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

Citation: Re Cook, 2017 BCSECCOM 136 Date: 20170419

Lance Sandford Cook and CBM Canada's Best Mortgage Corp.

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	Don Rowlatt	Commissioner
Hearing Dates	December 12 and 13, 2016	
Submissions Completed	February 16, 2017	
Date of Findings	April 19, 2017	
Appearing		
Maegan Richards	For the Executive Director	

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161(1) and162 of the *Securities Act*, RSBC 1996, c. 418.

[2] On April 25, 2016, the executive director issued a notice of hearing against the respondents (2016 BCSECCOM 115).

[3] In an amended notice of hearing issued October 5, 2016 (2016 BCSECCOM 340), the executive director alleged that:

a) Cook distributed securities without filing a prospectus and without an exemption from so doing, contrary to section 61 of the Act;

b) CBM distributed securities without filing a prospectus and without an exemption from so doing, contrary to section 61 of the Act; and

c) Cook, as an officer and the sole director of CBM, authorized, permitted or acquiesced in CBM's contraventions of section 61 of the Act and therefore, pursuant to section 168.2 of the Act, Cook also contravened section 61 of the Act.

[4] During the hearing, the executive director called four witnesses, a Commission investigator and three investors (Investors A, B and C), tendered documentary evidence and provided written and oral submissions.

[5] Although they had notice of the hearing, the respondents did not attend the hearing, tender any evidence or make oral submissions. Cook provided written submissions on liability.

[6] In his written submissions, Cook referred to a number of factual matters that were not admitted as evidence during the hearing. Although we have considered Cook's submissions in their entirety, we have not given any weight to those factual matters that were not otherwise supported by evidence adduced during the hearing.

II. Background

[7] Cook was a resident of Victoria, British Columbia during the time period relevant to the notice of hearing. Cook has never been registered under the Act in any capacity. However, during the relevant time period, Cook was a registered mortgage broker in British Columbia.

[8] CBM was a corporation registered under the laws of Canada and extra-provincially registered to do business in British Columbia. CBM has never been registered under the Act in any capacity. However, during the relevant time period, CBM was a registered mortgage broker company in British Columbia. Cook was the President of CBM and its sole director. CBM was dissolved for failing to file annual reports on June 28, 2014.

[9] Neither Cook nor CBM have ever filed a prospectus under the Act.

[10] This case involves four investors who gave money to one or both of the respondents, three of whom provided oral testimony at the hearing. A summary of the evidence as it relates to each of the four investors is set out below.

Investor A

[11] Investor A was a resident of British Columbia at all times during the time period relevant to the notice of hearing.

[12] Investor A and her husband were originally clients of the respondents' mortgage broker business. Investor A and her husband were seeking to acquire an investment property and were interested in using the equity in other properties that they owned in order to do so. Cook advised Investor A and her husband that they could borrow $80,000 more than they needed to purchase the property that they were seeking to purchase.

[13] Cook told Investor A and her husband that he had a use for that $80,000 and that he would pay them interest at 15% per year on the money. He pointed out to Investor A that there was a significant spread between the borrowing costs on the $80,000 and the interest that could be earned on that money at a 15% interest rate.

[14] Cook discussed with Investor A a technology company listed on the TSX Venture Exchange. He informed her that he had some role with that entity. Investor A formed the impression that her funds were to be used by Cook as an investment in this technology company.

[15] On September 19, 2007, Investor A gave Cook a bank draft, made out in the name of Cook personally, in the amount of $80,000 and in return, Investor A received a promissory note, in the name of Cook personally, for $80,000, having a term to maturity of one year and under which Investor A would receive 15% interest per annum. Cook also gave Investor A 12 post-dated interest cheques. The cheques were from a bank account in Cook's name.

[16] Interest payments during the term of this first promissory note were made by Cook.

[17] Prior to the maturity date of the original note, Investor A asked Cook for a return of her principal amount on the maturity date. Cook told Investor A that she could have her $80,000 back but that she could also extend the term of the promissory note. Investor A agreed to renew the arrangement.

[18] On September 19, 2008, Cook and Investor A entered into a new promissory note, in the name of Cook personally, for $80,000 and having a term to maturity of nine months (i.e. payable on June 19, 2009) and under which Investor A would receive 15% interest per annum.

