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

Citation: Re Braun, 2018 BCSECCOM 332 Date: 20181024

Alan Braun, Jerry Braun, Steven Maxwell (aka Steven Fassman), Braun Developments (B.C.) Ltd., 8022275 Canada Inc. and 0985812 B.C. Ltd. (dba TerraCorp Investment Ltd.)

Panel	Nigel P. Cave	Vice Chair
	Audrey T. Ho	Commissioner
	Don Rowlatt	Commissioner
Hearing Dates	May 4 and 7, 2018	
Submissions Completed	August 9, 2018	
Date of Findings	October 24, 2018	

Appearing

James Torrance	For the Executive Director
Patrick J. Sullivan	For Alan Braun
Owais Ahmed	For Jerry Braun
Steven Maxwell	For himself

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 May 10, 2017, the executive director issued a notice of hearing against the respondents (2017 BCSECCOM 114) alleging that:

a) the respondents committed fraud contrary to section 57(b) of the Act when they:

(i) took $450,000 from investors, that they said they would use to purchase properties to generate returns; and

(ii) did not purchase the properties but instead spent investors' money on other things;

(b) Alan Braun and Jerry Braun, as directors of Braun Developments (B.C.) Ltd., authorized, permitted or acquiesced in contraventions of section 57(b) of the Act by Braun Developments and that by operation of section 168.2 of the Act, Alan and Jerry also contravened section 57(b) of the Act;

(c) Steven Maxwell, as a *de facto* director of 8022275 Canada Inc. (275 Inc.), authorized, permitted or acquiesced in contraventions of section 57(b) of the Act by 275 Inc. and that by operation of section 168.2 of the Act, Maxwell also contravened section 57(b) of the Act; and

(d) Alan and Jerry, as directors of 0985812 B.C. Ltd. (dba TerraCorp Investment Ltd.) (TerraCorp), authorized, permitted or acquiesced in contraventions of section 57(b) of the Act by TerraCorp and that by operation of section 168.2 of the Act, Alan and Jerry also contravened section 57(b) of the Act.

[3] During the hearing, we asked the executive director to clarify the number of allegations of contraventions of section 57(b) that he was making against each of the respondents. The executive director clarified that he alleged three contraventions of section 57(b) against each of the respondents other than TerraCorp, against which he alleged only two contraventions.

[4] During the hearing, the executive director called three witnesses, a Commission investigator and two investors (Investor L and Investor ML), tendered documentary evidence and made written and oral submissions. Alan and Jerry were represented by counsel at the hearing, tendered documentary evidence and made written and oral submissions. Maxwell attended the hearing in person and tendered documentary evidence, but did not make written or oral submissions, nor did he attend the hearing of the oral submissions. None of Braun Developments, 275 Inc. or TerraCorp were represented at the hearing, tendered any evidence or provided any written or oral submissions.

[5] 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

[6] Alan is a resident of Surrey, British Columbia. At the relevant time, Alan was a church pastor. He has never been registered in any capacity under the Act.

[7] Jerry is Alan's son and is a resident of Surrey, British Columbia. During the relevant period, Jerry lived at the same residence as his father. He has never been registered in any capacity under the Act.

[8] Maxwell (who also goes by the last name of Fassman), during the relevant period, was a resident of White Rock, British Columbia, although he also told Commission investigators in an interview that he did not have a fixed address at the time. He has never been registered in any capacity under the Act.

[9] Braun Developments was incorporated in the Province of British Columbia in September of 2009. Braun Developments has never been registered in any capacity under the Act and it has never filed (nor received a receipt for) a prospectus under the Act. During the period relevant to the matters in the notice of hearing, Alan and Jerry were directors of Braun Developments. Alan and his wife were also officers of the company.

[10] 275 Inc. was federally incorporated on November 14, 2011. 275 Inc. has never been registered in any capacity under the Act and it has never filed (nor received a receipt for) a prospectus under the Act. During the relevant period, Maxwell was registered as one of two directors of 275 Inc. for one day only, April 1, 2013. However, the executive director alleges that during the entire period relevant to the notice of hearing Maxwell was either a director or a *de facto* director of 275 Inc. In an interview with Commission investigators, Maxwell confirmed that it was he who made all of the material decisions relating to this company.

[11] TerraCorp was incorporated in the Province of British Columbia on November 17, 2013. TerraCorp has never been registered in any capacity under the Act and it has never filed (nor received a receipt for) a prospectus under the Act. During the period relevant to the matters in the notice of hearing, Alan and Jerry were corporate officers and directors of TerraCorp and, in a marketing document prepared by TerraCorp (described below), Alan, Jerry and Maxwell were each described as senior executives of the company.

Investor L

[12] Investor L is a resident of Ontario and met Alan sometime in 2005 when Investor L was working at a seminary and Alan was on the Board of Trustees of that seminary.

