

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

Citation: Re DominionGrand, 2019 BCSECCOM 150

Date: 20190430

**DominionGrand II Mortgage Investment Corporation,
DominionGrand Investment Fund Inc., Donald Bruce Wilson,
David Scott Wright and Patrick K. Prinster**

Panel	Nigel P. Cave Judith Downes George C. Glover, Jr.	Vice Chair Commissioner Commissioner
Hearing Dates	November 19, 20, 21, 22 and 26, 2018	
Submissions Completed	March 8, 2019	
Date of Findings	April 30, 2019	
Appearing		
Derek Chapman Deborah Flood	For the Executive Director	
Patrick K. Prinster	For himself	
Donald Bruce Wilson	For himself	
David Scott Wright	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] In a notice of hearing issued June 15, 2017 (2017 BCSECCOM 203), the executive director alleged that between June 2011 and August 2013:
- a) DominionGrand II Mortgage Investment Corporation (MIC II), Donald Bruce Edward Wilson, David Scott Wright and Patrick K. Prinster:
 - i) raised \$610,134 from 19 investors;

- ii) represented to the investors that their invested funds would be invested in mortgages secured by real estate; and
- iii) the investors' funds were not invested in mortgages secured by real estate, but instead, most of the investors' funds went to companies related to the respondents, which companies did not invest in mortgages; and

as a consequence, MIC II, Wilson, Wright and Prinster perpetrated a fraud on 19 investors contrary to section 57(b) of the Act;

- b) as directors, officers or agents of MIC II, each of Wilson, Wright and Prinster permitted, authorized or acquiesced in MIC II's contraventions of section 57(b) and, as such, each of Wilson, Wright and Prinster contravened section 57(b) of the Act;

- c) DominionGrand Investment Fund Inc. (MIC III), Wright and Prinster:

- i) raised \$506,693 from 21 investors;
- ii) represented to the investors that their invested funds would be invested in mortgages secured by real estate; and
- iii) the investors' funds were not invested in mortgages secured by real estate, but instead, most of the investors' funds went to companies related to the respondents, which companies did not invest in mortgages; and

as a consequence, MIC III, Wright and Prinster perpetrated a fraud on 21 investors contrary to section 57(b) of the Act; and

- d) as directors, officers or agents of MIC III, each of Wright and Prinster permitted, authorized or acquiesced in MIC III's contraventions of section 57(b) and, as such, each of Wright and Prinster contravened section 57(b) of the Act.

[3] At the outset of the hearing, the executive director submitted that he was revising his allegations with respect to the activities related to MIC II. In particular, the executive director submitted that he was alleging that MIC II had only raised \$604,530 from 18 investors.

[4] During the hearing, the executive director called five witnesses (a Commission investigator, two investors, the former CFO of MIC II (VH) and a former salesperson for MIC II and MIC III (L)), tendered documentary evidence and provided written and oral submissions. Prinster, Wilson and Wright tendered documentary evidence and provided written and oral submissions on behalf of themselves. Wilson testified during the hearing. No one appeared on behalf of the corporate respondents and no specific documentary evidence was tendered nor were specific written or oral submissions made by them; however, many of the individual respondents' submissions were also applicable to the corporate respondents and we have considered them in that context.

- [5] These are our findings with respect to the liability of the respondents relating to the allegations in the notice of hearing, as revised at the hearing.

II. Background

The respondents

- [6] Wilson is a resident of North Vancouver, British Columbia. He has previously been both an insurance broker and was registered to sell mutual funds under the Act. Wilson was a licensed mortgage broker during the period relevant to the matters in the notice of hearing.
- [7] Wright is a resident of North Vancouver, British Columbia. He has never been registered under the Act. He previously founded a small mortgage investment corporation (unrelated to the corporate respondents) and has over 30 years of experience in real estate acquisition, finance, management, development and construction.
- [8] Prinster is a resident of Vancouver, British Columbia. He has never been registered under the Act. Prinster was a lawyer called to the bar in one or more jurisdictions in the United States.
- [9] MIC II was a British Columbia company incorporated on March 30, 2011. Its original name was Trillium Investment Fund II (MIC) Inc. The company's name was changed to DominionGrand II Mortgage Investment Corporation on September 10, 2012. MIC II was dissolved for a failure to file annual reports on February 16, 2015. MIC II's two directors were Wright and Wilson. In an interview with Commission investigators, Prinster described his role within MIC II as that of a general manager or administrator. The executive director alleged that Prinster was a *de facto* director of MIC II (this issue will be discussed in further detail below).
- [10] MIC III was a British Columbia company incorporated on August 24, 2012. MIC III's two directors were Wright and a third party, whom the executive director alleged did not have any role in the management or administration of the company. MIC III was dissolved for a failure to file annual reports on July 6, 2015. It was not contested that Wilson did not have any role with respect to the business or affairs of MIC III. In an interview with Commission investigators, Prinster described his role within MIC III as that of a general manager or administrator. The executive director alleged that Prinster was a *de facto* director of MIC III (this issue will be discussed in further detail below).

History of the business and organizational structure

- [11] In 2007, Wright and Prinster formed DominionGrand Development Group (DDG). The business purpose of DDG was to develop, market and manage real estate-based investment products. These investment products would ultimately include mortgage investment corporations (i.e. MIC I (discussed below), MIC II and MIC III).

- [12] DDG had a number of affiliated entities (including, among others, the corporate respondents in this matter). The specific business affairs and assets of these affiliated entities (other than the corporate respondents) were not clear from the evidence during the hearing, but appear to have included investments in hotels and other real estate assets.
- [13] Prior to the period that is relevant to the matters in the notice of hearing, the individual respondents were involved with another mortgage investment corporation – Trillium Investment Fund I (MIC) Inc. (MIC I). Wilson had been involved with MIC I prior to joining Wright and Prinster in DDG.
- [14] Wilson was the president and a director of MIC I. Wright was a director of MIC I. Unaudited (and draft) financial statements for MIC I for the year ended December 31, 2010 set out that it had approximately \$1.15 million in assets (including approximately \$900,000 in mortgage investments) and included a “going concern” note indicating that it was not generating sufficient income to fund its ongoing obligations.
- [15] In interviews with Commission staff under oath, the individual respondents said that, with respect to the mortgage investment corporation part of their businesses, they decided to move on from MIC I in late 2010 because they wanted to lower the expected rate of return offered to investors (without any explanation of why that could not be facilitated through MIC I) and that MIC I had insufficient assets (in their view, mortgage investment corporations needed a larger asset base to cover the operating expenses).
- [16] VH was hired by DDG in December, 2010. His original role was to assist in dealing with the assets and investments in MIC I and provide needed administrative structure to its operations. At a later date, his role expanded to become the CFO of MIC II where he was to assist in the creation and management of MIC II.
- [17] VH testified during the hearing. The material aspects of that testimony may be summarized as follows:
- not long after he was hired he became concerned that funds invested in MIC I were and would continue to be used for purposes which were not permitted uses of funds for mortgage investment corporations (in order for an entity to retain that status under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.));
 - in early May 2011, he resigned from DDG, before any funds were raised from investors by MIC II; and
 - the reasons for his resignation, which he outlined to the individual respondents, included:
 - o that expenses in MIC I were disproportionately high (relative to income);
 - o investor funds in MIC I were not being invested in proportion to the permitted investments for MIC I to retain its status as a mortgage investment corporation; and