[19] Interest payments during the term of this second promissory note were made by Cook.

[20] Prior to the maturity date of the second promissory note, Investor A asked Cook for a return of her principal amount on the maturity date. Cook said that he was not able to repay the promissory note on its maturity date. However, he said that he was able to extend the term of the promissory note.

[21] On June 19, 2009, Cook and Investor A and her husband entered into a new promissory note, in the name of Cook personally, for $80,000, having a term to maturity of 12 months and under which Investor A and her husband would receive 15% interest per annum.

[22] Interest payments during the term of this third promissory note were made by Cook.

[23] Prior to the maturity date of the third promissory note, Investor A and her husband asked for a return of their principal amount on the maturity date. Cook asked for a further extension of the term of the note.

[24] On June 19, 2010, Cook and Investor A and her husband entered into a new promissory note, in the name of Cook personally, for $80,000, having a term to maturity of 24 months and under which Investor A and her husband would receive 15% interest per annum.

[25] Interest payments on this fourth promissory note were made by Cook until May of 2011 when one of the interest payments did not clear due to insufficient funds.

[26] In May of 2011, Investor A read a newspaper story that indicated that the technology company that had been discussed by Cook with her at the time of the original promissory note had gone into bankruptcy. After reading this story, Investor A and her husband met with Cook, who indicated that he was in financial difficulty and would not be able to repay the fourth promissory note. He also indicated that he would not be able to continue making interest payments on the note.

[27] At the time of this discussion, Cook had paid Investor A and her husband a total of $40,000 of interest on their notes (collectively). He proposed that he issue to them a new non-interest bearing promissory note for $40,000 in satisfaction of the payment of the fourth promissory note in the amount of $80,000.

[28] Investor A testified that she and her husband agreed to this proposal in the belief that it offered them the only hope of receiving any repayment. On June 10, 2011, Cook and Investor A and her husband entered into a new promissory note, in the name of Cook personally, for $40,000. This fifth promissory note was non-interest bearing.

[29] In June of 2012, Cook contacted Investor A with a further proposal to restructure the fifth promissory note by reducing it further. Investor A and her husband did not agree to this further reduction.

[30] Investor A and her husband did not receive any further payments from Cook following June 10, 2011.

Investor B

[31] Investor B was a resident of British Columbia at all times during the time period relevant to the notice of hearing.

[32] Investor B met Cook at a real estate investment club. Investor B was interested in making an additional investment in real estate. Investor B asked Cook to give her a second opinion on the mortgage rate that she was paying on her existing property. As part of this second opinion process, Cook suggested that Investor B take equity from her home and give it to him rather than making an additional investment in real estate. He suggested to Investor B that giving him the money would be easier for her than dealing with the property management issues associated with an additional investment in real estate.

[33] Investor B testified that Cook was not specific about his intended use of her proceeds, although he did make reference to a possible expansion of CBM's business and the technology company that was discussed with Investor A (as described above).

[34] On October 26, 2007, Investor B gave Cook $70,000 and in return, Investor B received a promissory note, in the name of Cook personally, for $70,000, having a term to maturity of one year and under which Investor B would receive 15% interest per annum. Cook also gave Investor B 12 post-dated interest cheques. The cheques were from a bank account in Cook's name.

[35] Interest payments during the term of this first promissory note were made by Cook.

[36] On October 26, 2008, Cook and Investor B agreed to renew the arrangement and entered into a new promissory note, in the name of Cook personally, for $70,000, having a term to maturity of 12 months and under which Investor B would receive 15% interest per annum.

[37] Interest payments during the term of this second promissory note were made by Cook.

[38] On June 4, 2009, Cook and Investor B agreed to further renew the arrangement and entered into a new promissory note, in the name of Cook personally, for $70,000, having a maturity date of October 26, 2010 and under which Investor B would receive 15% interest per annum. The reason that this third promissory note was entered into by the parties in June and not October of 2009 was that Investor B was not going to be able to sign documents in October of 2009 for personal reasons.

[39] Interest payments during the term of this third promissory note were made by Cook.

[40] On October 14, 2010, Cook and Investor B agreed to further renew the arrangement and entered into a new promissory note, in the name of Cook personally, for $70,000, having a term to maturity of 24 months and under which Investor B would receive 15% interest per annum.