[13] Investor L had an interest in leaving his job and working on an arena development project. Sometime in late 2013 or early 2014, Investor L sent Alan a copy of a business plan for the arena development project for Alan to read and give Investor L his thoughts on the plan.

[14] In return, Alan sent Investor L a document called a Company Overview of TerraCorp which contained short business biographies of each of Alan, Jerry and Maxwell, who were each listed as senior executives of TerraCorp.

[15] Alan also called Investor L and told him that there was an opportunity for Investor L to invest in a real estate project in Edmonton that would offer a very high rate of return in a short period of time. Investor L testified that he had several phone conversations with Alan about the investment opportunity and then Alan told Investor L that Jerry would follow up to handle the logistics of the investment.

[16] Investor L testified that the investment opportunity was pitched as an opportunity to invest money that would be used to acquire a specific house and that Investor L would get his money back plus a 50% return on his investment in 60 days.

[17] Investor L and Jerry exchanged a number of electronic communications regarding the specifics of the transaction and then Jerry sent Investor L a document entitled "Purchase Sales Agreement" which was dated February 1, 2014.

[18] Investor L was also sent a document called an "Appraisal" which was prepared on behalf of TerraCorp and which contained a summary of valuations for a number of residential homes in Edmonton, including one for a property that was the subject of Investor L's transaction.

[19] The Purchase Sales Agreement is an agreement between "Braun Developments Ltd." as purchaser, 275 Inc. as vendor of a specific property in Edmonton for a purchase price of $150,000, as well as Investor L's company as "investor". The agreement contains a clause relating to the "Investor" which we set out in full below:

> 3. The Investor will provide the Purchaser with an amount equal to the Full Payment for the purposes of providing the Vendor with the Full Payment with the following conditions:
>
> a. The Purchaser will provide the Investor with a total repayment of $225,000.00 CDN to provide the Investor with a fifty percent (50%)/ $150,000[1] within 60 days from the date of this agreement, April 1st 2014 (the "Payment Date");
>
> b. In a default of the agreed and scheduled Payment Date, the Purchaser will provide the Vendor[2] with monthly default payments of $11,250.00 CDN (the "default payment") until such time as the full repayment of $225,000.00 CDN can be made or otherwise agreed to by the Purchaser and the Investor.

[20] The provision set out above is the only material provision in the Purchase Sales Agreement that applies to (or references) the Investor. The agreement is also littered with typographical and grammatical errors and references to defined terms that are not defined in the agreement.

[21] Investor L testified that the terms of the Purchase Sales Agreement, as they applied to the Investor, were the terms that he had previously discussed with Alan and that they were the essential business terms that he was expecting to see in the document.

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[1] Investor ML's two Purchase Sale Agreements say "fifty percent (50%) Return On Investment (ROI)".
[2] Although the Purchase Sale Agreement specifically says "Vendor", the only logical inference from the rest of the paragraph is that this is a typographical error and should say "Investor".

[22] According to a British Columbia corporate registry search, there is no British Columbia corporation, nor one registered to do business in British Columbia, by the name of "Braun Developments Ltd." There is a proprietorship registered with that name in British Columbia. The corporate registry information relating to the filing of that name (in connection with registering the sole proprietorship name) indicates that the filing was made by Braun Developments.

[23] Investor L was requested by Jerry to sign the Purchase Sales Agreement as the "Investor" and e-mail the executed document back to Jerry.

[24] Investor L did not have the $150,000 to make the investment. He agreed with Jerry to first provide $1,000 "in order to secure" the investment opportunity and provide the remainder at a later date.

[25] Investor L borrowed the remaining $149,000 from a friend of his (Z).

[26] On February 7, 2014, Investor L did execute the Purchase Sales Agreement using his numbered company as the "Investor" and Investor L e-transferred the $1,000 to Jerry.

[27] The Purchase Sales Agreement was ultimately executed by all the parties to the agreement. In particular, Alan signed on behalf of "Braun Developments Ltd.", Maxwell on behalf of 275 Inc. and Jerry as a "Witness".

[28] At both the time of sending the agreement and the initial payment and subsequently, messages sent by Investor L to Jerry indicated that Investor L was concerned that the transaction terms were "too good to be true". In response to one of these communications, Jerry replied that they had done two of these transactions prior to the investment by Investor L and that things had gone well.

[29] On February 23, 2014, Z was provided with transfer instructions for the payment of $149,000 into an account of 275 Inc. and Z then transferred those funds into that account.

[30] Investor L had also discussed with Alan the possibility of Investor L finding other investors who might be interested in investing in transactions similar to that set out in the Purchase Sales Agreement. In pursuance of this, Investor L was sent a document which set out highlights of the investment and "talking points" that he might use with prospective investors. Within those notes, there was a reference to doing a transaction in which Braun Developments would acquire a house for $150,000 and then resell the house for $300,000 and the $150,000 profit would be spit 50/50 between Braun Developments and the investor.

