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

Citation: Re SBC Financial Group Inc., 2018 BCSECCOM 113 Date: 20180416

SBC Financial Group Inc. and Prabhjot Singh Bakshi

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	Gordon L. Holloway	Commissioner
Hearing Dates	October 19, 20, 23 and 25, 2017 January 25, 2018	
Submissions Completed	February 16, 2018	
Date of Findings	April 16, 2018	
Appearing		
Mila Pivnenko	For the Executive Director	
Nicholas Isaac		

Findings

I. Introduction

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

[2] On January 24, 2017, the executive director issued a notice of hearing against the respondents (2017 BCSECCOM 16).

[3] On July 24, 2017, the executive director amended the original notice of hearing (2017 BCSECCOM 243), such that the executive director alleged that:

a) the respondents sold $3 million of securities of SBC Financial Group Inc. without being registered under the Act, in contravention of section 34(a) of the Act;

b) the respondents sold $2.3 million of securities of SBC without a filing a prospectus and without an exemption from so doing, in contravention of section 61 of the Act;

c) Prabhjot Singh Bakshi:

i) sold an aggregate of $400,000 of securities to three investors where their funds were to be invested in acquiring an interest in land in Hawaii;

ii) these funds were not forwarded for investment in the land transactions in Hawaii;
iii) Bakshi told the three investors several falsehoods about the land transactions; and
iv) as a consequence, Bakshi committed three contraventions of section 57(b) of the Act; and

d) as the sole director and officer of SBC, Bakshi authorized, permitted or acquiesced in SBC's contraventions of sections 34(a) and 61 of the Act, and therefore, pursuant to section 168.2 of the Act, Bakshi also contravened sections 34(a) and 61 of the Act.

[4] The number of alleged contraventions of sections 34(a) and 61 of the Act by the respondents is not clear from the amended notice of hearing.

[5] However, during the hearing the executive director submitted two spreadsheets:

a) one that set out 53 alleged issuances of securities in SBC by the respondents in contravention of section 61 of the Act for total proceeds of $2,070,238; and
b) one that set out 59 alleged issuances of securities in SBC in connection with the alleged contravention of section 34(a) of the Act by the respondents for total proceeds of $2,875,238.

Owing to the nature of the legal test associated with an alleged contravention of section 34(a) of the Act (as will be discussed below), we have assumed that the executive director is alleging one contravention, by each of SBC and Bakshi, of section 34(a) of the Act. We have also proceeded on the basis that there are 53 allegations of contraventions of section 61 of the Act against each of SBC and Bakshi.

[6] During the hearing, the executive director called eight witnesses (a Commission investigator), K (who solicited investors on behalf of the respondents), and six investors), tendered documentary evidence and provided written and oral submissions. The respondents did not tender any evidence during the hearing but Bakshi, on behalf of himself and SBC, provided written submissions.

[7] Following the oral hearing of submissions, we asked for further written submissions from the parties on the issue of whether the investments related to the Hawaiian land transactions were "securities" under the Act. We received further written submissions from the executive director and the respondents (through counsel, who was retained for the limited purpose of providing written submissions on the issue).

[8] These are our findings with respect to the liability of the respondents relating to the allegations in the notice of hearing.

II. Background

The respondents

[9] Bakshi is a resident of British Columbia. He was previously registered in various categories under the Act but ceased to be registered in any such capacity in February 2009.

[10] SBC was a British Columbia corporation incorporated on May 27, 2008. It was dissolved for failing to file records on November 21, 2016. SBC was also assigned into bankruptcy on January 23, 2015. SBC was not registered in any capacity under the Act at any time during its existence.

[11] Neither of the respondents ever filed a prospectus with the Commission with respect to the distribution of securities.

[12] Bakshi was the sole officer, director and shareholder of SBC.

The SBC loan transactions

[13] In the summer of 2010, the respondents began to offer investments to investors.

[14] During the period relevant to the matters in the notice of hearing, the respondents purportedly offered investors two different products – an interest bearing loan arrangement and a land transaction in Hawaii (discussed below).

[15] The interest bearing loan arrangements between the investors and the respondents were generally documented by one or more of: a Lender Loan Questionnaire, a letter agreement or a promissory note (collectively, the Loan Documents). The terms of the note arrangements differed as between investors, with the promised returns varying from 5-30% and the maturity dates varying from 2 months to 5 years. The most common term of the note arrangement was for three years.

[16] Notwithstanding the difference in purported products that were offered to investors, all of the proceeds from all of the investments made by all of the investors were co-mingled in the same bank account of SBC.

[17] Some of the investors for these products were found directly by Bakshi; while others were introduced to the respondents by two finders. The finders, K and L, were paid commissions for referring clients to the respondents. K was a mutual fund salesperson at the relevant time and directed some of his clients to the respondents. L was an accountant at the relevant time and directed some of his clients to the respondents.

[18] Investors had a varied understanding of what the respondents' business was and what their money would be invested in. The testimony of the investor witnesses indicated that they were told that Bakshi was a successful day trader. The respondents sent welcome letters to the investors that stated the respondents were engaged in "investment management ... in equity and fixed income."

[19] Investors received account statements which purported to show their investments and returns. These account statements were sent under SBC letterhead and were prepared and signed by Bakshi.

[20] Investors were given the option of receiving periodic interest payments on their loan arrangements or having their purported returns compound. Some investors chose to receive interest payments, many did not.