[41] Interest payments during the term of this fourth promissory note were made by Cook until May 2011. In June of 2011, Cook advised Investor B that he would no longer be able to make the interest payments on the fourth promissory note.

[42] At the time of this discussion, Cook had paid Investor B a total of $26,250 of interest, on her notes (collectively). He proposed that he issue to Investor B a new non-interest bearing promissory note for $42,750 in satisfaction of the payment of the fourth promissory note in the amount of $70,000. Investor B refused to accept this offer.

[43] Investor B did not receive any further payments from Cook following May of 2011.

Investor C

First Investment

[44] Investor C was a resident of British Columbia at all times during the time period relevant to the notice of hearing.

[45] Investor C met Cook through a mutual acquaintance. The respondents assisted Investor C with obtaining a second mortgage on her home in order that she could make an investment unrelated to the matters in the notice of hearing.

[46] Cook discussed with Investor C the technology company that Cook also discussed with Investors A and B. Cook suggested that he would like to raise funds so that he might make a further investment in the technology company before it went public.

[47] On December 27, 2007, Investor C gave Cook $100,000 and, in return, Investor C received a promissory note, in the name of Cook personally and another individual (NV), having a term to maturity of one year and under which Investor C would receive 15% interest per annum. Cook also gave Investor C 12 post-dated interest cheques. The cheques were from a bank account in the name of CBM. Investor C never met NV. There was no evidence as to NV's role in this transaction. There was no evidence that explained why CBM would be making the interest payments on the note.

[48] Interest payments during the term of this first promissory note were made by CBM.

[49] As this first promissory note was nearing its maturity date, Cook asked Investor C to renew the arrangement. Investor C agreed.

[50] On December 21, 2008, Cook, NV and Investor C entered into a new promissory note, in the name of Cook and NV personally, for $100,000, having a maturity date of December 21, 2009 and under which Investor C would receive 15% interest per annum.

[51] On the same day, December 21, 2008, Investor C entered into another promissory note, in the name of CBM, but otherwise having identical terms to the other promissory note of December 21, 2008. Investor C testified (and this was confirmed by writing found on this note) that this was a replacement for the other promissory note issued the same date and that no new funds were advanced by her in respect of this note. Investor C was unable to recall why the borrower changed on the new promissory note.

[52] Interest payments during the term of this second promissory note were made by CBM.

[53] On December 27, 2009, CBM and Investor C agreed to further renew the arrangement and entered into a new promissory note, for $100,000, having a term to maturity of one year and under which Investor C would receive 15% interest per annum.

[54] Interest payments during the term of this third promissory note were made by CBM.

[55] On October 14, 2010, CBM and Investor C agreed to further renew the arrangement and entered into a new promissory note, for $100,000, having a maturity date of December 27, 2012 and under which Investor C would receive 15% interest per annum.

[56] Interest payments during the term of this fourth promissory note were made by CBM until May of 2011.

[57] When interest payments on the fourth promissory note stopped, CBM had paid a total of $50,000 in interest payments on the notes. Cook proposed that Investor C be issued a new non-interest bearing promissory note for $50,000 in satisfaction of the payment of the fourth promissory note in the amount of $100,000. Investor C agreed to this proposal. On June 10, 2011, Investor C was issued a new non-interest bearing promissory note for $50,000 in the name of CBM.

[58] On September 10, 2012, Cook contacted Investor C with a further proposal to restructure the fifth promissory note by reducing it further. Investor C agreed to the proposal and was issued a further promissory note in the amount of $9,584 in the name of Cook personally in satisfaction of the payment of the fifth promissory note in the amount of $50,000. There was no evidence that explained why Cook became the borrower under the terms of this new note.

[59] Investor C did not receive any further payments from CBM or Cook following May of 2011.

Second Investment

[60] In May of 2008, Cook asked Investor C if she was interested in giving him further funds. Investor C was interested, as her original investment with the respondents was working as promised.

[61] On May 21, 2008, Investor C gave the respondents $50,000 and in return, Investor C received a promissory note, in the name of both the respondents, having a term to maturity of one year and under which Investor C would receive 15% interest per annum. Cook also gave Investor C 12 post-dated interest cheques. The cheques were from a bank account in the name of CBM.