[31] Investor L was asked very precisely during the hearing as to whether he thought that he was purchasing a house in Edmonton. His response to that question was:

> "No, not me personally. I was – my understanding was that I was the money that was enabling that group to proceed with the real estate purchase."

[32] In cross examination on this point, Investor L confirmed that he understood that his money was to be used to acquire a specific property in Edmonton and that his profits would come from the subsequent resale of that property.

[33] When the 60-day period set out in the Purchase Sales Agreement expired, Investor L did not receive his promised payment. He was told by Alan that things had not moved as quickly as Alan had expected.

[34] Following the due date for repayment of the investment, Investor L received three payments from Alan – two payments in the amount of $2,500 each and one payment in the amount of $1,000 - as a partial payment on the amount owed under the Purchase Sales Agreement. Investor L kept $3,500 of those payments and paid $2,500 to Z. Neither Investor L nor Z have received any further payments on the amount owed under the Purchase Sales Agreement.

[35] Commission investigators obtained records of the bank account of 275 Inc. into which the funds paid by Z, on behalf of Investor L, were deposited. Those records indicate that on the date that 275 Inc. received $149,000 from Z (on behalf of Investor L), $116,000 was transferred to Braun Developments.

[36] The banking records also establish that within a short period of time following the receipt by 275 Inc. of Investor L's funds:

a) 275 Inc. spent the $33,000 retained by it from those funds on matters unrelated to acquiring the specific property in Edmonton set out in Investor L's Purchase Sales Agreement; and

b) Braun Developments spent the $116,000 transferred to it by 275 Inc. on matters unrelated to acquiring the specific property in Edmonton set out in Investor L's Purchase Sales Agreement – many of these expenditures were personal living expenses of the Braun family.

[37] Title records relating to the specific property described in Investor L's Purchase Sales Agreement were also introduced into evidence. Those records confirm that that property was never acquired, during the relevant period, by any of "Braun Developments Ltd.", Braun Developments or 275 Inc.

Investor ML

[38] Investor ML and Investor L were introduced to each other by a mutual friend whom they knew through a church affiliation.

[39] Investor ML is a resident of Ontario.

[40] Investor ML testified at the hearing. It was clear from her testimony that Investor ML was a vulnerable investor and was emotionally fragile. During her testimony, Investor ML was incoherent (in parts) and appeared to lack a fulsome understanding of all of the

business aspects of the transactions that were the subject matter of the allegations (relating to her investments) in the notice of hearing. As a consequence, we have placed little weight on her testimony, except where her testimony was supported by other evidence and with respect to her personal circumstances which led to her investments which are relevant to this hearing.

[41] Investor L first introduced Investor ML to the investment opportunity at issue in this hearing and to Alan and Jerry. In fact, messages between Investor L and Jerry indicate that it was Investor L who originally asked Jerry to prepare documentation relating to Investor ML's initial investment (described below). As part of these initial discussions, Jerry introduced Investor L to Maxwell and Jerry described Maxwell as his "partner". Investor L had not met Maxwell (or had any other communications with him) prior to this introduction.

[42] Investor L and Investor ML reached an agreement on splitting the returns that she would receive from her initial investment of $150,000 with the Brauns – of the $75,000 in anticipated profit on that transaction, Investor L was to receive $60,000 and Investor ML was to receive $15,000. However, Investor ML was to provide all of the $150,000 initial investment. Investor L and Investor ML did not have any financial arrangements with respect to Investor ML's second investment (described below).

[43] Investor L referred Investor ML to Alan so that Alan and Investor ML could discuss the investment opportunity directly. In introducing Investor ML to Alan, Investor L warned Alan that Investor L was of the view that Investor ML tended to mix religion and business together and that she had been "burned" in previous business transactions. Alan's response to this warning from Investor L was as follows:

> You're sure she has the funds or can get the funds? Can she get 500k or more?

[44] Investor ML was ultimately contacted directly by Alan and this led to Investor ML travelling to British Columbia and staying with Alan and his family. During this visit, Investor ML also met Jerry and Maxwell. The visit appears to have largely been focused on spiritual and religious matters but resulted in Investor ML entering into two Purchase Sales Agreements (one where the benefits of that transaction were to be split between herself and Investor L (as described above) and the other solely for her benefit). Each of these agreements provided that she would invest $150,000, with her combined total investment being $300,000.

[45] The two Purchase Sale Agreements entered into by Investor ML, as the "Investor", were essentially identical to the one signed by Investor L, other than:

a) they were in respect of the acquisition of two other (and different) properties in Edmonton;

b) the purchase prices for the property, as between Purchaser and Vendor, were different; and

c) the listed Purchaser of the properties, in each case, was TerraCorp and not "Braun Developments Ltd."

