

Citation: 2014 BCSECCOM 263

**Streamline Properties Inc., 0772835 B.C. Ltd., Local 1661 Building Inc.,
Almaval Building Inc., Jeffrey Karl Wiegel and Michael Jerome Knight**

Securities Act, RSBC 1996, c. 418

Hearing

Panel	Nigel P. Cave	Vice Chair
	Audrey T. Ho	Commissioner
	George C. Glover, Jr.	Commissioner
	Don Rowlatt	Commissioner
Date of hearing	May 12 and 13 and July 3, 2014	
Submissions Completed	August 22, 2014	
Date of Findings	September 3, 2014	
Appearing		
Jennifer Whately	For the Executive Director	
Jeffrey Karl Wiegel	For himself	
Michael Jerome Knight	For himself	
Unrepresented	Streamline Properties Inc., 0772835 B.C. Ltd., Local 1661 Building Inc. and Almaval Building Inc.	

Findings

I Introduction

- ¶ 1 This is the liability portion of a hearing pursuant to sections 161, 162 and 174 of the *Securities Act*, RSBC, 1996, c.418.
- ¶ 2 On September 13, 2012 the executive director issued a temporary order and notice of hearing alleging that:
- between October 2006 and August 2010, the respondents distributed securities of 0772835 B.C. Ltd. (835 Ltd.), Local 1661 Building Inc. and Almaval Building Inc.

- without being registered under the Act and without having filed a prospectus, in breach of sections 34 and 61 of the Act;
- Michael Jerome Knight and Jeffrey Karl Wiegel perpetrated a fraud;
 - between October 2006 and April 5, 2007, Knight breached an April 5, 2004 order of the executive director which prohibited him from engaging in acts in furtherance of a trade or in investor relations activities for a period of three years.

¶ 3 During the hearing, the executive director called three witnesses, a Commission investigator and two investors (one solely an investor in 835 Ltd. and one an investor in both 835 Ltd. and in Almaval (Mr. B)), and tendered documentary evidence. Wiegel himself gave testimony and tendered documentary evidence. Knight attended the hearing but did not testify or enter any other evidence in the proceedings. The corporate respondents were given notice of the proceedings but did not attend.

II Background

A Facts

¶ 4 Streamline Properties Inc. was the umbrella development company under which the respondents marketed their real estate development projects. Separate companies were formed to develop each of these projects:

- 835 Ltd. to develop “The Brook” in North Vancouver;
- Local 1661 to develop “The Local” in Vancouver; and
- Almaval to develop a property or properties on West Broadway in Vancouver.

¶ 5 Wiegel is a resident of British Columbia and was a director and officer of each of the corporate respondents.

¶ 6 Knight is a resident of British Columbia and was the general manager of Streamline.

¶ 7 Neither Wiegel nor Knight was registered in any capacity under the Act at any time relevant to these proceedings. Knight was previously registered under the Act as a mutual fund salesperson between 1992 and 1995.

¶ 8 On April 5, 2004, the executive director issued an order prohibiting Knight from engaging in acts in furtherance of a trade or in investor relations activities for a period ending on April 5, 2007. This order resulted from a settlement agreement between Knight and the executive director in which Knight acknowledged contraventions of sections 34 and 61 of the Act, among other things.

¶ 9 None of the corporate respondents has ever filed a prospectus.

¶ 10 Between October 2006 and August 2010, one or more of the respondents:

- raised \$2,085,000 from 32 investors for 835 Ltd.;