- disclosure of these issues were not being made to investors in MIC I.
- [18] An offering memorandum and marketing materials were prepared for the sale of shares in MIC II (these will be discussed in greater detail below) and at least one salesperson (L) was retained to sell these shares to investors. The evidence was clear that all of the individual respondents and VH had input into the creation and information contained in the offering memorandum and the marketing materials.
- [19] Both MIC II and MIC III had managers who were licensed mortgage brokers under the *Mortgage Brokers Act*, RSBC 1996, c. 313. The manager of MIC II was called DominionGrand Financial Corporation (DFC) (its original name was Dominion Lending Centers Trillium Mortgage Corp.). Wilson and Wright were the directors of DFC during the period relevant to the matters in the notice of hearing and Wilson was the registered mortgage broker for DFC. The manager of MIC III was called DominionGrand Asset Management Inc. (DAM). Wright was a director of DAM during the relevant period.
- [20] The executive director tendered evidence of sales of shares of MIC II totaling \$604,530 to 18 investors, during the relevant period. This evidence was not contested by the respondents.
- [21] MIC II had a bank account at a large Canadian financial institution. Commission investigators obtained the records of that account. Signing authorities on that account included all of the individual respondents and, initially, VH. All cheques that were issued on that account were signed by Wilson and one of the other two individual respondents.
- [22] The executive director provided a summary of the cash flows from MIC II's bank account. That summary set out the following amounts paid by MIC II:
- \$242,833 to DFC (on a net basis);
 - \$195,300 to DDG (on a net basis);
 - \$35,400 to MIC I (on a net basis);
 - \$700 to Wright;
 - \$47,263 in commissions;
 - \$43,051 to investors;
 - \$15,170 in business expenses.
- [23] The payments to DFC and DDG above were documented as share subscriptions in DFC and DDG, respectively.
- [24] All of the individual respondents, in their interviews with Commission staff, confirmed that MIC II did not invest any of the funds raised by the sale of shares in MIC II in any mortgages.

- [25] In October 2012, Commission staff contacted MIC II about the currency of the financial statements that were contained in MIC II's offering memorandum. That issue was not resolved to the satisfaction of the Commission and a cease trade order relating to the securities of MIC II was issued on December 3, 2012. That cease trade order has not been revoked.
- [26] The executive director tendered evidence of sales of shares of MIC III totaling \$506,693 to 26 investors during the relevant period. However, Commission investigators were only able to trace the deposit of \$454,375 into the bank account of MIC III. Notwithstanding this, the respondents did not contest the larger dollar amount as the amount invested by investors in shares of MIC III.
- [27] MIC III also had a bank account at a large credit union that was opened in September, 2012. Commission investigators obtained the records of that account. Signing authorities on that account were limited to Wright and Prinster. All cheques that were issued on that account were signed by those two individual respondents.
- [28] The executive director provided a summary of the cash flows from MIC III's bank account. That summary set out the following amounts paid by MIC III:
- \$299,200 to DDG
 - \$84,125 to Kispiox
 - \$32,000 to DominionGrand Hotel Group
 - \$7,250 to Trillium Asset Management
 - \$1,500 to Wright
 - \$30,332 to commissions
 - \$11,803 in business expenses
- [29] Wright and Prinster, in their interviews with Commission staff, confirmed that MIC III did not invest any of the funds raised by the sale of shares in MIC III in any mortgages. Kispiox, DominionGrand Hotel Group and Trillium Asset Management were all related entities of DDG.
- Marketing Materials***
- [30] Investors who purchased shares of MIC II and MIC III received an offering memorandum. A variety of promotional materials were also prepared in connection with the sale of these shares, including websites, term sheets, frequently asked questions and an executive summary. Investors also entered into a subscription agreement with the issuers, which included a form of risk acknowledgement (the term "Marketing Materials" will hereafter be used to refer to all of these materials collectively).
- [31] The following are excerpts from those documents which we have quoted at length instead of summarizing, as their specific language is fundamental to understanding what investors were told:

Offering Memorandum of MIC II:

[32] MIC II's offering memorandum included the following disclosure (the following sections of the offering memorandum are included in their entirety):

1.1 Net Proceeds

Using the following table, disclose the net proceeds of the offering. If there is no minimum offering, state "\$0" as the minimum.

		Assuming min. offering	Assuming max. offering
A.	Amount to be raised by this offering	\$ 0	\$ 250,000,000
B.	Selling commissions and fees ¹	\$ 0	\$ 12,500,000
C.	Estimated offering costs (e.g., legal, accounting, audit.)	\$ 50,000	\$ 50,000
D.	Available funds: D = A - (B+C)	\$ (50,000)	\$ 237,450,000
E.	Additional sources for funding required	\$ 0	\$ 0
F.	Working capital deficiency	\$ 0	\$ 0
G.	Total: G = (D+E) - F	\$ (50,000)	\$ 237,450,000

1.2 Use of Net Proceeds

A detailed breakdown of how the Issuer will use the net proceeds is as follows:

Description of intended use of net proceeds listed in order of priority	Assuming min. offering	Assuming max. offering
Invest in commercial, industrial and residential Mortgages secured by real estate property located in Canada ²	\$ 0	\$ 166,215,000
Investments in real estate related assets ^{2, 3}	\$ 0	\$ 63,735,000
Yearly Management Fees ⁴	\$ 0	\$ 7,500,000

1.3 Reallocation

We intend to spend the available funds as stated. We will reallocate funds only for sound business reasons.

...

2.2 Our Business

The Issuer intends to maintain its qualification as a Mortgage Investment Corporation under section 130 of the *Income Tax Act* (Canada). Its principal business is to obtain a stable source of income by investing in a portfolio of residential, commercial and other mortgages. As a Mortgage Investment Corporation under the *Income Tax Act* (Canada), the Issuer is allowed a deduction from income in respect of dividends it pays. The Issuer intends to pay out substantially all of its net income and net realized capital gains as dividends, and does not anticipate paying any income tax.