[46] The two Purchase Sale Agreements are dated March 10, 2014 and were signed by Alan on behalf of TerraCorp, Maxwell on behalf of 275 Inc. and Jerry as a "Witness".

[47] During the hearing, when she was asked in direct and cross examination about her understanding of the investment that she was making and the use to which her invested funds were to be put, Investor ML gave a variety of answers. Many of those answers were focused on matters other than the specifics of her investment. However, in totality, those answers suggest that she understood that her funds were to be used to acquire specific properties in Edmonton and that she was to receive her return within 60 days from the date of the investment.

[48] While Investor ML was in British Columbia visiting Alan and his family, Jerry and Maxwell drove Investor ML to her bank on April 4, 2014 and assisted her in obtaining a bank draft in the amount of $300,000, payable to 275 Inc. That draft was subsequently deposited into 275 Inc.'s bank account.

[49] The banking records, for the account of 275 Inc. into which Investor ML's funds were deposited, indicate that on the date that these funds were deposited, 275 Inc. transferred $200,000 to Braun Developments. Not long thereafter, a further $12,500 was transferred from that account to Braun Developments.

[50] The banking records also establish that within a short period of time following the deposit by 275 Inc. of Investor ML's funds, 275 Inc. spent the $87,500 retained by it from those funds on matters unrelated to acquiring the specific properties in Edmonton set out in Investor ML's two Purchase Sales Agreements.

[51] On the same day that the $200,000 was transferred from 275 Inc. to Braun Developments over $100,000 from those funds were spent on matters unrelated to acquiring the specific properties in Edmonton set out in Investor ML's two Purchase Sales Agreements. The remainder of the $212,500 (in total) transferred to Braun Developments was spent within two weeks of receipt – many of those expenditures being personal living expenses of the Braun family.

[52] Title records relating to the two properties described in Investor ML's two Purchase Sales Agreements confirm that they were never acquired, during the relevant period, by any of TerraCorp, "Braun Developments Ltd.", Braun Developments or 275 Inc.

The Edmonton Property Transactions

[53] Considerable evidence was led by the executive director during the hearing related to a potential multi property transaction that each of the respondents was involved in during the period relevant to the matters in the notice of hearing.

[54] Given:

a) the totality of the evidence of the representations to Investor L and Investor ML as to the proposed use of their funds and the evidence of the actual use of those funds;

b) that, in none of the submissions from any of the respondents or the executive director, are there submissions that this multi property transaction is material to the central issues in this case; and

c) the allegations in the notice of hearing against each of the respondents,

we do not consider this evidence to be material to the issues to be determined in this hearing, other than as a backdrop to what was generally happening at the time of the investments made by each of Investor L and Investor ML.

[55] However, for the sake of completeness we can summarize the central tenets of that evidence as follows:

- commencing no later than December of 2013 and continuing thereafter throughout the relevant period, TerraCorp and an entity in Edmonton, controlled by a person in a common law relationship with Maxwell's sister, were negotiating a transaction in which TerraCorp would purchase a number of properties in Edmonton from that entity at 75% of their fair market value;

- why TerraCorp would be able to acquire these properties at a deep discount to their fair market value was not made clear in the evidence;

- the three properties in Edmonton that were the subject of the three Purchase Sales Agreements entered into by Investor L and Investor ML were included (among many others) in the properties that were the subject matter of this negotiation;

- in January and February of 2014, TerraCorp was having discussions with financial institutions about providing financing for the proposed transaction. At approximately this same time, Alan was enquiring about the possibility of finding private financings to acquire specific properties;

- on April 3, 2014, the day prior to Investor ML's payment of $300,000 to 275 Inc., the principal of the entity in Edmonton sent Alan an e-mail indicating that he was ceasing negotiations due to TerraCorp's delay in executing a formal agreement and its inability to find financing for the transaction;

- communications during the day of April 4, 2014 show that Maxwell was aware of this communication and he expressed dissatisfaction with the actions taken by TerraCorp;

- communications in the following days show an effort to resuscitate the transaction; and

- the negotiations never led to completion of the transaction.

Maxwell evidence

[56] At the conclusion of our hearing, Maxwell asked to enter certain financial records that he said set out that one or more of TerraCorp, Braun Developments, Alan and/or Jerry owed him money.

[57] During the hearing, the executive director objected to the entry of these documents as exhibits in the proceedings on the basis that Maxwell had previously been served with a production order during the investigation of this matter and had failed to deliver those records. Further, Maxwell had not provided disclosure of those records in the period immediately preceding the hearing.

[58] Notwithstanding these objections, we allowed Maxwell to tender these documents and asked for further submissions from all parties on the entry of these documents as exhibits. Maxwell did tender these documents to the panel and to the parties. All parties subsequently confirmed that they did not object to the admission of those documents as exhibits and the panel proceeded to confirm them as such.

