, 592087 BC Ltd and Rosen on May 7, 2003. On receipt of that notice, Rosen would have known beyond any doubt that the conduct described in this decision was, in staff's opinion, to breach the securities laws. He would also have been fully aware of the losses he had already caused to the investors in the earlier North American and Sniper Sports promotions.

¶ 105 Despite the issue of the notice of hearing dated May 7, 2003, Rosen continued to engage in conduct that was at significant risk of being found to be a deliberate flouting of the securities laws, and to have caused fraudulent losses to investors. The conduct described in this decision followed substantially the same methods as the conduct alleged in relation to Sniper Sports and North American. Rosen by this time could have been under no misapprehension about what he was doing (and doing to investors) in conducting the Statik promotion.

¶ 106 Rosen was convicted of theft related to securities in January 2005. We have taken into account the fact of the conviction.

¶ 107 We have permanently excluded Rosen from the capital markets, from acting as a director or officer of an issuer, and from investor relations activities, so he cannot continue to victimize the public (see *Sniper Sports Ltd* 2005 BCSECCOM 560).

¶ 108 The aggravating factors combine to allow us to describe Rosen's behaviour as reprehensible - clearly deserving the imposition of a significant administrative penalty. There do not appear to be any mitigating factors.

¶ 109 It is also important that we send a clear message to those who continue (or consider continuing) to breach the *Securities Act* after the clearest warnings from Commission staff.

¶ 110 It appears that sums raised from investors went straight into Rosen's pocket. There is no evidence that the funds were placed in a corporate bank account or accounted for as company assets. There is no evidence that Rosen spent any money to further the business purposes of Statik.

¶ 111 The company itself is, in a sense, a sham. It appears that it served only to provide credibility to Rosen's representations to investors. There is no evidence that it was a true enterprise in its own right. Rosen is apparently the only director. We do not think therefore that a fine against Statik would have any additional deterrent effect against the directors, officers and shareholders (most of whom are those who were defrauded).

¶ 112 However, in making orders, we wish to ensure that Statik cannot in future be used again for an improper purpose.

Orders

¶ 113 Accordingly, considering it to be in the public interest, we order:

1. under section 161(1)(b) of the Act, that all persons cease trading in the securities of Statik Sports Inc;

2. under section 161(1)(c) of the Act, that the exemptions in the Act do not apply to Statik Sports Inc permanently; and

3. under section 162 of the Act, that Rosen pay an administrative penalty of $200,000.

¶ 114 It is the Commission's usual practice to award costs against an unsuccessful respondent under section 174 of the Act and *Securities Regulation*, BC Reg. 196/97, section 22. The respondents were given notice that staff would seek costs of the hearing. We received no submissions from the respondents on costs.

¶ 115 We order that Rosen pay the prescribed fees or charges of or related to the hearing in the amount of $20,233.88.

¶ 116 August 31, 2005

¶ 117 **For the Commission**

Robin E. Ford
Commissioner

Marc A. Foreman
Commissioner

Roy Wares
Commissioner

2005 BCSECCOM 561