[21] Evidence in the hearing relating to the number of investors who invested funds in the loan arrangements, and the amounts, included:

- the bank records for the SBC bank account into which the investor funds were deposited;
- copies of the Loan Documents;
- the trustee's report in the bankruptcy proceeding of SBC (which included a list prepared by the respondents of the investors and the amounts owed to them);
- the testimony during the hearing of six investors; and
- the notes of conversations by Commission investigators with a number of the other investors.

[22] The totality of that evidence demonstrates that at least 59 separate investments were made (by a lesser number of actual investors, as a number of the investors made more than one investment) in the aggregate amount of between $2,787,703 and $2,954,250.

[23] The higher quantum of total investments comes from the list of investors prepared by the respondents themselves in the SBC bankruptcy proceeding.

[24] The lower amount comes from a Commission investigator's tracing of investor deposits into the SBC bank account.

[25] However, the Loan Documents and interviews of several investors indicate that a number of the investments were carried out with either cash (which did not appear to have a matching deposit into the SBC bank account) or for non-cash consideration (namely, the investor being credited for amounts lost by Bakshi in another investment unrelated to the allegations in the notice of hearing). That evidence confirmed proceeds of at least $2,875,238 for the issuance of the SBC securities.

[26] We find that the respondents engaged in 59 separate investment transactions for an aggregate amount of proceeds of at least $2,875,238. These figures include the transactions related to the Hawaiian real estate investments discussed below.

[27] The quantum of the amounts paid to the investors as either a repayment of their principal amount or as payment of purported returns on their investment is not relevant to the question of liability of either of the respondents with respect to any of the allegations in the notice of hearing. However, this may be relevant to issues of sanction and we would

expect to receive submissions by the parties on these amounts at that stage of these proceedings.

The Hawaiian land transactions

[28] Three investors invested an aggregate of $400,000 with SBC in relation to a purported Hawaiian land transaction.

[29] Two of the investors invested $100,000 each in the purported Hawaiian land transaction by transferring amounts owed to them by SBC under the loan arrangements. A third investor invested a total of $300,000 with SBC, $100,000 of this amount was to be invested in a loan arrangement and the other $200,000 was to be invested in the purported Hawaiian land transaction.

[30] Two of these three investors testified at the hearing.

[31] Investor T testified that:

- he was a friend of K's and was introduced to the respondents by K;
- he originally invested $175,000 in October of 2010 in the respondents' loan arrangement at 9% with a maturity of 6 months;
- he originally dealt with K with respect to his investments but after meeting Bakshi he commenced dealing with him directly;
- he believed that the principal business of the respondents was Bakshi's day trading and that his investment was supported (although not guaranteed) by the assets of SBC, which was principally cash;
- at the expiry of the initial 6 month term, he renewed his loan arrangement with Bakshi;
- he subsequently renewed his loan arrangement with the respondents on several occasions;
- in 2013, he was told by Bakshi that there was an upcoming real estate investment that he was offering to an exclusive group of his clients;
- he was told that it was a piece of land in Hawaii and that, following rezoning, title to a lot would be transferred to each investor and that the investor could then choose to sell the lot or build a house on the lot for vacation purposes;
- he was given a promotional brochure regarding the land purchase opportunity;
- he invested $100,000 of his funds that were previously invested in the respondents' loan arrangement in the real estate transaction;
- he was told that his funds were to go into a trust account with a large US financial institution;
- he received a letter dated May 1, 2013 on SBC letterhead confirming that SBC had acquired the rights to two parcels of land in Hawaii and that following subdivision, regulatory approvals and other closing conditions having been satisfied, a 1.5 acre parcel would be transferred into his name; and
- this letter further outlined that SBC's US lawyers had confirmed that all deposited funds (including those of Investor T) would be held in trust with a large US financial institution and would be returned if closing did not occur.

[32] During his testimony, Investor T was shown a copy of a letter purportedly from SBC (and signed by Bakshi) dated May 6, 2013. This letter stated that the real estate transaction had been cancelled and the $100,000 that Investor T had invested in the transaction would be returned to the respondents' loan arrangement. Investor T stated that he did not receive the letter and that he was not told by Bakshi that the transaction had been cancelled. To the contrary, during the months after his investment in the real estate transaction, Bakshi provided him verbal updates on the status of the project and the conditions of closing.

[33] Prior to investing in the purported Hawaiian land transaction, Investor T did receive some interest payments on his loans to SBC but did not receive his principal back nor did he ever recover the funds from the purported Hawaiian land transaction.

[34] Investor M testified that:

- he was a friend of Investor T and heard about the respondents through Investor T;
- he met twice with Bakshi prior to investing;
- in February of 2012, he invested $100,000 with the respondents in their loan arrangement, with the initial loan bearing 16% interest and a term to maturity of one year;
- he gave Bakshi $80,000 by way of a cheque and the rest, in cash;
- at the expiry of the initial term of the loan, he received $16,000 in interest from the respondents;
- at the expiry of the initial term of the loan, he was told about the Hawaiian land transaction and he was given a promotional brochure regarding the opportunity;
- at that time, he transferred his $100,000 from the SBC loan arrangement and believed that he had invested it in the Hawaiian real estate transaction;
- he was told that, upon clearing conditions of closing, he would be acquiring land in Hawaii that he could either sell or hold for his personal use; and
- on May 1, 2013, he received an identical letter to that of Investor T confirming his investment of $100,000 in the Hawaiian land transaction.

[35] Investor M was also shown a copy of a letter from SBC (signed by Bakshi) dated May 6, 2013 addressed to him that purported to be a cancellation letter of the Hawaiian land transaction. Investor M testified that he had never seen the letter and did not receive it.