[59] During his interview with Commission staff, Maxwell told Commission investigators that while he directed the flow of investor funds from the 275 Inc. account into which those funds flowed, he disbursed them on the instructions of Alan.

III. Analysis and Findings

A. Applicable law

Standard of Proof

[60] 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 (at para. 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.

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

[62] 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.

Definition of Security

[63] 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."

Fraud

[64] 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.

[65] 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 168.2(1)

[66] 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".

[67] There have been many decisions of this Commission 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. Position of the Parties

[68] The executive director submitted that:

a) the three investments made by Investor L and Investor ML, and more specifically the three Purchase Sales Agreements, were "securities" as defined in the Act (as "investment contracts" within the definition of "security");

b) each of the respondents (except TerraCorp, with respect to Investor L's investment) carried out the *actus reus* of fraud by representing to the investors that their funds were to be used by the respondents for one purpose (namely, financing the acquisition of properties in Edmonton), used the investors funds for other purposes and thereby subjected the investors to the risk of (and actual) deprivation; and

c) each of the respondents had the requisite *mens rea* with respect to both elements of the *actus reus* of the fraud.

[69] Counsel for both Alan and Jerry submitted that we do not have jurisdiction to make a finding that they committed contraventions of section 57(b) of the Act as the investments made by the two investors were not investments in "securities" as defined under the Act. They also confirmed that in the event we do not agree with these submissions then they take no position with respect to the executive director's submissions with respect to the *actus reus* and *mens rea* of the alleged frauds in this case.

[70] None of the corporate respondents nor Maxwell provided us with submissions in this case. However, we will address the specific evidence tendered by Maxwell in our analysis as set out below.

C. Analysis

Are the Purchase Sale Agreements a "Security"?

[71] Section 57(b) of the Act requires that the conduct which perpetrates a fraud on any person is "conduct relating to securities or exchange contracts…"

[72] The central issue in this case is whether the investments made by Investor L and Investor ML were investments in "securities" as defined under the Act.

[73] The executive director submitted that the investments made by Investor L and Investor ML were "investment contracts" which are one of the enumerated items included in the definition of "security" under the Act.

[74] Counsel for Alan and Jerry submitted that these investments were investments in residential real estate transactions, where the investors obtained a beneficial interest in the properties and that the transactions did not meet the common law definition (using the test as set out below) of an "investment contract". Rather, the transactions were more aligned with residential real estate transactions which are not (generally) considered to be "securities" under the Act.

[75] The term "investment contract" is not defined under the Act. However, there is substantial common law on the definition of that term. 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.

[76] The executive director submitted that all three aspects of the "investment contract" test were met in this case. He submitted that Investor L and Investor ML gave their funds to the respondents; those funds were to be invested in real estate acquisitions; the investors were not required to do anything further with respect to those transactions; the investors relied on the respondents to purchase property and to flip it to generate returns; and the investors were to receive a profit based upon the terms of their agreements.

[77] The respondents argue that, while Investor L and Investor ML did not expect to acquire title to the three properties in Edmonton that were the subject of the Purchase Sales Agreements that they signed, they expected to acquire beneficial ownership in those assets.

[78] The respondents further argue that the "common enterprise" component of the test for establishing an "investment contract" requires something more than a "one-off" contractual relationship. They refer to the decision in *British Columbia (Superintendent of Brokers) v. Lazerman Investment Metals International Inc.*, [1985] B.C.J. No. 2338 (C.A.) in support of that proposition.

[79] Finally, the respondents submitted that the "expectations of profits" aspect of the "investment contract" test requires that the efforts made by those other than the investor must be significant ones which affect the failure or success of the enterprise.

[80] Firstly, we disagree with the respondents' submissions that the investment was structured in such a way that the investors were to acquire a "beneficial interest" in the properties.

[81] Each of the three Purchase Sales Agreements set out clearly that "Braun Developments Ltd." or TerraCorp, as the case may be, were to be the purchasers of the properties. There is no other way to read those agreements. We have no difficulty inferring that the reference to Braun Developments Ltd. was really a reference to Braun Developments, either as a result of a typo of Braun Developments' proper legal name or a use of Braun Developments' sole proprietorship name. This inference is reinforced by Alan signing on behalf of this entity. Further, there is nothing in those documents to suggest that these entities were merely acquiring legal title but holding all or a portion of the beneficial interest in those properties in trust for the investors.

[82] The investors did testify to their understanding of the use of proceeds and each confirmed their understanding that their funds were to be used to acquire specific properties in Edmonton. However, having an understanding that their funds were to be used for that purpose and the investors acquiring beneficial interest in the properties are not one and the same concepts. They may be, depending on the other facts and circumstances, but they do not have to be. In this case, we do not find that they are.