We actively seek or originate Mortgages for investment, and we rely on the expertise of the Manager for a regular flow of investment opportunities. The Tax Act's MIC criteria permit revenue sources other than mortgages, including, among other things, equity investments in real estate and investments in stock and securities of Canadian companies. It is the Issuer's policy to primarily invest in Mortgages secured by Canadian real estate property. In addition the Issuer may seek investments in real estate related assets. A MIC's only permitted undertaking under the Tax Act criteria is the investing of its funds, and it is specifically prohibited from managing or developing real estate property.

We intend to conduct business in the Provinces of Alberta and British Columbia. We may expand our business into other provinces, and if so we will apply, if necessary, to be registered under any corporate and applicable mortgage brokering legislation in order to carry on business as a MIC in such Provinces.

The Issuer is in the business of investing in mortgages granted as security for loans (the "Mortgages"), to builders, developers and owners of commercial, industrial and residential real estate located in Canada. Our objective is to obtain a secure stream of income by optimizing our investment portfolio within the MIC criteria mandated by the Tax Act. We intend to invest primarily in first and second mortgages having a principal amount which, when added to the principal amount of prior mortgages is not more than 85% of the appraised value of the property against which they are secured.

2.3 Development of Business

Investment Policies

The Issuer's investment policies have been approved by the Board of Directors and are as follows:

Our only undertaking will be to invest funds in accordance with the objectives, strategies and restrictions of our investment guidelines;

We will primarily invest in commercial, industrial and residential Mortgages in Canada:

- a) All Mortgages will, prior to funding, be registered on title to the subject property in the Issuer's name;
- b) All Mortgage investments will be made in established or developing areas in British Columbia and Alberta;
- c) Generally, we will only invest in mortgages on properties for which we have reviewed and evaluated an independent appraisal;
- d) We will not invest in a mortgage or loan any funds to be secured by a mortgage unless at the date the Mortgage is acquired or funds are initially advanced (as the case may be) the indebtedness secured by such mortgage plus the amount of additional third party indebtedness of the borrower in priority to us, if any, generally does not exceed, on a property by property basis, 85% of the appraised value of the real property securing the mortgage, provided that the appraised value may be based on stated conditions including, without limitation, completion, rehabilitation or lease-up of improvements located on the real property which activities we will monitor on an ongoing basis;
- e) If the independent appraisal reports an appraised value for the real property securing the Mortgage other than on a "as is basis", we will advance funds by way of progress payments upon completion of specified stages of construction or development supported by receipt of reports of professional engineers, architects or quantity surveyors, as applicable, or upon completion of other specified milestones;
- f) We will not make any investment, or allow an investment mix, that would result in our failing to qualify as a MIC;
- g) To the extent that, from time to time, our funds are not invested in Mortgages or other investments backed by real estate assets, they will be held in cash deposited with a Canadian chartered bank or Trust company or will be invested by the Manager on our behalf at a Canadian chartered bank or Trust company in short term deposits, savings accounts or government guaranteed income certificates or treasury bills so as to maintain a level of working capital for our ongoing operations considered acceptable by the Directors.

The Issuer may invest up to twenty-five (25%) percent of the assets of the Issuer in real estate. The Issuer may purchase cash flowing real estate assets at market or below market prices as part of its investment portfolio. The time at which the Issuer sells such real estate assets is in the total discretion of the Manager. In addition the Issuer may seek investments in real estate related assets.

2.5 Short Term Objectives and How We Intend to Achieve Them

Over the next twelve (12) months the Issuer's objective is to raise further equity capital, invest it pursuant to the Tax Act's MIC criteria with the intent of optimizing return (as described in more detail above under items 2.2, 2.3 and 2.4) and continuing paying quarterly dividends to its shareholders. The issuer's goal over the next twelve (12) months is to increase its share capital base from its present amount \$100 to \$20,000,000. The Issuer's business plan is not dependent on attaining this goal; it is simply a target.

2.6 Insufficient Proceeds

The proceeds of the offering either may not be sufficient to accomplish all of the issuer's proposed objectives. Alternative financing is being considered, however, there is no assurance that alternative financing will be available.

2.8 Expenses and Management Fees

The Management Agreement provides that in consideration of the services provided by the Manager as described above, the Issuer has agreed to pay to the Manager a "Basic Fee" of two percent (2.00%) per year, a monthly fee equal to 0.167% of the aggregate sum of: (i) the loan capital borrowed by the MIC, plus (ii) the paid up capital of the MIC's issued and outstanding Shares (together, the "Aggregate Capital"). This percentage fee will be reviewed by the parties from time to time, but in no case will there be a change in the fee unless the Manager and the Issuer agree in writing. In addition to the Basic Fee, the Issuer shall pay to the Manager an amount (Additional Fee) equal to fifty

(50%) percent of the Yield of the Issuer (as defined in the Management Agreement) which exceeds the Target Yield of the Issuer. At the time of publication of this Offering Memorandum the Target Yield is the "Base Rate" plus 2.50% [see also ITEM 5: SECURITIES OFFERED]. The Target Yield will be reviewed by the parties from time to time and agreed upon in writing.

This Basic Fee is calculated and paid monthly on or before the 15th day of the month following the month in question on the basis of the operations of the Issuer during the previous month subject to the adjustment as a result of a dispute by the Issuer. The fee will ultimately be reconciled on an annual basis. The Additional Fee shall be paid by the Issuer annually.

The Manager will bear the cost of administration of the mortgages in the Issuer's asset portfolio and other expenses except certain disbursements as provided for in the Management Agreement. The Manager and the Issuer may by mutual agreement reduce the amount payable to the Manager on account of services provided to the Issuer. Management services provided to the Issuer and expenses incurred by or on behalf of the Issuer in connection with all matters, other than management services in connection with the Issuer's daily operations will be for the account of the Issuer.

The expenses to be paid directly by the Issuer include fees and expenses of its directors and officers, the cost of acquisition of mortgages, appraisal fees, foreclosure costs, taxes of all kinds to which the Issuer is subject, the interest expenses, auditors' fees, legal fees, fees payable in respect of the issuance and administration of the Issuer's debentures, transfer agent fees, the cost of submitting financial reports and providing other information to shareholders and regulators, messenger service, photocopying, land title search, credit bureau reports, printing costs, survey certificates, postage, long distance telephone charges, accounting fees, real estate commissions, advertisements, promotions, insurance premiums and brokerage fees. All expenses to be paid by the Issuer will be approved by the Directors of the Issuer.

Website for MIC II:

[33] The website pages describing MIC II included the following excerpts:

Are you getting 10.5% annual returns, paid regularly?

If you have been investing in risky and under-performing stocks, mutual funds or GICs, there is now an *alternative*. Trillium Investment Fund II (MIC) targets a 10.5% annual return paid regularly in cash or reinvested in additional company shares.