[36] Investor M also testified that sometime, more than a year after his original investment in the Hawaiian land transaction, he was told by Bakshi that the transaction had not proceeded and that his money had not been put into trust as described in the May 1, 2013 letter.

[37] Other than the $16,000 in interest that he received at the expiry of the original one year term of his loan arrangement, Investor T did not receive any funds from the respondents and has not recovered the $100,000 that he invested in the purported Hawaiian land transaction.

[38] The May 6, 2013 cancellation letters were purportedly copied to K. The May 6, 2013 letters were provided to the Commission investigators by the respondents and not by any of the addressees or by K. On the copies of the letters provided to the Commission by the respondents was a handwritten note suggesting that the letters were being provided to K for subsequent delivery to Investors T and M (along with two other investors).

[39] K testified that he did not receive the May 6, 2013 cancellation letters. However, K did receive an e-mail on May 9, 2013 from Bakshi confirming that the investment in the Hawaiian land transaction was confirmed for a third investor who K continued to deal with directly. K also testified that he never dealt with Investor M and that, by this time, he had ceased to deal directly with Investor T

[40] Finally, K testified that it was his understanding that the Hawaiian land transaction had gone ahead. It was only in October of 2014 when he learned of problems with this investment. At that time, Bakshi admitted to him that this project did not exist and that no investments of that kind had been made on behalf of the investors.

[41] Commission investigators contacted:

- the owners of the land in Hawaii (at the relevant time) that was described in the promotional brochure that was provided to the investors and discovered that neither of the respondents ever had any right to purchase the land or any interest in the land;
- the US law firm that was described in the confirmation letters to investors as SBC's lawyers and determined that neither of the respondents were ever clients of that firm nor had that firm ever set up a trust account with the US financial institution as described in such letters.

[42] We find that all elements of this investment were simply fabricated by Bakshi. Neither of the respondents had a right to acquire an interest in the purported land in Hawaii that was the subject of the purported investment. The respondents did not retain US counsel to assist them in that endeavor. The investors' money was never forwarded into a trust account for the purpose of this investment.

[43] Finally, the purported "cancellations" of these investments on May 6, 2013 never happened. We make this finding on the basis of:

- the May 9, 2013 e-mail to K's client confirming that the client had invested in the Hawaiian project – this e-mail was three days after the purported cancellation of these investments;
- Investor T's, Investor M's and K's testimony that they never received these letters;
- the fact that K had stopped dealing with Investor T and never dealt with Investor M, so that K would not have been the conduit for a letter of this type for these two investors; and

- the consistent oral testimony of each of Investor T, Investor M and K that Bakshi continued to discuss the progress of the purported investment in the Hawaiian project in the months following May of 2013.

Role of K

[44] With respect to matters other than the Hawaiian land transactions, K testified that:

- he and Bakshi had previously worked together in 2006 at a financial services firm;
- he first learned about the respondents' business in 2010 when Bakshi told him that SBC was a vehicle for him to trade blue chip securities and to invest in 3 real estate properties in San Francisco;
- he entered into a referral agreement with SBC in which K would receive a 10% commission on funds that were invested in SBC by investors found by K;
- he referred between 25 and 30 clients to SBC between 2010 through 2014;
- Bakshi told him that he owned all of the shares of SBC and that he was responsible for all of SBC's investing and other activities;
- other than finding potential investors for SBC, K did not have any role with SBC as an officer or director nor did he own any shares of the company;
- K did not have any role in the investment decisions of SBC;
- Bakshi was the one who developed the paperwork relating to the loan arrangements but that K often completed the paperwork with the clients that he referred to the respondents;
- K and Bakshi agreed that K should try and refer people to the respondents who were K's friends and family;
- at some point K learned that the investment arrangements did not comply with section 61 of the Act (i.e. the prospectus obligations described below) but chose to carry on referring clients to the respondents;
- Bakshi prepared all of the account statements for clients;
- in 2012, Bakshi discussed with K the Hawaiian real estate transaction and told K that he could solicit investors interested in the project; and
- K referred one client to the respondents for the Hawaii project – he was also aware that Investors T and M participated in the purported project.

Collapse of SBC

[45] K testified that Bakshi began making excuses for why investors could not have their investments returned several months in advance of the October 2014 collapse of the respondents' business transactions with investors.

[46] On October 1, 2014, Bakshi sent K an e-mail stating the following:

> I am so sorry. I haven't been honest with you because I was doing everything in my power to get the money in place. I have completely screwed everything up and do not have any money for tomorrow. I've made some big mistakes and heavy losses in the investments I invested company money into. I will email you within a couple of hours with more detailed info and we can talk tomorrow. I

> was doing everything in my power to rectify things and make everyone whole on their investments but I ended up getting screwed myself.

[47] In January of 2015, SBC was petitioned into bankruptcy. The investors did not receive any funds out of the bankruptcy proceedings.

III. Analysis and Findings

A. Applicable Law

Standard of Proof

[48] 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.

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

[50] 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

[51] 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."

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.

[52] 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.

[53] 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.
>
> 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…

Registration Requirements

[54] Section 34(a) states "A person must not… trade in a security …unless the person is registered in accordance with the regulations…".