- raised \$1,940,000 from 21 investors for Local 1661;
 - raised \$100,000 from two investors, ostensibly for 835 Ltd., but structured as a loan to Almaval through a promissory note issued by Almaval.
- ¶ 11 Testimony from the investors and from Wiegel established that Knight was primarily responsible for dealing with investors and day to day operations of the property developments. Despite having no previous experience with real estate development and being something akin to a figurehead, Wiegel was actively involved with investors and the projects.
- (a) Streamline**
- ¶ 12 Although Streamline was generally acknowledged to be the umbrella development company for the three projects, its role, if any, in the raising of money from investors was not made clear during the hearing. Certain of the promotional materials provided to investors included the Streamline corporate name, without explanation of its role. None of the legal investment documents includes any reference to Streamline. Wiegel and Knight had Streamline email addresses, but it was not clear that when they were acting, they were acting on behalf of Streamline versus one of the other corporate respondents. Owing to this lack of clarity, we have made no findings against Streamline in these proceedings.
- (b) 835 Ltd.**
- ¶ 13 The general nature of the investments in 835 Ltd. is clear. The investors were told that their investments took the form of a shareholder loan and share ownership in 835 Ltd. An investment also entitled the investor to be allocated a unit in the development, with the investor having the right to decide between purchasing the unit upon completion at a predetermined price or an entitlement to the profits from the sale of that unit above the predetermined price by the respondents. What is less clear is how, in each investor's case, these investments were manifested. All investors signed a Founders Agreement (a commercial agreement/quasi shareholders' agreement among the investors), some investors received shareholder loan receipts or promissory notes and some received share certificates in 835 Ltd. The Founders Agreement for 835 Ltd. referred to the investments as shareholder loans and to the investors as shareholders.
- ¶ 14 Wiegel admits to his contraventions of sections 34 and 61 of the Act with respect to the sales of securities in 835 Ltd. He had previously made such admissions in a proceeding under the *Offence Act* in the Provincial Court of British Columbia. In that proceeding, Wiegel pled guilty to a breach of section 61 of the Act and received a suspended sentence and two years probation.
- ¶ 15 The Brook was ultimately completed but all of the investors in 835 Ltd. lost their money.

(c) Local 1661

- ¶ 16 The investments in Local 1661 were even less well documented than those in 835 Ltd.
- ¶ 17 Investors in Local 1661 did not enter into subscription agreements but did sign a Founders Agreement. The Founders Agreement for Local 1661 was almost identical to that used in connection with 835 Ltd. Again, that agreement refers to the investments as shareholder loans and to the signatories as shareholders. At least two of the investors received documents which evidenced a loan, in one case a shareholder loan receipt and in another a promissory note. Notwithstanding the absence of subscription agreements and other documentation (e.g. other loan documents or share certificates), we find that the Local 1661 investments were structured in substantially the same manner as those in 835 Ltd.
- ¶ 18 As discussed below, Wiegel argues that the investments in Local 1661 were not securities as defined under the Act; however, he admits, if we find that such investments were securities under the Act, he contravened sections 34 and 61 in respect of those investments.
- ¶ 19 The Local was the subject of foreclosure proceedings prior to completion and all of the investors in Local 1661 lost all of their money.

(d) Almaval

- ¶ 20 By December of 2008, The Brook development had run into financial difficulties and Streamline was looking for additional sources of funds. Knight approached two existing investors in 835 Ltd. (one of whom was Mr. B) about making an additional \$100,000 short term investment in The Brook development. The two investors agreed to provide the funds on the understanding that the loan would be repaid in three months and if the loan was not repaid on maturity then the loan would become secured by a mortgage at that time.
- ¶ 21 Although this \$100,000 loan was intended for further development of The Brook, Knight and the two investors ultimately agreed upon a promissory note from Almaval containing the terms described above. The terms in the note include a promise by Almaval that its failure to pay the note by April 15, 2009 would result in Almaval granting the investors a mortgage over a property at 3701 West Broadway, Vancouver.
- ¶ 22 The promissory note contains a signature purporting to be that of Wiegel. However, Wiegel claims that Knight forged his signature on this document. This evidence was not rebutted by any evidence entered in the proceedings. Mr. B gave evidence at the hearing. He indicated that, at the time of this investment, he only had dealings with Knight.
- ¶ 23 The promissory note was not repaid on April 15, 2009 as required by its terms. Almaval did not grant mortgage security over 3701 West Broadway upon default, as Almaval did

not own that property. Almaval had entered into an agreement to purchase that property but did not complete that transaction prior to the default on the promissory note.

¶ 24 Mr. B stated that he was not advised at the time of the investment that Almaval did not own the property. Wiegel suggests that we should not rely upon the evidence of Mr. B due to inconsistencies in his testimony. However, Mr. B, in re-direct examination, was unequivocal that he and the other Almaval investor were not advised at the time of their investment that Almaval did not own the property. The respondents did not enter any evidence to rebut that given by Mr. B on this issue.