[62] Interest payments during the term of this first promissory note were made by CBM.

[63] On May 21, 2009, Investor C and the respondents agreed to renew the arrangement and entered into a new promissory note, for $50,000, having a term to maturity of one year and under which Investor C would receive 15% interest per annum.

[64] Interest payments during the term of this second promissory note were made by CBM.

[65] On April 28, 2010, Investor C and the respondents agreed to further renew the arrangement and entered into a new promissory note (although it was not signed by CBM), for $50,000, having a maturity date of May 21, 2011 and under which Investor C would receive 15% interest per annum.

[66] Interest payments during the term of this third promissory note were made by CBM.

[67] On March 31, 2011, Investor C and CBM agreed to further renew the arrangement and entered into a new promissory note (there was no explanation for why Cook was no longer a borrower under this note), for $50,000, having a maturity date of May 21, 2013 and under which Investor C would receive 15% interest per annum.

[68] Interest payments were made by CBM on this fourth promissory note until May of 2011.

[69] When interest payments on the fourth promissory note stopped, CBM had paid a total of $21,875 in interest payments on the notes. Cook proposed that Investor C be issued a new non-interest bearing promissory note for $28,125 in satisfaction of the payment of the fourth promissory note in the amount of $50,000. Investor C agreed to this proposal. On June 10, 2011, Investor C was issued a new promissory note for $28,125 in the name of CBM.

[70] On September 10, 2012, Cook contacted Investor C with a further proposal to restructure the fifth promissory note by reducing it further. Investor C agreed to the proposal and was issued a further promissory note in the amount of $5,391 in the name of Cook personally, in satisfaction of the payment of the fifth promissory note in the amount of $28,125. There was no evidence that explained why Cook became the borrower under the terms of this new note.

[71] Investor C did not receive any further payments from CBM or Cook following May of 2011.

Third Investment

[72] In September of 2009, Cook asked Investor C if she was interested in giving him further funds. Investor C was interested, as her original two investments with the respondents were working as promised.

[73] On September 30, 2009, Investor C gave Cook $50,000 and in return, Investor C received a promissory note, in the name of Cook personally, for $50,000, having a term to maturity of one year and under which Investor C would receive 15% interest per annum. Cook also gave Investor C 12 post-dated interest cheques. The cheques were from a bank account in the name of a numbered company controlled by Cook. There was no evidence about the numbered company other than it was controlled by Cook and that for some reason, not explained by the evidence, Cook chose this entity to make the interest payments on this note.

[74] Interest payments during the term of this first promissory note were made by the numbered company.

[75] On September 9, 2010, Investor C and Cook (personally) agreed to renew the arrangement and entered into a new promissory note, for $50,000, having a maturity date of September 30, 2012 and under which Investor C would receive 15% interest per annum.

[76] Interest payments during the term of this second promissory note were made by the numbered company until May of 2011.

[77] When interest payments on the second promissory note stopped, the numbered company had paid a total of $12,500 in interest payments on the notes. Cook proposed that Investor C be issued a new non-interest bearing promissory note for $37,500 in satisfaction of the payment of the second promissory note in the amount of $50,000. Investor C agreed to this proposal. On June 10, 2011, Investor C was issued a new promissory note for $37,500 in the name of Cook personally.

[78] On September 10, 2012, Cook contacted Investor C with a further proposal to restructure the third promissory note by reducing it further. Investor C agreed to the proposal and was issued a further promissory note in the amount of $7,188 in the name of Cook personally, in satisfaction of the payment of the third promissory note in the amount of $37,500.

[79] Investor C did not receive any further payments from the numbered company or Cook following May of 2011.

Investor D

[80] Investor D met Cook when the respondents assisted Investor D in obtaining a mortgage on her home. Investor D was also an acquaintance of Investor B and had heard from Investor B about her promissory note transactions with the respondents. Investor D contacted Cook about the possibility of entering into a similar transaction.

[81] When Investor D and Cook met to discuss a transaction, Investor D was told that Cook needed the money in order to expand the operations of CBM. Investor D believed that she was investing in CBM and not with Cook personally.