[55] National Instrument 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) includes further detail on the circumstances under which persons are required to be registered to trade in securities. This National Instrument sets out the registration requirements and the Companion Policy contains interpretations of the National Instrument by the Canadian Securities Administrators. The Canadian Securities Administrators comprises the securities regulators of all of the provinces and territories of Canada. Section 8.4(1) of NI 31-103 states:

> 8.4(1) In British Columbia…, a person…is exempt from the dealer registration requirement if the person…
> (a) is not engaged in the business of trading in securities…as principal or agent, and
> (b) does not hold himself, herself or itself out as engaging in the business of trading in securities…as a principal or agent.

[56] Since September 28, 2009, although certain exemptions from the requirement to be registered (using the "trade trigger" approach (discussed below)), continued both on a transitional basis and on a permanent basis, the applicability of section 34(a) has been determined based upon a "business trigger". Generally, persons are required to be registered under the Act when they are in the business of trading in securities.

[57] The following from the Companion Policy to NI 31-103 are factors that regulators consider relevant to the determination whether a person is in the business of trading:

- engaging in activities similar to a registrant – including whether the person is acting as an intermediary between the buyer and seller of securities;

- directly or indirectly carrying on the activity with repetition, regularity or continuity – including the frequency of transactions (but the activity does not have to be the sole or even the primary endeavor of the person) and whether the activity is carried out with a view to making a profit, the person's various sources of income and amount of time allocated to the activity;

- being compensated for the activity – receiving or expecting to be compensated for carrying on the activity indicates a business purpose; and

- directly or indirectly soliciting – contacting potential investors to solicit securities transactions suggests a business purpose.

[58] Companion Policies do not have the force of law. Their function is to inform market participants of the regulators' interpretation of certain aspects of securities law. We find that the statements of policy in the Companion Policy to NI 31-103, outlined above, to be appropriate to the interpretation of some of the factors to be considered in determining whether a person is required to be registered under the Act.

[59] As noted above, certain exemptions from the requirement to be registered under the Act, with respect to specific trades in securities, have continued to exist since the adoption of NI 31-103. One of these is found in BC Instrument 32-513 – *Registration Exemption for Trades in Connection with Certain Prospectus-Exempt Distributions*. This exemption is more commonly called the Northwest exemption (after the geographical region of Canada in which this exemption has been adopted).

[60] BC Instrument 32-513 was amended during the period relevant to the allegations in the notice of hearing, there was one version in effect prior to April 15, 2012 and another version thereafter. Other than as described below, the two versions were substantively similar.

[61] The later version of the Northwest exemption provides that a person is not required to be registered under section 34(a) of the Act in connection with trades in securities which are exempt from the prospectus requirements under the:

a) accredited investor exemption (section 2.3 of NI 45-106);
b) family, friends and close business associates exemption (section 2.5 of NI 45-106);
c) offering memorandum exemption (section 2.9 of NI 45-106); and
d) minimum investment amount (section 2.10 of NI 45-106),

if:

a) the person is not registered under the provincial or territorial legislation and was not formerly registered;
b) the person is not registered under the securities legislation of a foreign jurisdiction and was not formerly registered;
c) prior to the trade, the person did not advise, recommend or otherwise provide suitability advice to the purchaser;
d) at or before the time of purchase, the person obtained a risk acknowledgment form (in the prescribed form) from the purchaser;
e) the person does not hold or have access to the purchaser's assets;
f) the person does not provide financial services to the purchaser other than the prospectus exempt purchase of securities; and
g) the person has filed with the Commission a form notifying the Commission of the person's reliance upon the Northwest exemption in connection with a particular trade or trades.

[62] The pre-April 15, 2012 version of the Northwest exemption did not contain the limitation that the person must not have been formerly registered or the limitation found in subparagraph 61(f) above.

Fraud

[63] Section 57(b) states

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

[64] In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, the British Columbia Court of Appeal cited the elements of fraud from *R. v. Theroux*, [1993] 2 SCR 5 (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 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).

Liability under section 168.2

[65] 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".

[66] 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

Preliminary issues

[67] There are two issues that impact our findings on liability with respect to more than one of the allegations against the respondents in the notice of hearing.

[68] The first of these issues relates to the limitation period under section 159 of the Act. Certain of the loan transactions between the investors and the respondents occurred earlier than the presumptive limitation period (as discussed below). The impact, if any, of the limitation period on these transactions will determine the quantum of the allegations of potential contraventions by the respondents of both sections 34(a) and 61 of the Act (and, consequently, the allegations against Bakshi under section 168.2 of the Act).

[69] The second of these issues is whether the conduct of the respondents with respect to the Hawaiian land transactions constitutes "conduct relating to securities" as required under section 57(b) of the Act. More precisely, the issue is whether the land transactions were "securities" under the Act. A determination of this issue impacts our potential liability findings with respect to not only the allegations of contraventions of section 57(b) of the Act against Bakshi but also (as these investments were included in the allegations of contraventions of sections 34(b) and 61) the quantum of the remaining allegations of contraventions of the Act against both respondents.

Limitation Period

[70] The notice of hearing for this matter was issued on January 24, 2017.

[71] Section 159 of the Act requires that proceedings under the Act must not be commenced more than six years after the date of the events that give rise to the proceedings. Therefore, the presumption is that events that occurred prior to January 24, 2011 cannot be the subject of a notice of hearing.

[72] The investments made by investors with the respondents that are the subject matter of the allegations in the notice of hearing began in August 2010 and run through to September 2014 (the date of the last of the 59 investments).

[73] The executive director acknowledges that nine investments by eight investors (of the 59 covered by the allegations in the notice of hearing) were made prior to January 24, 2011 for aggregate proceeds of $615,000. Of these issuances, the executive director alleges that all of them were made in contravention of section 34(a) of the Act and that seven of the issuances for $340,000 were made in contravention of section 61 of the Act.