¶ 25 Wiegel ultimately repaid part of the promissory note personally. In addition, the Almaval investors commenced legal proceedings against Almaval and were able to recover (some years later) the remaining amounts outstanding from the sale of other assets of Almaval.

III Analysis and findings

A Illegal distributions of securities and trading without registration

¶ 26 Wiegel and Knight offered only two initial submissions on these allegations. Firstly, Wiegel suggested that the investments in Local 1661 were not securities for the purposes of the Act. As noted above, Wiegel admitted that, if we determine that the investments in Local 1661 were securities, he contravened sections 34 and 61 in respect of issuance of those securities to investors. Secondly, Wiegel and Knight argued that the executive director failed to properly investigate the circumstances of each of the investors. They argue that had the executive director done so, he would have determined that a number of the investments would have qualified for exemptions under the Act. Wiegel and Knight initially pointed to no specific investments that would potentially be exempt or under what specific exemptions. However, in follow-up submissions, Wiegel suggested that certain investors did qualify for exemptions as discussed below. Wiegel and Knight entered no evidence in the proceedings on this point.

¶ 27 Having admitted to his contraventions of sections 34 and 61 with respect to the investments in 835 Ltd., Wiegel's first submission must, logically, rest upon there being some distinction in the nature of the investments between those made in 835 Ltd. and those made in Local 1661. However, we have found that the investments in Local 1661 were structured similarly to those in 835 Ltd.

¶ 28 In addition, Wiegel's submission also fails upon legal analysis. The definition of "security" under the Act 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 . . . ”

...

(1) an investment contract, . . .”

¶ 29 The investments in Local 1661 were predominately structured as shareholder loans and purchases of shares which would be caught by subsection (d) of the definition of “security”. More broadly, the test for what constitutes an “investment contract” in subsection (1) of the definition of “security”, as set out by the Supreme Court of Canada in *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario (Securities Commission)*, [1978] 2 SCR 112 at pages 128-129, includes:

- a) an investment of money;
- b) in a common enterprise between the investor and those seeking the investment; and
- c) profits derived from the efforts of others.

Clearly, the investments in Local 1661 satisfy each part of the three part test for an “investment contract”. Investments in Local 1661 were investments in “securities” under the Act.

¶ 30 Turning to the respondents’ second submission; generally, the onus of proving that exemptions from the prospectus and registration requirements were available to the respondents for the investments lies with the respondents (*Solara*, 2010 BCSECCOM 163). The respondents tendered no evidence to suggest that any of the investments or investors satisfied the requirements for any exemptions under the Act.

¶ 31 However, the executive director tendered into evidence summaries of interviews and emails with a number of the investors in 835 Ltd. and Local 1661. Those interviews included questions about the investors’ relationships with one or more of the respondents and about their potential qualifications as accredited investors as defined under securities laws. Certain of those investors provided responses which suggest that their investments could qualify for one or more of the exemptions available under National Instrument 45-106 *Prospectus and Registration Exemptions*. Wiegel’s follow up submissions suggested that certain investors would qualify for exemptions.

¶ 32 Counsel for the executive director provided thoughtful and thorough submissions on this issue. She argued that the respondents’ lack of supporting paperwork and disregard for securities laws should result in our finding contraventions of sections 34 and 61 even if, factually, exemptions for any specific investments were available. We do not accept that as the law. Decisions of this Commission in *Photo Violation Technologies Corp. and others*, 2013 BCSECCOM 276 and *Aviawest Resorts Inc. and others*, 2013 BCSECCOM 319 are examples where this Commission found exemptions from the requirements of the Act, even though the respondents did not turn their minds to compliance with securities laws at the time of the investments or keep adequate paperwork.

¶ 33 Here the executive director's own evidence with respect to:

- (a) one investor in 835 Ltd. whose investments totalled \$150,000; and
- (b) two investors in Local 1661 whose investments totalled \$250,000,

suggested, on the balance of probabilities, that there were exemptions from sections 34 and 61 of the Act regarding these investments. As a result, we do not find that the burden of proof with respect to contraventions of sections 34 and 61 has been met with respect to these three distributions.

¶ 34 We wish to emphasize that in reaching this decision we are not changing the onus of establishing the availability of an exemption under the Act. Although the respondents did not submit the evidence in question, the evidence was still before the panel, and it was required to consider it. Having done so, and considering the executive director's helpful submissions, we find that exemptions were available for these three distributions.