[82] On December 1, 2008, Investor D gave Cook $30,000 and in return, Investor D received a promissory note made out in the name of Cook personally, for $30,000, having a term to maturity of one year and under which Investor D would receive 15% interest per annum. There was no evidence that explained why the promissory note was made out with Cook as the borrower versus CBM. Cook also gave Investor D 12 post-dated interest cheques. The cheques were from a bank account in the name of CBM.

[83] Interest payments during the term of this first promissory note were made by CBM.

[84] As this first promissory note was nearing its maturity date, Cook asked Investor D to renew the arrangement. Investor D agreed.

[85] On December 1, 2009, Investor D entered into a new promissory note, this time with CBM as the borrower instead of Cook personally, for $30,000, having a term to maturity of 12 months and under which Investor D would receive 15% interest per annum. There was no evidence that explained why the borrower changed on this new note.

[86] Interest payments during the term of this second promissory note were made by CBM.

[87] As this second promissory note was nearing its maturity date, Cook asked Investor D to renew the arrangement. Investor D again agreed.

[88] On December 1, 2010, CBM and Investor D entered into a new promissory note for $30,000, having a term to maturity of 24 months and under which Investor D would receive 15% interest per annum.

[89] Interest payments during the term of this third promissory note were made by CBM until May of 2011.

[90] When interest payments on the third promissory note stopped, CBM had paid a total of $10,875 in interest payments on the notes. Cook proposed that Investor D be issued a new non-interest bearing promissory note for $19,125 in satisfaction of the payment of the third promissory note in the amount of $30,000. Investor D agreed to this proposal. On June 10, 2011, Investor C was issued a new promissory note for $19,125 in the name of CBM.

[91] Investor D did not receive any further payments from Cook or CBM following June of 2011.

III. Analysis and Findings

A. Applicable Law

Standard of Proof

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

> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

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

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

Prospectus Requirements

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

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

b) Section 1(1) defines "security" to include "(a) a document, instrument or writing commonly known as a security", "(b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person", "(d) **a bond, debenture, note or other evidence of indebtedness**, share, stock..." and "(l) an investment contract." (emphasis added)

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

d) Section 61(1) states "Unless exempted under this Act, a person must not distribute a security unless…a preliminary prospectus and a prospectus respecting the security have been filed with the executive director" and the executive director has issued receipts for them.

[96] Section 1.10 of the companion policy to *National Instrument 45-106 – Prospectus Exemptions* (NI 45-106) states that the person distributing securities is responsible for determining, given the facts available, whether an exemption from the prospectus requirement, set out in section 61(1), is available.

[97] In *Solara Technologies Inc. and William Dorn Beattie*, 2010 BCSECCOM 163, the Commission confirmed that it is the responsibility of a person trading in securities to ensure that the trade complies with the Act. The Commission also said that a person relying on an exemption has the onus of proving that the exemption is available. The Commission said:

> 37 The determination of whether an exemption applies is a question of mixed law and fact. Many of the exemptions are not available unless certain facts exist, often known only to the investor. To rely on those facts to ensure the exemption is available, the issuer must have a reasonable belief the facts are true.
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> 38 To form that reasonable belief, the issuer must have evidence. For example, if the issuer wishes to rely on the friends exemption, it will need representations from the investor about the nature of the relationship…

Limitation period – section 159

[98] Section 159 of the Act states that "Proceedings under this Act … must not be commenced more than 6 years after the date of the events that give rise to the proceedings."

Liability under section 168.2

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

[100] There have been many decisions which have considered the meaning of the terms "authorizes, permits or acquiesces". In sum, those decisions require that the respondent have the requisite knowledge of the corporate contraventions and have the ability to influence the actions of the corporate entity (through action or inaction).

B. Analysis

Positions of the Parties

[101] The executive director submits that the respondents contravened section 61 of the Act by virtue of the following:

a) each of the promissory notes issued to each of the investors by one or both of the respondents was a "security" as defined under the Act;

b) each issuance of a promissory note, that was a renewal of an existing promissory note, was still a distribution of a security for valuable consideration, notwithstanding that additional funds were not given to either of the respondents in connection with those issuances;

c) the respondents did not file a prospectus with respect to the distributions of any of the promissory notes nor was there an exemption from so doing; and

d) the distributions of the promissory notes, in contravention of section 61 of the Act, occurred within the limitation period under the Act, if viewed as a continuing course of conduct or when interpreting the meaning of section 159 of the Act.