[74] However, four of the investments totaling $340,000 in aggregate that were made prior to January 24, 2011 were renewed, upon the expiry of the original term of the loan transaction, within the limitation period. Of these four investments, the executive director alleges that all of them were made in contravention of section 34(a) of the Act and that two of the issuances for $65,000 were made in contravention of section 61 of the Act.

[75] The Commission recently addressed a similar scenario (when considering the application of section 159 of the Act) where loans made outside of the limitation period were renewed during the limitation period in *Re Cook*, 2017 BCSECCOM 136. We agree with the following from paragraph 128 of *Cook* and would apply its reasoning to this case:

> 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.

[76] A renewal, after January 24, 2011, of the four loans made prior to January 24, 2011 constitute both a "trade" in a security (as defined under the Act) for the purposes of section 34(a) of the Act and a "distribution" of a security (as defined under the Act) for the purposes of section 61 of the Act. Therefore, we find that these four loan arrangements are not statute barred by section 159 of the Act.

[77] There is no evidence that the remaining five loans totaling $275,000, made by investors prior to January 24, 2011, were renewed during the limitation period. Of these loans that were not renewed, the executive director alleges that all five were made in contravention of sections 34(a) and 61 of the Act.

[78] Notwithstanding this, the executive director says that the respondents' fundraising activities constitute a "continuous course of conduct" that was carried out both prior to and during the limitation period such that the issuances prior to January 24, 2011 are not statute barred. The executive director relies upon the majority decisions in *Re Wireless Wizard*, 2015 BCSECCOM 100 and *Re Williams*, 2016 BCSECCOM 18 in support of this argument.

[79] The executive director further argues that the respondents' fundraising was a "single activity" that must be considered an "event" for the purposes of section 159 of the Act such that allegations of contraventions of section 61 of the Act (and, we presume, under section 34(a) of the Act) could be brought with respect to all 59 investments until 6 years following the last event in a series of events (i.e. September 2020). The executive director relies upon the decision in *Re Wong*, 2016 BCSECCOM 208 in support of this argument.

[80] The interpretation or application of section 159 must differ depending on the provision of the Act or the nature of the contravention to which it must be applied. An "event" for the purposes of section 159 must be interpreted in light of the alleged contravention. Put more generally, the application of the notion of an "event" for the purposes of section 159 must differ depending on whether the alleged misconduct is, for example, fraud, failure to be registered or a contravention of the prospectus requirements.

[81] It must be different because the nature of the impugned conduct is fundamentally different in different sections of the Act. As will be discussed in greater detail below, the registration requirements of section 34 of the Act are founded upon a "business" trigger. In the general sense, the test of whether a person is required to be registered under the Act is whether a person is "in the business of trading in securities". Whether a person is "in the business of trading" in securities involves a holistic analysis of that person's conduct as it relates to securities as carried out over a period of time. Given this, the concept of an "event" in section 159 must be read expansively. It must be read to encapsulate the entirety (or at least a sufficiently long period of conduct to ascertain the respondent's business) of the respondent's conduct or business.

[82] A person's failure to register may also be an ongoing one where that contravention exists both prior to and after a presumptive limitation date. Where the conduct or business is the same both before and after that date, as was the case here, section 159 should not operate to preclude findings of a contravention over the entirety of the period of misconduct.

[83] Therefore, we find that section 159 does not limit the extent of the allegations in the notice of hearing of contraventions of section 34(a) of the Act by the respondents.

[84] The application of section 159 to alleged contraventions of section 61 is more challenging. This is reflected in the differing approaches to this issue suggested in the *Wireless Wizard*, *Williams* and *Wong* decisions along with the dissents in the *Wireless Wizard* and *Williams* decisions.

[85] Unlike the "business" trigger under section 34(a) of the Act, an analysis of potential contraventions of section 61 is presumptively done on a trade by trade basis. The Act requires that a prospectus be delivered to the investor, or an exemption therefrom be found, with respect to each trade in a security.

[86] However, as can be seen from the *Wireless Wizard*, *Williams* and *Wong* decisions, there have been circumstances in which panels have found that multiple, distinct, trades in securities can be considered together for a single event or course of conduct, for the purposes of section 159 of the Act, so that trades that occurred prior to a presumptive limitation period could be considered, along with trades that occurred within the limitation period, without being statute barred.

[87] The dissents in *Wireless Wizard* and *Williams* set out that such an amalgamation or grouping of trades is not appropriate for the purposes of applying section 159 of the Act to alleged contraventions of section 61 of the Act.

[88] The fundraising activities of the respondents in this case is different from that carried out by the respondents in *Wireless Wizard* and in *Wong*. In those two cases, the financing, although carried out over a period of time, was directed towards a single purpose. It was possible, in those cases, to characterize the activities of the respondents as a single, related, financing. That was not the case for SBC and Bakshi in the circumstances of this case. They were simply raising funds continuously for nebulous purposes. It is not possible to characterize their fundraising activities as a single "financing". As such, it is not possible to characterize all 59 investments, spanning the presumptive limitation period, as a "continuous course of conduct" (as described by the majority in *Wireless Wizard*) or as a single event (as determined in *Wong*).

[89] The fundraising activities of the respondents in this case are very analogous (from the perspective of the allegations of contraventions of section 61) to those of the respondents in the *Williams* case. In *Williams*, the respondents were engaged in continuous fundraising activities for a similarly nebulous purpose.