- The world's wealth has been made in real estate based investments. Perhaps it's time for you to start.

How It Works

Low volatility, high return investing secured by real property. Trillium Investment Funds are Mortgage Investment Corporations (MIC). They offer an alternative way to earn higher than average returns while having your investment in a company that invests in relatively lower risk real estate backed debt investments.

How it works is simple:

1. You invest in Trillium
2. With your investment, Trillium invests in a pool of diversified residential and commercial mortgages
3. You receive 100% of Trillium's net profits

In a nut shell Trillium gains significantly higher returns with lower risk when compared to traditional investment like mutual funds, stocks or GICs. [Higher returns don't always mean higher risk. Now there are other options.]

Mortgages represent one of the most common institutional investments in the world. Bankers like mortgages for the same reason that you will:

1. Good return on investment.
2. Good security.
3. Relatively lower risk than most alternatives.

Benefits

Secure, Low Risk, Low Volatility

Your investment is in fixed-value shares in a company with real estate backed assets and is not subject to fluctuations in the real estate market. Investments are structured using risk minimizing strategies which provide long-term growth and excellent returns. Profits are paid monthly in cash or reinvested in additional company shares for compounded returns.

High Returns

Over the past 30 years, MIC investments across Canada have earned exceptional returns with a net ROI in excess of 10% consistently on a long term basis.

Liquidity

With Trillium, you have the benefit of more liquidity than any fixed-rate investment, real estate investment or first or second mortgage. Plus, there are no penalty fees for withdrawal.

...

Canada's Strong Mortgage Industry

The stability of Canada's mortgage industry, the backbone of Trillium, provides for exceptional capital preservation while providing very predictable returns. Strict Canadian regulations have made Canada the most stable and secure mortgage market in the world.

Conservative Strategy

Trillium only grants mortgages that are in accordance with our conservative lending strategy and have a low loan to value ratio. Borrowers are required to make a significant down payment and be heavily invested in the property before being granted a mortgage.

Trillium also allows investors to get involved in debt based investments usually reserved for banks and institutional investors. Why do banks prefer this type of investment? Low risk. Banks prefer to invest in debt because it is safe, protected against loss and backed by hard assets – in this case, real estate.

As qualified MICs, Trillium Investment Funds operate under regulations enforced by the:

- Canada Revenue Agency
- British Columbia Financial Institutions Branch
- British Columbia Securities Commission

Security

When you invest in Trillium you become a shareholder. As a shareholder, you become a part owner of the pool of money that is used to fund mortgages for carefully selected real estate borrowers but without the burden of real estate ownership.

In the 30+ years that MICs have existed, no investor has lost their capital. The only risk is a small change in returns percentage. The same cannot be said for stocks or mutual funds.

Being a Canadian tax-exempt corporation, 100% of the MIC's net annual income, as verified by an external audit, will be distributed to investors in the form of dividends.

Who We Are

What are the Trillium Investment Funds?

Trillium Investment Funds are Mortgage Investment Corporations as defined by Section 130.1 of the Canada Tax Act. Simply put, a MIC is a private mortgage lender. It's made up of a group of investors who formed a company and created a pool of mortgage money that is then loaned to qualified investors.

Executive Summary for MIC II offering:

[34] The Executive Summary for the MIC II offering included the following disclosure (the following are excerpts):

Use of Proceeds

The proceeds of this offering will be invested in a diversified portfolio of mortgages. The Mortgages the MIC intends to invest in will be shorter-term. It is anticipated that these mortgage loans will generally be for terms ranging from three (3) to twenty-four (24) months. Fees and interest rates to be charged are generally higher than commercial banks. Generally these loans will be secured by first and second residential and commercial mortgages on real property in British Columbia, Canada.

The long-term principal investment objective is to provide investors with stable and sustainable income while preserving the fund capital for distribution and re-investment. This principal investment objective will be achieved by:

Maintaining a diversified portfolio of low loan-to-value (85% or better) first and second mortgages and other cash flowing investments as permitted by the Canadian Tax Act and as administered by professional management;

Providing a superior return for investors;
Increasing the issuer's share of potential MIC business in the provinces of British Columbia, Canada.

Investing in Mortgages

Investing in Canadian mortgages is a valid option for those who want to diversify their investment portfolio into real estate without actually buying real property. Mortgages offer higher rates of return than bank and government backed securities and even most mutual funds, at relatively low risk given the real estate pledged as security and the borrower's personal and/or corporate guarantee. Private mortgages and mortgage pools (MICs) generate higher rates of return to investors than banks due to their higher interest rate and fee structure, notwithstanding similar or even more conservative lending criteria.

A Mortgage Investment Corporation

A Mortgage Investment Corporation "MIC" is essentially an externally audited, federally and provincially-regulated company that allows investors to invest in a diversified pool of mortgages in residential and commercial real estate with the

benefit of using a corporate entity allowing 100% of net profits of the MIC to flow through to investors. The MIC structure is unique to Canada and does not exist in United States.

Similar to a mutual fund, the MIC mortgage pool provides a way to diversify into a portfolio of investments; in this case mortgages, instead of stocks and bonds. Unlike a mutual fund, and to the investor's advantage, the investor's money is secured by real estate along with the borrower's guarantee and is not subject to volatility of stock market. ...

...

The Safety of Canadian Mortgages

The Canadian mortgage market has maintained historically low default and foreclosure rates. Due to the dominance in the market by Canada's chartered banks and strict governmental regulation and oversight, higher underwriting standards have remained in place. As a result, second mortgages in Canada carry about the same level of risk as prime-first mortgages in the US. Currently, first mortgages in Canada have a statistical foreclosure rate of .27% versus 1.99% in the United States. Subprime mortgages in Canada have a statistical foreclosure rate of 2.22% versus 16.42% in US.

... All aspects of the mortgage market are regulated. In the case of the MIC, regulation and supervision comes from the Canada Revenue Agency, the Financial Institutions Commission and the Securities Commissions of the provinces of British Columbia and Alberta.

Risk Factors

There are a number of risks inherent in this offering including, but not limited to the following:

- the investment shares are not insured,
- there is no guaranteed return on your investment,
- the investments are secured against real property whose value can fluctuate,
- the MIC will be competing with others for mortgage loans,
- the MIC cannot guarantee the profitability of our mortgage portfolio.
- the performance of the mortgage portfolio may be affected by environmental, regulatory and other matters outside our control

FAQ for MIC II:

[35] A Frequently Asked Questions document related to MIC II included the following excerpts:

Is the investment guaranteed? No, the underlying security is the Canadian real estate against which the MIC has mortgage charges plus the personal guarantees of the owners of the property.