[102] The executive director further says that Cook as an officer and the sole director of CBM is liable for the contraventions of section 61 of the Act by CBM by virtue of section 168.2 of the Act.

[103] The respondents submit that:

a) none of the promissory notes were "securities" as defined under the Act;

b) all of the alleged misconduct in the notice of hearing that occurred prior to April 25, 2010 (being the date that was six years prior to the date of the notice of hearing in this matter) is statute barred pursuant to section 159 of the Act; and

c) all of the investors were close personal friends and/or close business associates of Cook and therefore there were exemptions from the requirement to file a

prospectus under section 61 of the Act in respect of the issuances of promissory notes to the investors.

Issues – contraventions of section 61

[104] As a consequence of the above, there are three central issues for the panel to determine:

a) are some or all of the promissory notes "securities" under the Act?

b) if some or all of the promissory notes are "securities" under the Act, how does the limitation period set out in section 159 of the Act apply to the circumstances of this case? and

c) if there were securities issued without a prospectus that are not statute barred by section 159 of the Act, were there any exemptions from the prospectus requirements available for those distributions?

Promissory notes as "securities" under the Act

[105] The definition of "security" under the Act includes reference to "a bond, debenture, note or other evidence of indebtedness …"

[106] On a plain reading of that definition, all of the promissory notes would clearly qualify as either "notes" or "evidences of indebtedness".

[107] However, the respondents submit that the decisions in *Ontario Securities Commission v. Tiffin*, 2016 ONCJ 543 and in *Aviawest Resorts Inc. (Re)*, 2013 BCSECCOM 319 should lead us to the conclusion that the promissory notes were not "securities" for the purposes of the Act, but rather belong to a class of commercial or, as they refer to them, non-security notes.

[108] The executive director acknowledges that the decision in *Pacific Coast Coin Exchange v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112 sets out that a purposive approach may also be required in interpreting the meaning of "security" under the Act. In particular, form should be disregarded for substance, and that the emphasis should be on the economic reality of the instrument in question.

[109] The British Columbia Court of Appeal in *British Columbia (Securities Commission) v. Gill*, 2003 BCCA 169 and the court in *Tiffin* both considered the United States Supreme Court decision, *Reves v. Ernst & Young*, 494 U.S. 56 (1990), [1990] SCT-QL 1056 in applying a purposive approach to the definition of "security".

[110] In *Reves*, the court considered the scope of the word "note" in the context of securities law and set out a rebuttable presumption that any "note" or "evidence of indebtedness" is a security. The court listed four factors which were relevant in determining whether the instrument was a security:

a) the motivation that would prompt a reasonable seller and buyer to enter the transaction: if the seller's purpose is to raise money for general business purposes and the buyer's purpose is to profit from the returns the instrument is expected to generate, the instrument is likely a security;

b) the intended distribution of the instrument: if it is one in which there will be "common trading for speculation or investment" it is likely a security;

c) the reasonable expectations of the investing public: the more the public expects that an instrument will be a security and thereby regulated by the securities laws, the more likely it is a security; and

d) the existence of another regulatory regime: if there is no other regulatory regime that significantly reduces the risk of the instrument, thereby rendering securities regulation necessary, the more likely it is a security.

[111] The respondents submit that, viewed through this purposive analysis, the promissory notes were not securities because:

- the investors did not have a sense of investment or interest in the CBM business beyond the terms of the promissory notes;

- there were a small number of transactions with existing friends, without any intention for a wider distribution;

- the promissory notes were similar to notes secured by a lien on a small business or its assets;

- the restructured loans bore no interest and therefore cannot be seen to have the attributes of a security (i.e. they could no longer be viewed as an investment);

- neither the respondents nor the investors had a reasonable expectation that the promissory notes were "securities"; and

- the respondents were regulated in their mortgage broker business by the Financial Institutions Commission (FICOM) and therefore there was another regulatory scheme that was the governing agency for these transactions.

[112] We agree that the purposive analysis starts from a framework that there is a rebuttable presumption that promissory notes are securities. It is a very strong presumption that unsecured, high interest bearing, promissory notes are securities.