[83] Lastly, and most importantly, the economic returns that were to have been provided to the investors do not suggest that they were acquiring a beneficial interest in the properties. A beneficial interest provides an ownership interest in the underlying asset. Yet the investors' returns were not conditional on the completion of the purchase of the properties, nor on the actual value of the properties; the investors were promised a fixed return. Sixty days after the date of a Purchase Sales Agreement, the underlying property would be worth whatever it was worth on that date. The actual worth of the property might have been less than or more than the amount necessary to generate the promised return. Yet the respondents guaranteed that return.

[84] It is clear that the money to generate the returns for the investors was intended to come from a "flip" of the properties and that the investors' interests were highly aligned with that transaction. But the economic structure of the agreements does not align with the concept of the investors having a beneficial ownership interest in the properties. To the contrary, the economic structure, as it pertains to the investors, set out in each of the Purchase Sales Agreements aligns completely with a loan structure, not one of beneficial ownership.

[85] In this way, this case is completely different from the facts in a recent decision of this Commission in *Re SBC Financial Group Inc.*, 2018 BCSECCOM 113. In *SBC*, the panel found that an investment structure was not an "investment contract" and was more akin to a traditional real estate purchase transaction. However, the facts in that case were very different from those before us in this hearing. In *SBC*, the investors testified that they understood that they were purchasing both legal and beneficial ownership in an acre of land in Hawaii which they could either sell at a later date or use for their own purposes. The documentation accurately reflected this understanding. In addition, the transaction terms were also structured like a traditional real estate transaction where the investors' funds were purportedly to be put in trust awaiting the clearing of closing conditions tied to the property.

[86] The respondents' remaining two submissions are related and, when combined, suggest that in order for there to be an "investment contract", there must be a long-term relationship between the parties, where the return on investment is contingent on that long-term relationship and on the significant efforts of persons other than the investor.

[87] We do not agree that the respondents' characterization of the investment contract test is correct, in particular with respect to the common enterprise aspect of the test.

[88] Firstly, in the *Lazerman* decision there is a review of some of the key passages from the *Pacific Coin* decision. With respect to the "efforts of others" and "common enterprise" aspect of the test, the court in *Lazerman* (at paragraph 10) referenced this passage from *Pacific Coin*:

> 10. After commenting on the facts of the *Pac. Coin* case which was before him, the judge went on as follows with respect to the law at p.129:
>
> > The word "solely" in that test has been criticized and toned down by many jurisdictions in the United States. It is sufficient to refer to *SEC v. Koscot Interplanetary, Inc.* [497 F. 2d 473 91974)], and to *SEC v. Glen W. Turner Enterprises, Inc.* [474 F. 2d 476 (1973)]. As mentioned in the *Turner* case, to give a strict interpretation to the word "solely" (at p. 482) "would not serve the purpose of the legislation. Rather we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise". In the same case of *Turner*, the expression "common enterprise" has been defined to mean (p. 482) "one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties." These refinements of the test, I accept.

[89] The Court applied the "common enterprise" test (at paragraph 20):

> 20. There is here no common enterprise. The customers and I.M.I. do not share in each other's profits or losses. Apart from the general question of solvency, the success or failure of I.M.I. is not a matter of concern to its customers.

[90] Later in *Lazerman* (at paragraph 21), the court applied the "efforts of others" test:

> 21. Third, the profits of the customers do not depend on efforts by I.M.I. which are the "undeniably significant ones". Once the customer purchases the precious metals, profits depend upon fluctuations in the national market and the customer's decision when to sell or take delivery, not managerial efforts by I.M.I.

[91] All of that suggests that the "significant efforts of others" aspect of the test must focus on how material the decisions and efforts of others are to failure or success and not on the quantum or length of those efforts. Further, that the "common enterprise" aspect of the test must focus on how interwoven and dependent the investor's returns are on the success or failure of the efforts of a third party. We do not see a requirement that there must be a long-term relationship between the investor and the third party to meet the "common enterprise" aspect of the test.

[92] In this case, all of the material efforts in the deal structure were to come from the respondents and none from the investors. In theory, it would have been through the efforts of the respondents that:

- an (presumably) undervalued property was located;
- the right to purchase and sell such asset was acquired; and
- the timing, manner and marketing for selling the property was determined.

[93] Further, although the quantum of the investor returns was not specifically tied to the successful resale of the properties nor to the exact gain or loss on the resale of the properties, it is clear that the money to pay the investors was intended to come from the resale. Investor L's and Investor ML's returns were to come from the successful efforts of the respondents to flip the properties. In fact, in the document sent from Alan to Investor L, which included Alan's "talking points" on the investment opportunity, it sets out that profits from the resale of the property would be split between the investors and the respondents.

[94] We do not see the circumstances of this case as being analogous to those in *Lazerman* where the third party in question (the equivalent of the respondents in the case before us) was maintaining segregated accounts, holding commodities and where the returns were dependent on a) the general movement of a commodity price; and b) the timing (provided by the investor and not the third party) of buying and selling that commodity. In *Lazerman*, the returns of the investor were not dependent, in any material way, upon the efforts of the third party.