Is investing in a MIC as secure as owning real estate? Yes. When a MIC lends money, an interest rate is fixed for the term of the mortgage and is not subject to real estate market fluctuations. As the maximum loan to value ratio is 85%, the risk is greatly reduced.

What are the advantages of a MIC?

The MIC is a secured lending vehicle

As a mortgage lender every loan made by the MIC is secured by a mortgage. As you know, a mortgage is the most secured financing vehicle possible in real estate investing. Thus, in a worst case scenario, which is a mortgage default and resulting foreclosure, the MIC has sufficient collateral and security to adequately cover all of its investments.

Where will Trillium be investing? Trillium's intention is to invest substantially all, if not all, of its funds in the Provinces of British Columbia and Alberta. By investing in a high growth region such as British Columbia and Alberta, the MIC will be able to invest in mortgages paid by high income individuals and families living in British Columbia and Alberta on properties located in a stable and ascending real estate market.

Do these high returns also mean high risk? Although there is no such thing as a risk free investment, the relatively high return of a MIC has a disproportionately low risk. This has been the case since MICs were established.

How secure are the mortgages? BC and Alberta are home to some of the fastest appreciating property values and fastest growing income in Canada. This means that borrowers will have sufficient income to service mortgages which results in a secure and steady cash flow to MIC investors.

Risk Acknowledgement from MIC II subscription agreement:

[36] The risk acknowledgement form attached to the subscription agreement for acquiring MIC II shares included the following excerpts:

Risk Acknowledgement Form

I acknowledge that this is a risky investment

- I am investing entirely at my own risk
- No securities regulatory authority has evaluated or endorsed the merits of these securities or the disclosure in the offering memorandum
- The person selling me these securities is not registered with a securities regulatory authority and has no duty to tell me whether this investment is suitable for me.
- I will not be able to sell these securities except in very limited circumstances. I may never be able to sell these securities.
- I could lose all the money I invest.

Offering Memorandum of MIC III:

[37] The MIC III's offering memorandum included the following representations (the following sections are reproduced in their entirety):

1.1 Net Proceeds

		Assuming min. offering	Assuming max. offering
A.	Amount to be raised by this offering	\$ 5,000	\$ 250,000,000
B.	Selling commissions and fees ¹	\$ 500	\$ 25,000,000
C.	Estimated offering costs (e.g., legal, accounting, audit.)	\$ 50,000	\$ 50,000
D.	Available funds: D = A - (B+C)	\$ - 45,500	\$ 224,950,000
E.	Additional sources for funding required	\$ 0	\$ 0
F.	Working capital deficiency	\$ 0	\$ 0
G.	Total: G = (D+E) - F	\$ - 45,500	\$ 224,950,000

1.2 Use of Net Proceeds

A detailed breakdown of how the Issuer will use the net proceeds is as follows:

Description of intended use of net proceeds listed in order of priority	Assuming min. offering	Assuming max. offering
Invest in commercial, industrial and residential Mortgages secured by real estate property located in Canada ²	\$ 0	\$ 157,465,000
Investments in real estate related assets ^{2,3}	\$ 0	\$ 53,988,000
Yearly Management Fees ⁴	\$ 0	\$ 13,497,000

2.5 Short Term Objectives and How We Intend to Achieve Them

Over the next twelve (12) months the Issuer's objective is to raise further equity capital, invest it pursuant to the Tax Act's MIC criteria with the intent of optimizing return (as described in more detail above under items 2.2, 2.3 and 2.4) and continuing paying quarterly dividends to its shareholders. The issuer's goal over the next twelve (12) months is to increase its share capital base from its present amount \$100 to \$20,000,000. The Issuer's business plan is not dependent on attaining this goal; it is simply a target.

What we must do and how we will do it	Target completion date or, if not known, number of months to complete	Our cost to complete
The Issuer intends to raise a total of \$ 20,000,000 in equity capital over the next twelve (12) months and invest in compliance with the Tax Act's MIC criteria. We will source investments through our related entities' Immigration Program contacts and our realtor and mortgage broker contacts.	12 months	See Item 1, Use of Available Funds.

[38] In all other respects, the Offering Memorandum for MIC III was substantively similar to that of MIC II.

[39] Similarly, the website disclosure, Executive Summary, FAQ and risk acknowledgement forms (attached to the subscription agreements) related to MIC III were substantively similar to that prepared for MIC II.

Testimony of L

[40] L was a salesperson who sold shares of MIC II and MIC III. L testified during the hearing.

[41] The material aspects of L's testimony may be summarized as follows:

- L was hired by DDG to sell shares in MIC II and, later, MIC III;
- L was paid by commissions and received 10% of the amounts invested by investors in MIC II and MIC III;
- L had previously worked for another mortgage investment corporation;
- L's understanding was that mortgage investment corporations, including MIC II and MIC III, were required to invest primarily in mortgages;
- L understood from his discussions with one or more of the individual respondents that MIC II and MIC III would be investing in first and second mortgages, primarily on residential properties located in the Lower Mainland;
- all promotional materials that were delivered or available to investors were prepared or vetted by the individual respondents;
- all investors that L dealt with received a package of marketing materials which included a newspaper article (describing mortgage investment corporations, in general, as a good investment vehicle) and the applicable offering memorandum, term sheet and executive summary;
- investors were asked to (and did) sign subscription agreements and a risk acknowledgement form; and
- L sometimes organized meetings between investors and one or more of the individual respondents.

Investor testimony

[42] Two investors testified during the hearing (JL and DB).

JL

[43] JL is a high school teacher and he invested \$15,000 in MIC II pursuant to a subscription agreement and risk acknowledgement form dated July 19, 2011.

[44] JL first learned about MIC II through his own internet research but ultimately he contacted MIC II and thereafter dealt with L.

[45] The material aspects of JL's testimony may be summarized as follows:

- he was first interested in MIC II because the website indicated that it offered a fixed return of 10.5%;
- he generally understood that MIC II was a mortgage investment corporation and that a mortgage investment corporation invested its funds in mortgages secured by real estate;
- an investment with lower risk was appealing to JL as he was a conservative investor – as a consequence, that mortgage investment corporations invested in mortgages secured by real estate was important to him;
- JL had previously invested in another mortgage investment corporation (unrelated to the matters in this proceeding) and everything he saw in the promotional materials was generally consistent with his understanding of how mortgage investment corporation investments were structured;
- JL had several conversations with L about MIC II and ultimately he received the package of promotional materials;
- L generally went over the promotional materials and the contents were generally consistent with his understanding of the investment; however, JL did not read the offering memorandum in any detail;
- L provided JL with several e-mails post-investment that indicated that JL's investment was performing well;
- JL received \$2,821 in dividend payments on his investment; and
- JL has not received any other payments in respect of his investment.