[90] The majority in *Williams* found that the pre-limitation period distributions were not statute barred. In so doing, the majority did find that there was a similar common purported purpose for the fundraising activities. More importantly, the panel emphasized, as the basis for making its finding on the limitation period issue, the ongoing nature of the common activities (i.e. providing marketing materials, communications with investors, signing of documents) that each of the respondents carried out, generally, with respect to the raising of funds both before and after the presumptive limitation date.

[91] We do not agree with the broad approach to this issue suggested by the *Williams* decision. The "common activities" approach suggested in that decision could lead to unrelated, completed financings, carried out over an unlimited period of time, being considered a "continuous course of conduct." This result would eviscerate the legislative intent of section 159 of the Act. We have elected not to follow the reasoning in that decision.

[92] Therefore, whether viewed through a failure to meet the tests to group trades as set out in either *Wireless Wizard* or *Wong* or through the reasoning of the dissents in *Wireless Wizard* and *Williams*, we find that the issuances of securities by the respondents that occurred prior to January 24, 2011, and that were not renewed after that date, are statute

barred (pursuant to section 159 of the Act) for the purposes of alleged contraventions of section 61 of the Act. This reduces the possible contraventions of section 61 from 53 to 48 issuances of securities for proceeds of $1,735,238.

Are the Hawaii land transactions a "security"?

[93] Section 57(b) of the Act requires that a person must not perpetrate a fraud in respect of conduct relating to securities. The allegations of fraud in this case are specifically related to three investments in the Hawaiian land transactions. Therefore, the issue is whether those investments were in a "security" as defined in the Act.

[94] A determination that these were not "securities" would also impact the quantum of the allegations of contraventions of sections 34(a) and 61, as the Hawaiian land transactions were included in these allegations. Both section 34(a) and 61 require that the subject matter of a trade or a distribution, as applicable, be a "security" under the Act.

[95] The executive director submits that the Hawaiian land transactions were an "investment contract" in the definition of "security" in the Act.

[96] The law relating to the interpretation of an investment contract is long settled. The Supreme Court of Canada in *Pacific Coast Coin Exchange of Canada v. Ontario Securities Commission*, [1978] 2 SCR 112 set out that an investment contract exists when a person invests money, in a common enterprise, where there is an expectation of profits to be derived from the efforts of a third party.

[97] The executive director says that the Hawaiian land transactions meet all elements of that test:

- the investors' gave their money to the respondents;
- the land in Hawaii needed to be rezoned and that the rezoning efforts were dependent upon a third party and that this also constituted the "common enterprise"; and
- the land, once acquired, could have been resold by the investors with a view to a profit.

[98] The executive director cited the following decisions in support of this analysis: *Re Streamline*, 2014 BCSECCOM 263; *Re Falls*, 2015 BCSECCOM 59; *Re Inverlake*, 2015 BCSECCOM 348; *Re Schouw*, 2017 BCSECCOM 17 and *Wong*.

[99] The respondents submit that the investors were acquiring an interest in land (and not in a "security") and that each of the decisions cited by the executive director above are distinguishable in that while the principal asset of the issuer in each of the cited decisions may have been real estate, in each case, the investors were clearly acquiring a security (i.e. a share, a loan, joint venture units, etc.) in the issuer that owned the real estate assets.

[100] The respondents submit that the investors were principally interested in acquiring an interest in real estate in Hawaii and that the transactions were therefore commercial transactions that fall outside the ambit of the Act.

[101] The key evidence relating to the nature of the investments in the Hawaiian land project was the testimony of two of the investors who invested in this project and the confirmation letters dated May 1, 2013 sent by the respondents to all three of the investors. These letters documented the nature of the transaction. All of that evidence clearly demonstrates that the funds were advanced by the investors with the intent that they were to acquire parcels of land.

[102] These transactions were structured like common real estate purchases - with money being put up by the purchasers, to be held on deposit by a third party until satisfaction of certain conditions to closing. In this case, the key condition to closing was a purported rezoning process. A closing condition in a real estate transaction that is to be completed by a third party is common (for example, completion of inspections or removal of third party interests on title). We do not think that a condition of closing in a real estate transaction that is to be completed by a third party, prior to the investment even coming into being, is sufficient to satisfy the "common enterprise" element of the "investment contract" test. In this case, the effort of others was directed at removing a closing condition not in carrying out an improvement that would lead to profits by the investor. The common effort contemplated in this case was to be completed prior to the investors' funds being released.

[103] Frankly, the only way in which these transactions differed from ordinary real estate transactions is that they arose in the context of the respondents' investment business and not through a licensed realtor. That the opportunity to participate in these transactions arose through the respondents' investment business does make them different from a common real estate transaction and does suggest an intention to profit from the transactions. However, an investor's intention to make profit from a transaction does not, in and of itself, turn that transaction into one involving a "security".

[104] We agree with the respondents that each of the decisions submitted by the executive director in support of their submissions is distinguishable from the case at hand. In several of the cases (for example *Schouw*), there was a direct ownership interest in real estate that was obtained by, or a right to acquire such interest granted to, the investor. However, in each case, there was also a separate, share, note or joint venture unit that was issued to the investor. In all but the *Wong* decision, this additional instrument was clearly one of the enumerated instruments within the definition of "security".