[95] We find that the transactions evidenced by the Purchase Sales Agreements were investments of money that satisfy both the "efforts of others" and the "common enterprise" aspects of the *Pacific Coin* test for an "investment contract". We find that the Purchase Sales Agreements were "investment contracts".

[96] As an aside, all of the submissions in this case focused on whether the instruments in question were "investment contracts." As set out above, we have found that they are. However, as noted above, the form of the economic arrangements is also aligned with a loan structure. We would also have found that the investors' arrangements with respect to the Purchase Sales Agreements were "evidences of indebtedness" under the definition of "security" under the Act.

Actus Reus of fraud

[97] The executive director submitted that the *actus reus* of the fraud in each case was one of misappropriation, in that:

a) Alan, Jerry and Braun Developments promised to invest Investor L's and Investor ML's funds in specific properties in Edmonton;

b) 275 Ltd. and Maxwell participated in the deception of the investors by purporting to be the vendors of the properties to be sold; and

c) instead of investing the investors' funds in properties, as promised, all of the respondents spent some portion of the investors' funds on unrelated matters.

We have no difficulty in finding that a "prohibited act, be it an act of deceit, a falsehood or some other fraudulent means" (from *Anderson*), was carried out with respect to the investments made by Investor L and Investor ML.

[98] The prohibited act or deceit was that the investors were promised that their funds would be used for one purpose and then those funds were diverted and used for an entirely different purpose (mainly on the personal living expenses of Maxwell, Alan and Jerry). This deceit was exacerbated by the fact that, at the time of entering into each of the Purchase Sales Agreements, none of the respondents had any right (i.e. they did not own the properties in question) to carry out the transactions contemplated by the terms of those agreements.

[99] The prohibited act or deception clearly resulted in the risk of deprivation and, ultimately, actual deprivation to the investors.

[100] On this aspect of the analysis for fraud, the only question is whether each of the respondents participated in each of the alleged frauds against the two investors. In this regard, we note that the executive director only alleged that TerraCorp participated in the two acts of fraudulent misconduct with respect to Investor ML and not with respect to the one act of fraud with respect to Investor L.

[101] The evidence was clear that both Alan and Jerry had multiple communications with Investor L, and that Alan had multiple communications with Investor ML, in which it was clear that they represented to the investors that their funds would be used to acquire specific properties in Edmonton.

[102] The evidence did not establish that Maxwell had a role in directly communicating this representation to either of the investors.

[103] However, each of the individual respondents (on behalf of the corporate respondents or as a witness) and 275 Inc. signed each of the three Purchase Sale Agreements. TerraCorp. was a party to two of the agreements and Braun Developments (through its sole proprietorship name) was a party to the other. The very terms of each of the Purchase Sale Agreements contain the representation that, in each case, the investors' funds were to be used by the purchaser under each agreement for the specific purpose of acquiring specific properties. Each of the respondents was clearly a party to that representation made to each of the investors.

[104] Alan, Jerry, Maxwell, Braun Developments and 275 Inc. were then also all involved in the flow of funds which resulted in the diversion of the investors' funds to a use other than what was represented to the investors. All but $1,000 of Investor L's and Investor ML's funds flowed through the 275 Inc. bank accounts. Maxwell was responsible for retaining a portion of those funds and then forwarding the remainder of those funds to Braun Development. Maxwell was responsible for using the portion of the funds retained

in the 275 Inc. bank accounts for purposes other than acquiring properties in Edmonton. Alan and Jerry were then responsible for the use of funds transferred by 275 Inc. to Braun Developments for purposes other than acquiring properties in Edmonton. The remaining $1,000 was sent directly to Jerry which was then deposited into a personal bank account of Alan and his wife.

[105] We find that each of the respondents carried out the *actus reus* of fraud in the manner alleged by the executive director.

Mens Rea of fraud

[106] The *mens rea* of a corporate respondent may be determined based upon the *mens rea* of the directors and officers of the corporation (particularly those who are directly responsible for managing or carrying out the affairs of the entity). In this case, Alan and Jerry were directors and officers of Braun Developments and TerraCorp and were responsible for directing the affairs of those entities. We may attribute to Braun Developments and TerraCorp the *mens rea* of Alan and Jerry. Similarly, Maxwell was a director or *de facto* director of 275 Inc. and, by his own admission, was responsible for its affairs. We may attribute to 275 Inc. the *mens rea* of Maxwell.

[107] We have no difficulty finding that each of Alan, Jerry and Maxwell had the requisite *mens rea* of fraud with respect to each of the three fraudulent acts committed against Investor L and Investor ML.