DB

[46] DB invested 54,999.90 in MIC II in July 2011. At a later date, it appears that DB had his investment in MIC II converted to an investment in MIC III, although the circumstances surrounding that change were not clear from the evidence in the hearing.

[47] DB first learned about MIC II through hearing a radio advertisement but ultimately he contacted MIC II and thereafter dealt with L.

[48] The material aspects of DB’s testimony may be summarized as follows:

- DB was first interested in MIC II as an investment opportunity as he understood from the radio advertisement that shares in MIC II qualified to be held in an RRSP account;
- after hearing the radio advertisement, DB went online and reviewed the website for MIC II and was further interested in the investment as a result of seeing the 10.5% fixed return that was offered;
- DB and L spoke and discussed MIC II, including its 10.5% return, RRSP eligibility and that MIC II invested in mortgages backed by real estate;
- L sent DB various documents including the offering memorandum, subscription agreement, executive summary and risk acknowledgement form;
- DB looked at the offering memorandum but did not read it in great detail. His general understanding that MIC II would be investing in real estate backed by mortgages was confirmed from that review;
- DB executed a subscription agreement and a risk acknowledgement form;
- DB received some dividend payments; however, those payments stopped and he has never received a return of his original investment amount of \$54,999.90; and
- since 2014, DB has corresponded with Prinster about the return of his investment and received a variety of responses including that the corporation would be wound up and his money would be returned, repayment was delayed pending the sale of assets, fund payments were awaiting board approvals and that cash payments would be made in 30 days.

III. Analysis and Findings

A. Applicable Law

Standard of Proof

[49] 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 paragraph 49):

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.

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

[51] 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, paragraph 35.

Definition of “security”

[52] Section 1(1) of the Act 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

[53] Section 57(b) of the Act 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.

[54] 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

[55] 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”.

[56] 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

Position of the Parties

[57] The executive director submitted that:

- a) the shares sold to investors in MIC II and MIC III, respectively, were “securities” as defined under the Act;
- b) the respondents, in many different forms and many different documents, represented to investors that the funds invested in MIC II and MIC III would be invested in mortgages secured by real estate;
- c) none of the funds invested by investors in MIC II and MIC III was invested in mortgages secured by real estate and that, as a consequence, the respondents, engaged in dishonesty which would fall within the “other fraudulent means” part of the *actus reus* of fraud as set out in *Anderson*;
- d) the diversion of the investors’ funds from the intended purpose (mortgages backed by real estate) caused the investors to suffer deprivation (both the risk of deprivation and actual deprivation); and
- e) each of the respondents had the requisite mental intent or *mens rea*, of both the *actus reus* and the deprivation arising therefrom, for us to find them liable for fraud.

[58] The executive director further submitted that:

- a) each of Wright, Wilson and Prinster, as directors, officers or agents of MIC II, permitted, authorized or acquiesced to MIC II’s fraudulent misconduct and that, by virtue of section 168.2 of the Act, each of them therefore also contravened section 57(b) of the Act; and
- b) each of Wright and Prinster, as directors, officers or agents of MIC III, permitted, authorized or acquiesced to MIC III’s fraudulent misconduct and that, by virtue of section 168.2 of the Act, each of them therefore also contravened section 57(b) of the Act.

[59] The respondents submitted that:

- a) the executive director deliberately or negligently brought fraud allegations against the respondents to justify prohibitions the Commission imposed on the respondents from issuing further securities in MIC II and MIC III; which

prohibitions damaged the respondents' reputations, destroyed the respondents' businesses, destroyed the two mortgage investment corporations and resulted in the loss of the investors' funds;

- b) the executive director mistakenly alleged that the respondents represented to investors that the investors' funds were to be invested in mortgages backed by real estate when the respondents consistently represented to investors that their funds would be used to acquire shares of MIC II and MIC III, as applicable (which was what each investor acquired under their respective subscription agreements);
- c) MIC II and MIC III used investor funds as the respondents represented to investors that those funds would be used, in the Offering Memoranda of MIC II and MIC III, respectively; and
- d) as a consequence of all of the above, the executive director failed to prove that the respondents engaged in the *actus reus* of fraud or had the requisite mental intent to commit fraud.

Analysis

Actus Reus

- [60] There was no dispute among the parties that the shares in MIC II and MIC III are "securities" as defined in the Act. Shares are one of the enumerated inclusions within the definition of "security" in the Act.
- [61] The main issues in this case revolve around whether the executive director has proved, on a balance of probabilities, that the *actus reus* of fraud was carried out by the various respondents (as applicable, relative to their involvement with MIC II and MIC III). In particular, the parties' submissions diverge on what representations were made to investors and whether those representations were dishonest or deceitful.
- [62] As set out above, the executive director submitted that, in many different places in the Marketing Materials (including in each of the website descriptions, the offering memorandum, the executive summary and FAQs) and in many different words but with similar effect, the investors received representations that MIC II and MIC III would be investing in mortgages secured by real estate.
- [63] Although the notice of hearing alleges that the individual respondents committed fraudulent misconduct directly, the executive director's submissions were all to the effect that MIC II or MIC III (as applicable) made these representations to investors (through L and the marketing materials). That, combined with the fact that there was little if any evidence of direct contact between the individual respondents and investors prior to investment, means that the individual respondents' liability is best assessed pursuant to section 168.2 of the Act rather than directly, pursuant to section 57(b) of the Act.

- [64] The respondents' first submission was that the executive director deliberately or negligently brought fraud allegations against the respondents to justify prohibitions the Commission imposed on the respondents from issuing further securities in MIC II and MIC III. There is no merit to this submission, as there was no evidence during the hearing which supported it in any fashion.
- [65] The respondents' next submission was that the allegations in the notice of hearing – that the investors' funds would be used to invest in mortgages backed by real estate – must fail because, in fact, investors were told that there invested funds would be used to acquire shares of MIC II or MIC III, as the case may be, and that the evidence demonstrates that is what happened.
- [66] There are two possible interpretations to this submission (and the submission was not clear in this respect):
- a) that the notice of hearing was too imprecise or deficient in some manner in failing to describe the alleged *actus reus* as a deceit with respect to the manner in which investors' funds were used by the issuer of the shares; and/or
 - b) that the representations to investors were limited to the form of security that investors would acquire.

We do not agree with either of these possible interpretations of this submission.