[105] In *Wong*, the investors acquired a joint venture unit. The *Wong* decision analyzed the nature of that unit under the "investment contract" analysis set out above and concluded that it was a "security". The nature of the investment structure was fundamentally different in *Wong* from the circumstances of this case. In *Wong*, a group of investors were to acquire a single parcel of land with a view to holding the land for a period of time during which the respondents would make efforts to further develop and bring

improvements to the land (including the possibility of subdivision). Here, subdivision was merely a condition of closing and there was no evidence that, following closing, anyone would be doing anything to or with the land.

[106] We do not find that the Hawaiian land transactions satisfy the "common enterprise" aspect of the "investment contract" test. Therefore, we find that the Hawaiian land transactions were not "securities" under the Act.

[107] The notice of hearing and all of the executive director's submissions in this case were founded on a theory of fraud that the Hawaiian land transactions were investment contracts and that the "conduct relating to securities" (as required under section 57(b) of the Act) was the purported issuance of these securities.

[108] Therefore, although Bakshi clearly engaged in extensive deceitful conduct in respect of these transactions (i.e. the respondents did not have the right to acquire these real estate interests; Bakshi did not advance the investors' money to acquire these lots as the investors intended; and the May 6, 2013 "cancellation letters" were fabrications), we must dismiss the allegations against him pursuant to section 57(b) of the Act.

[109] Despite this finding, there was "conduct relating to securities" that occurred in connection with Bakshi's deceits relating to the Hawaiian land transactions. Two of the investors were induced to reinvest funds they had previously invested in the loan arrangements in the land transactions. These loan arrangements, as discussed below, are securities under the Act. We would have found that this inducement, leading to the investors redeeming their loan arrangements, was "conduct relating to securities", if the executive director had brought forward an allegation in that manner. It would have then been open to the executive director to frame an allegation within the context of section 57(b) of the Act. However, that was not how the case was presented to us, and it is not open to us to make a finding in this regard.

[110] Our finding that these transactions were not securities also reduces the quantum of the remaining allegations of contraventions of section 34(a) and section 61. Of the three investments in the Hawaiian land transactions, only one transaction (for $200,000) represented a new investment of money. The other two transactions (also for $200,000 in total) were simply rolled over from prior loan arrangements with SBC. Therefore, the quantum of the section 34(a) allegations must be reduced by $200,000 and the quantum of the section 61 allegations must be reduced by three transactions (as the Hawaiian land transactions were included in the original 53 issuances of securities alleged to contravene section 61) and by $200,000. Therefore, the quantum of the section 34(a) allegations is reduced to $2,675,238 and the quantum of the section 61 allegations are further reduced to 45 issuances of securities for proceeds of $1,535,238.

Contravention of section 34(a) allegation

[111] The notice of hearing alleges that both respondents traded in securities without being registered to do so. This allegation was not contested by the respondents in their written submissions.

[112] Section 34(a) of the Act requires that those who trade in securities must be registered to do so under the Act and the regulations, unless there is an exemption from this requirement.

[113] The executive director submits that both respondents were in the business of trading in securities throughout the period relevant to the allegations in the notice of hearing and that none of the trades carried out by the respondents in the securities of SBC to the investors were exempt from the requirement to be so registered pursuant to the Northwest exemption.

[114] The Commission in *Re Zhong*, 2015 BCSECCOM 165 set out a simple three part test to analyze alleged contraventions of section 34(a) of the Act:

- were the instruments offered to investors "securities" under the Act?
- was the respondent in the "business of trading" securities as contemplated by NI 31-103?
- if the first two questions are answered in the affirmative, did the respondent have an exemption from the requirement to be registered?

[115] The loan arrangements offered by the respondents to the investors in this case were clearly securities. In some cases, the loan arrangements were documented by promissory notes - while in others, they were documented with letter agreements or lender questionnaires. These arrangements were either "notes" or "evidences of indebtedness" in subparagraph (d) of the definition of "security" in section 1(1) of the Act. They would also qualify as "investment contracts" in subparagraph (l) of that definition using the *Pacific Coast Coin Exchange* test (as described above).

[116] However, as noted above, the Hawaiian land transactions were not securities as defined in the Act and the respondents' activities in connection with these transactions cannot, therefore, be held to contravene section 34(a) of the Act.

[117] The respondents were also clearly in the "business of trading" in securities.

[118] The Companion Policy to NI 31-103 lists a number of factors associated with the "business trigger", including, whether the person:

- engaged in activities similar to a registrant;
- directly or indirectly carried on the business with repetition, regularity or continuity;
- being, or expecting to be compensated, for the activity; and
- directly or indirectly soliciting investors.

[119] All of these factors were present in connection with the respondents' dealings with the investors in this case:

- the respondents held themselves out in their letters to investors, financial statements and account statements as being in the investment/financial services business;
- the respondents' loan questionnaires included questions designed to gather information about the finances, risk tolerance and investment horizons of investors that are similar to those included in "know your client" forms used by registrants;
- the respondents carried out the transactions associated with the loan investments over a four year period, involving over 50 separate transactions;
- the respondents solicited investors directly and through K and L, its finders;
- the respondents paid commissions to its finders; and
- the respondents received the proceeds of the loan transactions and obtained the benefit of these funds.

[120] Finally, there were no exemptions available to the respondents from their obligations to be registered under the Act. In particular, the Northwest exemption was not available to the respondents, as:

- the issuances of securities to the investors were not carried out under the required prospectus exemptions (as will be discussed in more detail below);
- Bakshi was a former registrant and therefore was not eligible for the exemption after April 15, 2012;
- the investors did not provide a risk acknowledgement form (in the prescribed form) in connection with the loan transactions with the respondents; and
- the respondents did not file the required form with the Commission indicating that they were relying on the Northwest exemption in connection with the trades in securities with the investors.