[113] The evidence does not support most of the respondents' submissions that that presumption should be rebutted in this case. Nor do we agree with the conceptual framework for most of the respondents' submissions. We do agree that there is considerable doubt that the restructured promissory notes which bore no interest were

securities. As will be discussed in the section on limitation period issues, nothing turns on this finding.

[114] Firstly, FICOM was not an alternative regulator with respect to the promissory notes in the sense meant by the court in *Reves*. FICOM regulated the respondents with respect to their activities as mortgage brokers. The promissory notes were clearly not mortgages and would not fall under that regulatory scheme.

[115] Secondly, none of the promissory notes were secured in any manner and bear no resemblance to the secured notes of a small business. This case is clearly distinguishable from *Tiffin* on this point. In *Tiffin*, the issuer was clear in communicating to investors that the funds that were being raised were being used by the issuer to resolve cash flow difficulties of the issuer and that the funds were to be secured by the assets of the issuer. None of that was the case here.

[116] The evidence does not support the respondents' submission that the promissory notes were issued to a small number of friends. The evidence that the respondents rely upon to suggest that Investors A, B, C and D were close personal friends and/or close business associates of Cook comes from Cook's written submissions. There was no evidence tendered during the hearing in support of those submissions - in fact, the respondents' submissions on this point are directly contradicted by statements made by Cook in a compelled interview with Commission staff, given under oath, on June 24, 2015. Finally, each of Investors A, B, C and D categorically denied being close personal friends or close business associates of Cook and three of them gave that evidence in oral testimony and the other investor did so in her interview with Commission investigators. We find that Investors A, B, C and D were not close personal friends or close business associates of Cook.

[117] The entire context of the circumstances in which the four investors gave money to the respondents supports, in an incontrovertible fashion, that these were investments where they gave the respondents money with an investment intent.

[118] Investors A, B and C met the respondents in circumstances where they were looking to make a further investment in real estate (outside of their personal residences) and all three of them were told that the technology company was to be the (or one of the) intended purpose(s) of the funds raised by the respondents; Investor D invested because she wanted the same deal that her friend Investor B had with the respondents.

[119] Further, all of the investors were looking to make money on short term promissory notes where the interest rate spread between what they would pay to borrow the funds and what the respondents would pay on the notes would offer a substantial return.

[120] Lastly, use of proceeds by the respondents was vague at best. The evidence we have is that two of the investors were told that the proceeds were to be used on a highly speculative technology company and that a third investor was told that this was one of the possible uses of the funds (along with expanding CBM's business).

[121] We note that the *Aviawest* decision is not supportive of the respondents' submissions. In that decision, there were several different types of notes or evidences of indebtedness. The notes that were most similar to those found in this case were held to be "securities" for the purposes of the Act.

[122] In summary, on a plain reading of the definition of "security" all of the promissory notes were securities. A purposive analysis of the promissory notes also supports the finding that all of the interest bearing promissory notes issued to all four of the investors were securities.

Limitation period analysis

[123] The respondents submit that any of their alleged misconduct that occurred prior to April 25, 2010 is statute barred pursuant to section 159 of the Act.

[124] The executive director submits that the panel should follow the decision in *Re Wong*, 2016 BCSECCOM 208 and interpret, in the circumstances of this case, section 159 of the Act in a manner that allows us to consider all of the misconduct alleged in the notice of hearing (some of which dates back to September 2007).

[125] The executive director submits that we should look at each investment made by each investor in each promissory note and view it as a continuing course of conduct or a sequence of events starting from the date of each investor's initial investment in a particular note and carrying through each renewal of each promissory note. In so doing, the executive director's allegations in this case are that the respondents are only alleged to have contravened section 61 with respect to 6 distributions (one promissory note to each of Investors A, B and D and 3 promissory notes to Investor C) of securities for aggregate proceeds of $380,000.

[126] We note that the executive director did not frame his case such that each issuance of a promissory note and each renewal was to be viewed as an illegal distribution, although that would have been open to the executive director based upon the allegations in the notice of hearing.

[127] We think it overly complicated and unnecessary in this case to engage in an analysis of the interpretation of section 159 under a continuous course of conduct theory (as set out in the majority decision in *Re Wireless Wizard*, 2015 BCSECCOM 100) or as set out in *Wong*.