- [67] The investments in this case, and the representations related to them, went far beyond just the form of the security acquired (i.e. shares in one of MIC II or MIC III). We have set out in our reasons (above) large excerpts from the various Marketing Materials. Reading those materials in their entirety make it abundantly clear that the representations made to investors went far beyond the mere fact that an investment would result in the investor acquiring shares in MIC II or MIC III, as the case may be.
- [68] We also do not find there to have been any deficiency in the notice of hearing on this point. Notices of hearing in Commission enforcement proceedings are not to be read in the same manner and with the same level of precision as criminal indictments. The test a notice of hearing must meet is whether it provides sufficient notice to the respondents for them to know the case that they have to meet. Further, the contents must not create some aspect of procedural unfairness for a respondent (see *Re Wong* 2016 BCSECCOM 208 at paras. 256-264). Read in its entirety, it is clear from the notice of hearing what the executive director's central theory of the case was and how he construed the *actus reus* of the alleged fraudulent misconduct – that investors were promised that their funds would be used for one purpose and that, in fact, investor funds were used for entirely different purposes, causing deprivation.
- [69] The respondents' last submission was that MIC II and MIC III used investor funds as represented to them in the offering memoranda relating to the two issuers.

[70] This submission included the following specific arguments:

- a) that the Marketing Materials were clear that MIC II and MIC III were mortgage investment corporations and that mortgage investment corporations can maintain their tax status by investing a portion of their funds in assets other than mortgages. In particular, the respondents pointed to the table in section 1.2 of the offering memorandum for each of MIC II and MIC III which described use of proceeds for things other than mortgages;
- b) that the offering memorandum disclosed that investor funds could be used to pay the expenses of the issuer and the manager. In particular, the respondents pointed to the disclosure in sections 1.2 and 2.8 of the offering memorandum of each of MIC II and MIC III which describe that each of the entities would pay a management fees to its manager and that the entities would incur some direct expenditures;
- c) that the offering memoranda disclosed that the business plan was to build the business of MIC II and MIC III, as the case may be, and that they disclosed that investor funds would be used to fund initial operations (i.e. start-up costs);
- d) that the offering memoranda disclosed that the business plan for each of MIC II and MIC III, as the case may be, was to raise \$250,000,000 (\$20,000,000 within the first twelve months of operation) and that there was no guarantee that the funds would be raised or the business plans carried out. In particular, the respondents point to sections 1.2 and 2.5 of the offering memorandum of each of MIC II and MIC III which describe the first twelve month business plan of the issuers. The respondents also highlighted the risk acknowledgement form under which a risk of loss of investment was made known to investors;
- e) that the evidence showed that MIC II and MIC III used investor funds to fund start-up costs and investments in real estate as described in the offering memoranda and as allowed under the rules relating to use of proceeds by mortgage investment corporations; and
- f) that the Commission prohibited the respondents from raising further capital, thereby preventing MIC II and MIC III from being able to carry out their respective business plans, including investing in mortgages secured by real estate.

[71] There are elements of these submissions for which there is evidentiary support; however, in their entirety, we do not agree that these submissions establish a defence to the allegations in the notice of hearing.

[72] First, it is correct to say that there was disclosure in various parts of the Marketing Materials that MIC II and MIC III were mortgage investment corporations. It is also correct that there was disclosure in the offering memoranda that the use of proceeds from investor funds could involve more than investments in mortgages backed by real estate.

[73] The simplest and clearest representation of the use of investor funds in the offering memorandum for each of MIC II and MIC III was in section 1.2 “Use of Proceeds”. This section in each offering memorandum includes a table with the following heading “*Description of intended use of net proceeds listed in order of priority*”. In the case of each of MIC II and MIC III, the tables then set out a use of proceeds in which a significant majority of the funds would be invested in mortgages backed by real estate as the first item in the table, with significantly smaller portions of the funds to be allocated to investing in “real estate related assets” and “yearly management fees”, as subsequent items in the table.

[74] Sections 2.2 and 2.3 of the offering memorandum for each of MIC II and MIC III also provide a description of the “business” of the issuers.

[75] Section 2.2 “Our Business” (in each offering memorandum) sets out the following excerpts (emphasis added):

The issuer intends to maintain its qualification as a Mortgage Investment Corporation under section 130.1 of the *Income Tax Act* (Canada). Its principal business is to obtain a stable source of income by investing in a portfolio of residential, commercial and other mortgages.

...

The issuer is in the business of investing in mortgages granted as security for loans ...

[76] Section 2.3 “Development of Business” (in each offering memorandum) sets out the following excerpt (emphasis added):

Our only undertaking will be to invest funds in accordance with the objectives, strategies, and restrictions of our investment guidelines. We will primarily invest in commercial, industrial and residential mortgages in Canada ...

[77] A review of the remainder of the Marketing Materials makes it clear that the primary representation as to use of investor funds was that MIC II and MIC III would be investing in mortgages secured by real estate. We have reproduced significant portions of the Marketing Materials. When the Marketing Materials are read in their entirety, this conclusion is inescapable. This “use of funds” and the “business of the issuers” is stated time and again. It is also indirectly referenced time and again through other Marketing Materials, including references as to how an investment in MIC II and MIC III would be less risky than other investments due to the security provided by mortgages.

- [78] There was disclosure in the Marketing Materials that MIC II and MIC III may not be successful in their business plans and that investors were investing in a risky investment in which they could lose their investment. That is not one and the same as disclosure that investor funds would be entirely diverted from the principal intended use of proceeds to other uses.
- [79] Contrary to the submissions of the respondents, there was no disclosure anywhere in the Marketing Materials to suggest that investor funds would be required to cover start-up costs of MIC II, MIC III or their manager. Similarly, there was no disclosure that funds would not be invested in mortgages until a certain amount of funds had been raised.
- [80] During oral submissions, the respondents suggested that any reasonable investor would understand that investor funds could be entirely diverted from mortgages as the offering memoranda showed each of MIC II and MIC III as “zero balance sheet” entities. Again, we do not agree that these submissions provide a defence to the allegations. The most that can be said for the Marketing Materials that investors received is that they set out some disclosure that some of the investors’ funds would go to things other than mortgages. We find that a reasonable investor would believe that MIC II and MIC III represented to them, through their Marketing Materials, that they would primarily invest funds raised from investors in mortgages secured by real estate. That was, in fact, the conclusion that both JL and DB reached at the time of their investments in MIC II. We find that any reasonable investor relying on the MIC II or MIC III Marketing Materials would have similarly reached that conclusion.
- [81] The evidence of the actual use of investor funds by MIC II and MIC III was conclusive - none of the investors’ funds was invested in mortgages secured by real estate. Each of the individual respondents admitted as much in interviews with Commission staff.
- [82] Evidence from the Commission’s review of the bank accounts for MIC II and MIC III details that the majority of investors’ funds was paid by MIC II and MIC III to related companies of the respondents. We had insufficient evidence to determine what the business and assets of those related companies were and whether investments in those companies would even qualify as real estate investments (as disclosed in section 1.2 of each offering memorandum). If anything, the submissions of the respondents during the oral hearing were to the effect that those payments were largely for start-up costs of MIC II and MIC III and their manager and that those payments were capitalized with a view that at some point the shares might return value to MIC II and MIC III.
- [83] Lastly, the respondents submitted that the actions of the Commission to stop MIC II and MIC III from raising further investor funds were responsible for the respondents’ failure to complete their business plans.
- [84] This submission is completely without merit. First, the Commission cease traded the securities of MIC II in December 2012 (after first contacting MIC II in October 2012) because the offering memorandum of MIC II was no longer in compliance with securities laws. Compliance with securities laws is the responsibility of participants in the capital

markets (in this case, the respondents). It was the respondents' failure to comply with those requirements that led the Commission to take action. Secondly, that submission is completely at odds with the time frame relevant to the allegations in the notice of hearing. MIC II was raising money from investors in the summer of 2011. JL and DB both invested in July 2011. The cease trade order was issued nearly 18 months later. During that period, MIC II failed to invest in a single mortgage on real property as it had promised that it would to investors.