¶ 35 Based upon the evidence, we find that:

1. each of Wiegel and Knight contravened sections 34 and 61 with respect to the distributions of \$1,935,000 of securities of 835 Ltd. and \$1,690,000 of securities of Local 1661; and
2. Knight contravened sections 34 and 61 with respect to the distributions of \$100,000 of securities in Almaval; and
3. each of 835 Ltd., Local 1661 and Almaval contravened sections 34 and 61 with respect to, and only with respect to, the distributions of its own securities (in the amounts set out above).

¶ 36 Section 168.2(1) of the Act states that if a corporate respondent contravenes a provision of the Act, an individual who is a director or officer of the company also contravenes the same provision of the Act, if the individual "authorizes, permits, or acquiesces in the contravention". Wiegel was a director of all of the corporate respondents. Knight was an officer (as a general manager) of Streamline, and performed similar functions as those of a director or officer for the other corporate respondents. The evidence is clear that they directed the affairs of the corporate respondents. Therefore, we also find that Wiegel and Knight authorized, permitted and acquiesced in the corporate respondents' contraventions of sections 34 and 61 and therefore they also contravened sections 34 and 61 under section 168.2(1).

B Fraud

¶ 37 Section 57(b) of the Act states that "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 perpetrates a fraud on any person”.

1. **Applicable law**

¶ 38 In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, the British Columbia Court of Appeal stated the following regarding fraud under the Act (at page 29):

“Fraud is a 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.”

¶ 39 The *Anderson* decision cited the elements of fraud from *R. v. Theroux*, [1993] 2 SCR 5 (at page 20):

“... the actus reus of the offence of fraud will be established by proof of:

1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
2. deprivation caused by the prohibited act, which may consist of 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 interest are put at risk).”

A. Prohibited act and deprivation

¶ 40 In *R. v. Cuerrier* [1998] 2 SCR 371, the Supreme Court of Canada stated (at para. 116) that the element of dishonesty in fraud “can include non-disclosure of important facts”. Here, the fact that Almalval did not own the property at 3701 West Broadway at the time it promised to provide a mortgage on that property if the promissory note was not repaid when due was clearly an important fact. Having only an agreement to purchase the property would clearly be an important fact. It was clear from the evidence of Mr. B and from the terms of the promissory note itself that the ability to get mortgage security in the event of a failure to repay the loan on maturity was a material part of this investment. We find that the failure to disclose to the Almalval investors that Almalval did not own the property was dishonesty amounting to deceit.

¶ 41 We also find the evidence establishes deprivation. The investors advanced funds to Almaval based, in part, upon the deceit. In *R. v. Abramson* [1983] B.C.J. No. 1305, the British Columbia Court of Appeal confirmed that the payment of money as part of an investment upon deceit was sufficient to establish deprivation, regardless of any subsequent repayment.

B. Respondents' subjective knowledge of the prohibited acts and deprivation

¶ 42 Wiegel and Knight will be addressed separately on this issue.

a) Knight

¶ 43 The evidence establishes that Knight was the person with whom the two investors negotiated the terms of the loan with Almaval. Almaval was an entity established by Streamline and Streamline, in turn, was run on a day to day basis by Knight. Knight knew that Almaval did not own the property at 3701 West Broadway. We find that Knight had subjective knowledge of the prohibited act, being the failure to tell the investors that Almaval did not own the property.

¶ 44 Knight essentially argued that because Almaval had an unconditional agreement to purchase the property at 3701 West Broadway at the time the investors made the loan, he did not have the subjective belief that the prohibited act would lead to deprivation. We do not accept this. Owning a property and having an unconditional agreement to purchase are not one and the same thing. There are risks to completion on even an unconditional agreement to purchase, as was borne out in this case. The predominant risk is obviously the need to come up with the purchase price. Streamline and its related ventures were clearly in financial difficulty at the time of the investment. After all, they were seeking short term financing to complete The Brook. We find that Knight had the subjective knowledge that the failure to disclose to the investors that Almaval did not own the property could, as a consequence, cause actual deprivation and put the investors' pecuniary interests at risk.

b) Wiegel

¶ 45 With respect to Wiegel, this issue is far more complicated. Wiegel's evidence was that while he had knowledge of the fact that a loan was being negotiated to provide short term funding for The Brook, he was not involved in its specifics. He claims he did not know the terms of the loan, did not deal with the Almaval investors and did not engage in deceit. While the promissory note purports to be signed by him, he claims that Knight forged his signature.