[128] In this case, a new security was issued every time an interest bearing promissory note was renewed. It is clear that in each case, the new interest bearing promissory note was issued in satisfaction of repayment of its predecessor interest bearing promissory note. In other words, there was clearly an issuance of (or trade in) a security for valuable consideration (in this case, forbearance of repayment on the maturity date of the previously issued note) every time a new interest bearing promissory note was issued. This is the definition of a "distribution" under the Act.

[129] The evidence establishes that, with respect to each interest bearing promissory note to each investor, there was such a distribution after April 25, 2010 as follows:

- Investor A - $80,000 promissory note on June 19, 2010
- Investor B - $70,000 promissory note on October 14, 2010
- Investor C - $100,000 promissory note on October 14, 2010; $50,000 promissory note on March 31, 2011; and $50,000 promissory note on September 9, 2010
- Investor D - $30,000 promissory note on December 1, 2010

[130] Having made this finding it is unnecessary to consider events that occurred prior to April 25, 2010 and it is also unnecessary to further consider whether the issuances of non-interest bearing promissory notes (which occurred after the events above) are securities for the purposes of the Act.

[131] We find that that there were six distributions of securities (as described in paragraph 129) for a total of $380,000 within the limitation period set out in section 159 of the Act.

Prospectus exemptions

[132] The respondents submit that there were exemptions from the prospectus requirement of the Act for the six distributions of securities set out above. As set out in *Solara*, the onus is on a respondent to prove, on a balance of probabilities, the availability of an exemption from the prospectus requirement.

[133] The respondents submit that each of Investor A, B, C and D were close personal friends or close business associates of Cook, and therefore a distribution of securities to them qualified for an exemption from the prospectus requirement under the Act.

[134] For all of the reasons set out in paragraph 116 above, we find that the respondents have not met the onus of establishing that the investors were close personal friends or close business associates of Cook in order to qualify for an exemption from the prospectus requirement. The respondents did not submit that there was any other basis for (nor was there any evidence to support) an exemption from the prospectus requirements for any of the six distributions to any of the investors.

Summary

[135] We have found that the interest bearing promissory notes were securities. Neither of the respondents filed a prospectus with respect to any of the promissory notes. We have also found that six distributions of securities for an aggregate of $380,000 occurred within the limitation period under the Act.

[136] The only remaining question for us to determine is whether each of the respondents is liable for a contravention of section 61 of the Act in respect of each of those six distributions. Did each of the respondents carry out a trade or acts in furtherance of a trade in respect of each of those six distributions of promissory notes?

[137] There is no evidence that CBM did anything in respect of the distributions of the promissory notes to Investors A or B (ie. it was not the borrower, signatory of a promissory note or an interest payor) that occurred within the limitation period. There is also no evidence that CBM did anything with respect to the distribution related to the third investment by Investor C that occurred within the limitation period. As a consequence, we do not find CBM liable under section 61 for any of those three distributions.

[138] There is evidence that Cook (either because Cook personally was the issuer of the promissory note itself or because Cook sold the security and executed the promissory notes on behalf of CBM) traded or acted in furtherance of a trade with respect to the distributions of all six of the promissory notes that occurred within the limitation period.

[139] Therefore, we find that Cook contravened section 61 with respect to six distributions of securities to four investors for total proceeds of $380,000. We find that CBM contravened section 61 with respect to three distributions of securities to two investors for total proceeds of $180,000.

Contraventions of section 61 by virtue of section 168.2

[140] The executive director alleges that Cook, as an officer and the sole director of CBM, is liable for CBM's contraventions of section 61 of the Act by virtue of section 168.2 of the Act.

[141] The evidence is clear that Cook was the controlling mind and management of CBM. He clearly authorized, permitted, or acquiesced to CBM's contraventions of section 61. We therefore find Cook liable under section 61 of the Act for those contraventions under section 168.2. In this case, this finding has no significance as we have already found Cook directly liable for contraventions of section 61 in respect of the same distributions of securities.

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

By May 12, 2017	The executive director delivers submissions to the respondents and to the secretary to the Commission.
By May 26, 2017	The respondents deliver response submissions to the executive director and to the secretary to the Commission.
	Either party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission. The secretary to the

	Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By June 2, 2017	The executive director delivers reply submissions (if any) to the respondents.

April 19, 2017

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

Don Rowlatt
Commissioner