[85] We find that the use of investor funds by MIC II and MIC III was not the use represented to investors. This conduct clearly constituted a deceitful act, or similarly a dishonesty within the meaning of "other fraudulent means," under the first element of the test for fraud in *Anderson*.

[86] In *R. v. Zlatic*, [1993] 2 SCR 29, 1993 CanLII 135 (SCC) p. 45, the Supreme Court of Canada cited with approval the Ontario Court of Appeal decision in *R. v. Currie* (1984), 5 OAC 280 (at p.47):

The accused were in the business of investing funds in a certain company... but diverted these funds without notice to the investors to [another] company... Nor was there any question as to what the accused were authorized to do with the funds given to them. The court ... found that the fact that the accused used the funds in a manner which was not authorized was sufficient grounds for finding that the accused acted dishonestly.

[87] Similar findings have been made by panels of this Commission, including in *Lathigee (Re)*, 2014 BCSECCOM 264.

[88] We also find that the dishonesty caused deprivation to the investors. That funds were diverted from investing in mortgages secured by real estate and actually paid to related companies and other persons on an unsecured basis, caused both the risk of loss and actual loss to investors.

[89] As a consequence, we find that MIC II and MIC III committed the *actus reus* of fraud. As noted above, the evidence does not suggest that the individual respondents engaged in that conduct directly (as they neither dealt with most (or all) of the investors directly nor were they directly engaged in the diversion of the investor funds (i.e. the funds were clearly in control of MIC II and MIC III, as the case may be)).

Mens rea

[90] The analysis of whether MIC II and MIC III had the requisite *mens rea* for fraud is rather straightforward.

[91] The *mens rea* of a corporation is established by determining the *mens rea* of the directors and officers responsible for carrying out and directing the activities of the corporation (See *Re Braun* 2018 BCSECCOM 332, at para. 106). With respect to MIC II, the

directors and officers who were responsible for carrying out and directing the activities of that entity were Wright and Wilson. With respect to MIC III, it was Wright.

[92] The executive director alleged that Prinster acted as a *de facto* director and officer of both MIC II and MIC III. This issue was not specifically addressed by the respondents. However, we find that Prinster did act in that capacity with respect to both MIC II and MIC III. Prinster acknowledged acting as an agent of those entities in his interviews with Commission staff. He also acknowledged he was involved in key decision making like the investment of funds for those entities. All of the testimony from L and VH demonstrated that Prinster had an equal role with Wright and Wilson (with respect to MIC II) and Wright (with respect to MIC III) in decision-making regarding the business and affairs of those entities.

[93] We find that the individual respondents, as directors and officers of MIC II and MIC III had the requisite *mens rea* of the *actus reus*. We make that finding based on the following:

- all of Wright, Wilson and Prinster, in the case of MIC II, and both Wright and Prinster, in the case of MIC III, were responsible for the preparation and contents of the Marketing Materials in respect of those entities (by their own admission and, as confirmed, by the testimony of both VH and L) – they would have had knowledge that investors were told that MIC II and MIC III would principally be investing in mortgages;
- the individual respondents (in their respective roles) were the signing authorities for the bank accounts of MIC II and MIC III – they would have had knowledge about the use of investors’ funds;
- as a consequence, the individual respondents (in their respective roles) would have had knowledge of the diversion of investors’ funds; and
- any business person would know that the diversion of investors’ funds from their intended use into unsecured investments mainly in related companies (primarily for start-up costs) would result in deprivation (both the risk of loss and actual loss). Each individual respondent was a sophisticated business person with experience in the real estate industry (as they themselves admitted and reiterated throughout the proceedings).

[94] As a consequence, we find that:

- a) MIC II contravened section 57(b) of the Act with respect to 19 investors for \$610,134; and
- b) MIC III contravened section 57(b) of the Act with respect to 21 investors for \$506,693.

Liability pursuant to section 168.2 of the Act

- [95] Section 168.2 of the Act sets out that directors, officers and agents of a corporate entity that authorize, permit, or acquiesce in a contravention of the Act by the corporation are also liable for that misconduct.
- [96] In this case, Wright and Wilson were directors of MIC II. Prinster was clearly an agent and *de facto* director of MIC II. Wright was a director of MIC III. Prinster was clearly an agent and *de facto* director of MIC III.
- [97] As set out above, Wright, Wilson and Prinster were responsible for the preparation and contents of the Marketing Materials related to MIC II and for the bank account of that entity. We find that each of them authorized, permitted, or acquiesced in the fraudulent misconduct of MIC II.
- [98] Wright and Prinster were responsible for the preparation and contents of the Marketing Materials related to MIC III and for the bank account of that entity. We find that each of them authorized, permitted, or acquiesced in the fraudulent misconduct of MIC III.
- [99] As a consequence, we find that, pursuant to section 168.2 of the Act:
- a) each of Wright, Wilson and Prinster contravened section 57(b) of the Act with respect to 19 investors for \$610,134; and
 - b) both Wright and Prinster, contravened section 57(b) of the Act with respect to 21 investors for \$506,693.

IV. Conclusion

- [100] In conclusion, we find that:
- a) MIC II contravened section 57(b) of the Act with respect to 19 investors for \$610,134;
 - b) MIC III contravened section 57(b) of the Act with respect to 21 investors for \$506,693;
 - c) each of Wright, Wilson and Prinster contravened section 57(b) of the Act with respect to 19 investors for \$610,134; and
 - d) both Wright and Prinster, contravened section 57(b) of the Act with respect to 21 investors for \$506,693.

V. Submissions on Sanctions

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

By May 28, 2019 The executive director delivers submissions to the respondents and to the secretary to the Commission.

By June 18, 2019 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 25, 2019 The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

April 30, 2019

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

George C. Glover, Jr.
Commissioner