¶ 46 The executive director urged us not to believe this element of Wiegel's evidence. The executive director argued that Wiegel's evidence regarding the forgery arose late in these proceedings and would have been raised earlier in the investigation if true. The executive director also argued that Wiegel's subsequent conduct suggested that he had accepted

responsibility for the promissory note (i.e. his personally repaying part of the loan) from which we should infer that he was aware of the deceit at the time of its making.

- ¶ 47 Knight did not challenge Wiegel’s evidence with respect to the fact that Knight placed Wiegel’s signature on the promissory note. In oral submissions the executive director also admitted that he had not introduced any evidence that confirmed (or even suggested) that Wiegel had subjective knowledge of the deceit at the time it was made, other than his subsequent actions. Wiegel’s later actions do not necessarily equate to his having knowledge of the deceit at the time it was made. He may have had other motivations for his subsequent actions. We do not find that the executive director has satisfied the burden of proof in establishing Wiegel’s subjective knowledge of the deceit.
- ¶ 48 The executive director also submitted that Wiegel should be responsible for the fraud as a result of his having been a director of Almaval. The argument is that Almaval contravened section 57 of the Act and under section 168.2 of the Act, if Wiegel “authorized, permitted or acquiesced” in the contraventions of section 57 by Almaval, then he too would be liable.
- ¶ 49 The problem with this argument is that neither the notice of hearing nor in any submissions to the panel did the executive director allege that Almaval contravened section 57. Nor does the notice of hearing allege that Wiegel contravened section 57 by virtue of section 168.2(1) of the Act. This submission must fail as a result. A respondent cannot be found liable for a contravention of the Act which is not alleged in the notice of hearing.
- ¶ 50 In summary, we find that Knight committed fraud in contravention of section 57 of the Act. We do not find that the executive director has satisfied the burden of proof to establish that Wiegel committed fraud.

C Breach of Order

- ¶ 51 Based upon the evidence and consistent with our findings that Knight breached sections 34 and 61 in respect of the trades in securities of 835 Ltd and Local 1661, we find that Knight contravened the April 5, 2004 order prohibiting him from conducting acts in furtherance of a trade and from engaging in investor relations activities.

D Public interest order

- ¶ 52 In the executive director’s written submissions, although this was not argued in oral submissions, the executive director suggested that it was within this panel’s jurisdiction to consider, in addition to any specific contraventions of the Act, if the conduct of the respondents in their totality amounted to conduct that was contrary to the public interest.

¶ 53 While there is much to be concerned about regarding the respondents' conduct as it relates to the public interest, this submission must also fail due to a deficiency in the notice of hearing.

¶ 54 In addition to the specific allegations of contraventions of the Act set out above, the notice of hearing contains this sentence: "It is in the public interest that the Commission issue orders under sections 161 and 162 of the Securities Act". This language does not give guidance to the panel or the respondents about what conduct, whether specific or in totality, the executive director alleges as the basis for this order. In order for a panel to make orders in the public interest, the notice of hearing must give the panel and the respondent(s) sufficient detail of the allegations in order to know the specific misconduct that must be proven to establish those allegations. The language relied upon in the notice of hearing is deficient in this regard. Until this request appeared in the executive director's written submissions, the panel was not aware that an order in the public interest was being requested by the executive director above and beyond the allegations of specific contraventions of the Act. If the panel did not know this, neither could the respondents.

IV Summary of findings

¶ 55 We have found that:

- all of the respondents, other than Streamline, contravened sections 34 and 61;
- Knight perpetrated a fraud, contrary to section 57(b); and
- Knight contravened an order of the executive director of April 5, 2004.

V Submissions on Sanctions

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

By September 17 The executive director delivers submissions to the respondents and the secretary of the Commission

By October 1 The respondents deliver response submissions to the executive director and to the secretary of the Commission

Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission

By October 8

The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission

¶ 57 September 3, 2014

¶ 58 **For the Commission**

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner

George C. Glover, Jr.
Commissioner

Don Rowlatt
Commissioner