[121] We find that the respondents contravened section 34(a) in connection with the SBC loan transactions between October 2010 and September 2014 in the amount of $2,675,238.

Contravention of section 61 allegation

[122] The executive director alleged in the notice of hearing that 59 issuances of securities for proceeds of approximately $2.3 million by the respondents were carried out in contravention of section 61 of the Act. By the time of the hearing, the quantum of the alleged contraventions under this provision had dropped to approximately $2 million. Our findings with respect to the limitation period and the Hawaiian investments (set out above), have further dropped the quantum of these allegations to 45 issuances of securities for approximately $1.5 million.

[123] The executive director submits that the evidence clearly establishes that the amount described above was raised from investors. He further submits that the loan transactions were securities. Finally, he submits that both of the respondents were engaged in trades or acts in furtherance of trades in securities. SBC was the issuer of the security and Bakshi was involved in all material aspects of the sales, including approving the loans to investors and negotiating their terms and signing the documentation evidencing the loans (i.e. the promissory notes or loan questionnaires).

[124] We agree with the executive director that the loan transactions were securities and that both the respondents traded securities or engaged in acts in furtherance of trades of securities with respect to each of the remaining 45 issuances of loans.

[125] Therefore, the executive director submits that the onus of proving that the respondents had an exemption from the prospectus requirements of section 61 falls upon the respondents and that the respondents have failed to establish that they had exemptions for any of these distributions.

[126] The respondents submit that all of the issuances of securities to investors are exempt from the prospectus requirements of section 61. They submit that K was really a *de facto* officer and/or director of SBC and that, as such, the friends, family and close business associates exemption found in NI 45-106 applies to these distributions.

[127] We do not agree with the respondents submissions on this point.

[128] First, the respondents' submissions on this point, even if correct, do not address the fact that certain of the investors were not introduced to the respondents by K and there is no evidence of any kind that these investors were friends, family or close business associates of K.

[129] Second, the evidence does not support a finding that K was really a *de facto* officer and/or director of SBC. In *British Columbia (Securities Commission) v. Alexander*, 2013 BCCA 111, the Court of Appeal adopted a legal test for determining whether someone is a *de facto* director or officer which looks to whether an individual, in the circumstances, is an integral part of "mind and management" of the company, taking into account the entirety of the person's alleged involvement in the context of the business activities at issue.

[130] The evidence does not support a finding that K was an integral part of "mind and management" of SBC.

[131] K testified that he did not exercise control or direction over any aspect of SBC's business. Although, K, during his testimony, attempted to minimize (to some extent) his involvement in the misconduct associated with this case we did not find this damaging to his overall credibility. We found K to be a credible witness.

[132] His testimony was supported by the oral testimony from the six investor witnesses. They testified that on the key business terms of their investment it was Bakshi with whom they negotiated (directly or indirectly through K). K's testimony on this point was also supported by the documentary evidence. It was Bakshi who had sole signing authority over SBC's bank account. It was Bakshi who signed welcome letters to new investors and provided account statements to the investors. Bakshi's own e-mail to K of October 1, 2014 is inconsistent with his submissions on this point. The contents of that e-mail suggest it is Bakshi and Bakshi alone who made the decisions on how SBC's funds were invested and what the status of those investments was.

[133] Furthermore, the friends, family and close business associates exemption under NI 45-106 is only available if a commission has not been paid to the director and/or officer of the issuer in connection with the distribution. Even if K was a *de facto* officer or director of SBC, the evidence was clear that he received a 10% commission on the referrals he made to the respondents. That exemption was simply not available to the respondents in the circumstances.

[134] The respondents have not established, on a balance of probabilities, that any exemption from the prospectus requirements of the Act was available to any of the 45 trades in SBC securities that are part of this allegation.

[135] We find that SBC and Bakshi contravened section 61 of the Act with respect to 45 issuances of securities for $1,535,238.

Bakshi's indirect liability under sections 34(a) and 61

[136] As set out above, we have found that SBC contravened sections 34(a) and 61 of the Act.

[137] Section 168.2(1) of the Act provides that those directors and officers of a corporation who authorize, permit or acquiesce in that entity's contraventions of the Act may be held liable for those same contraventions.

[138] In this case, Bakshi was the sole director, officer and shareholder of SBC. He was solely responsible for the corporation's business activities and there is no question that he authorized SBC's contraventions of the Act. Therefore, pursuant to section 168.2(1) of the Act, we find that Bakshi also contravened sections 34(a) and 61 of the Act with respect to SBC's contraventions of those sections.

IV. Conclusions

[139] We find that the respondents:

a) contravened section 34(a) of the Act with respect to trading in securities between October 2010 and September 2014 in the amount of $2,675,238; and
b) contravened section 61 of the Act with respect to 45 issuances of securities for $1,535,238.

[140] We also find Bakshi liable pursuant to section 168.2(1) of the Act with respect to SBC's contraventions of section 34(a) and 61.

[141] We dismiss the allegations of contraventions of section 57(b) of the Act against Bakshi.

V. Submissions on Sanctions

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

By May 11, 2018	The executive director delivers submissions to the respondents and to the secretary to the Commission.
By May 25, 2018	The respondents deliver response submissions to the executive director and to the secretary to the Commission. Any 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 1, 2018	The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

April 16, 2018

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

Gordon L. Holloway
Commissioner