[108] All of Alan, Jerry and Maxwell were aware that, throughout the period in which they were:

a) soliciting the investors;
b) making representations to the investors about the use of their funds;
c) executing the Purchase Sales Agreements; and
d) spending the investors' funds,

that 275 Inc. had no right or interest in the specific properties that were the subject of the Purchase Sales Agreements (nor did any of the other respondents).

[109] Alan and Jerry were each directly involved in the representations made to Investor L as to the use of his invested funds. Alan made representations directly to Investor ML as to the use of her invested funds. Each of the respondents then made the deceitful representation to each of the investors as to the use of the investors' funds through their execution of each of the Purchase Sales Agreements. Each of Alan, Jerry and Maxwell dealt with Investor ML with respect to her investment, including Jerry and Maxwell assisting her with transferring her funds.

[110] In addition, each of Alan, Jerry and Maxwell were also involved in the flow of the investors' funds following their deposit into 275 Inc.'s bank account. Maxwell, through 275 Inc., retained a portion of those funds and then caused the remainder of those funds to be sent to Braun Developments. Maxwell used the funds retained by 275 Inc. on

matters unrelated to acquiring the properties set out in the three Purchase Sales Agreements. Alan and Jerry used the funds sent by 275 Inc. to Braun Developments on matters unrelated to acquiring the properties. All of them had knowledge of the diversion of funds from the represented purpose and the deprivation to which this exposed the investors. Jerry directly received Investor L's first $1,000 of his invested funds and then diverted those funds into his parents' personal account.

[111] Therefore, we find that each of the respondents had the requisite *mens rea* with respect to their fraudulent misconduct.

[112] Before concluding, there were two other issues that arose as a consequence of the evidence tendered by Maxwell during the hearing and the respondents' submissions. The first issue is the submission made by Jerry that he largely acted on the instruction of Alan. The second issue relates to the documents that Maxwell tendered which suggest that TerraCorp (and/or Alan, Jerry or Braun Developments) owed him or 275 Inc. money. Although submissions on this evidence were not made by Maxwell, the logical inference from this is that Maxwell believed that he was entitled to keep the investors' funds retained by 275 Inc.

[113] That Jerry may have acted on the instructions of Alan with respect to his conduct, is not relevant to a finding of liability pursuant to section 57 of the Act. We have found that Jerry committed both the *actus reus* of fraud and had the requisite mental knowledge for fraud. These submissions may have some relevance to the question of sanctions but we will take submissions from the parties on this issue at that stage of these proceedings.

[114] The documents that Maxwell tendered with respect to amounts owed to him by TerraCorp also are not relevant to his liability for having engaged in fraudulent misconduct. That money may have been owing to Maxwell and/or 275 Inc. is not relevant and does not excuse the misappropriation of the investors' funds, nor the failure to use those funds in the manner that was represented to the investors.

Vicarious liability under section 168.2 of the Act

[115] The notice of hearing alleges that Alan and Jerry should be held vicariously liable for the fraudulent misconduct of each of Braun Developments and TerraCorp and that Maxwell should be held vicariously liable for the fraudulent misconduct of 275 Inc.

[116] The evidence established that Alan and Jerry were directors, throughout the relevant period, of both Braun Developments and TerraCorp, and that Maxwell was a director or *de facto* director, throughout the relevant period, of 275 Inc.

[117] In each case, the evidence established that Alan and Jerry, in the case of Braun Developments and TerraCorp, and Maxwell, in the case of 275 Inc., were responsible for the actions of those corporations and permitted or acquiesced to the fraudulent misconduct of those entities.

[118] Therefore, we find Alan and Jerry are liable under section 168.2 with respect to Braun Developments' and TerraCorp's contraventions of section 57(b) of the Act. We also find that Maxwell is liable under section 168.2 with respect to 275 Inc.'s contraventions of section 57(b) of the Act.

IV. Conclusions

[119] We find that:

a) Alan contravened section 57(b) with respect to three investments by two investors in the amount of $450,000;

b) Jerry contravened section 57(b) with respect to three investments by two investors in the amount of $450,000;

c) Maxwell contravened section 57(b) with respect to three investments by two investors in the amount of $450,000;

d) Braun Developments contravened section 57(b) with respect to three investments by two investors in the amount of $450,000;

e) 275 Inc. contravened section 57(b) with respect to three investments by two investors in the amount of $450,000;

f) TerraCorp contravened section 57(b) with respect to two investments by one investor in the amount of $300,000;

g) Alan and Jerry are liable under section 168.2 with respect to each of Braun Developments' and TerraCorp's respective contraventions of section 57(b); and

h) Maxwell is liable under section 168.2 with respect to each of 275 Inc.'s contraventions of section 57(b).

V. Submissions on Sanctions

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

By November 15, 2018	The executive director delivers submissions to the respondents and to the secretary to the Commission.
By November 29, 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 December 7, 2018	The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

October 24, 2018

For the Commission

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner

Don Rowlatt
Commissioner