

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

Citation: Re Lau, 2016 BCSECCOM 207

Date: 20160615

**Tin Chao Alan Lau**

<b>Panel</b>	Judith Downes	Commissioner
	Gordon L. Holloway	Commissioner
	Don Rowlatt	Commissioner

**Hearing Dates** January 11, 13 and 14, 2016

**Submissions Completed** April 4, 2016

**Date of Findings** June 15, 2016

**Appearances**

Shaneel Sharma For the Executive Director

Tin Chao Alan Lau For himself

**Findings**

**I. Introduction**

- [1] This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.
- [2] On July 30, 2015, the executive director issued a notice of hearing against the respondent (2015 BCSECCOM 302) in which he alleged that the respondent perpetrated a fraud contrary to section 57(b) of the Act by taking \$50,000 from an investor for a purported investment and then using it for personal expenses.
- [3] During the hearing, the executive director called three witnesses, a Commission investigator, the investor and his son and tendered documentary evidence. The respondent appeared on his own behalf, testified and tendered documentary evidence.

**II. Background**

- [4] The respondent is a resident of British Columbia.
- [5] The respondent is a director and one of the founders of the Canadian Low Income Seniors Affordable Housing Society.
- [6] The respondent is also the sole proprietor of the Richmond Community Benefit Program Centre.

- [7] According to a press release provided by the respondent, Richmond Community Benefit Centre is the current name of the Canadian Low Income Seniors Affordable Housing Society.
- [8] In the testimony of both the investor and the respondent and in other evidence, “Society”, “Richmond Community Benefit Centre”, “Canadian Low Income Seniors Affordable Housing Society”, “Benefit Society” and other iterations of these terms were used interchangeably to refer to the entity in which the investment was to have been made. We find that all of these references are to one entity and for the purposes of these Findings, we refer to that entity as the “Society”.
- [9] The Society provides services to seniors, including running a seniors centre in Richmond.
- [10] The respondent is the chairperson of the seniors centre and responsible for its day-to-day operations.
- [11] The investor was a volunteer at the seniors centre in 2013. He neither speaks nor reads English.
- [12] On December 24, 2013, while volunteering at the seniors centre, the investor asked the respondent for time off to go to his bank to deal with a \$50,000 deposit that he had received from his daughter.
- [13] The respondent offered to drive the investor to the bank. During the drive, the respondent suggested that the investor invest the \$50,000 in the Society. The investor understood that the investment would be used to buy and resell goods to low income seniors. The respondent told the investor an investment in the Society would be a “win-win situation”.
- [14] The terms agreed to by the respondent and the investor were that the investment would bear interest at 5% per annum, payable monthly, and have a term of six months. The respondent told the investor that, regardless of the six-month term, he could withdraw his funds at any time.
- [15] The investor said that the respondent told him that interest on his investment would be paid from the profit the Society received from the resale to low income seniors of food and goods purchased by the Society.
- [16] During the course of his testimony, the respondent gave a number of different explanations of the purpose of the investment. He first said that the investor did not want to be paid interest but instead to learn a “common business” with the respondent’s assistance. The respondent then said that he had wanted to assist the investor in learning the accounting business so that, in six months’ time, the investor could carry on the business with his son’s assistance. The respondent further testified at the hearing:

The investment is because he want to have interest, so I can use the money to buy merchandise with the supermarket five, ten percent discount, but I cannot purchase immediately, I have to start gradually, so within six months I think, you know, I can pay off the interest at the same time he learn already how to run a business.

- [17] We find the latter statement to be the most credible of the explanations given by the respondent as to the purpose of the investment as it is largely consistent with the investor's testimony.
- [18] The investor had no previous investment experience.
- [19] At the investor's bank, the documents authorizing payment of the \$50,000 were completed by the bank teller and the respondent in English. The documents directed payment of the funds to the respondent personally. The investor could not understand the documents as they were in English and he believed the funds were being deposited to the Society.
- [20] On the same day, the respondent deposited the \$50,000 into his personal bank account at his own bank. The bank put a hold on \$25,000 of the deposit. However, the respondent immediately made payments totaling \$18,461 on two personal credit cards and withdrew \$5,000 in cash.
- [21] After the respondent deposited the \$50,000 into his personal bank account, he gave the investor written documentation acknowledging receipt by the Society of the \$50,000. The document made reference to the Society assisting the investor to set up a vehicle loan business. The investor testified that using the investment for vehicle loans was never discussed prior to his investment, and he did not know what the respondent was "playing here" by providing him with that document. As outlined above, it is clear from the evidence that, at the time of the investment, both parties understood that the investment funds would be used for the purchase and resale of goods to low income seniors for a profit. We find that the post-investment description included in the document provided by the respondent referencing some form of vehicle loans does not accurately reflect the agreement between the parties, and is not relevant to our analysis, below.
- [22] Once the hold on the balance of the deposit was removed by his bank, the respondent spent the remaining \$25,000 through transfers to personal bank accounts and credit cards, cash withdrawals and payments by cheque or pre-authorized debit for other expenses. By January 14, 2014, the respondent had spent the entirety of the investor's funds.
- [23] The respondent admitted that he used the investor's funds to pay the respondent's debts. He said that all of the Society's expenses were paid by him personally and that his personal debt included Society expenses. The respondent did not provide any evidence to corroborate this.

- [24] The investor said that he first asked the respondent for his money in January 2014 but the respondent refused to return the funds saying that the investment had a six-month term. The investor said that he continued to request the return of his funds.
- [25] The respondent paid the investor interest at the agreed 5% rate from December 2013 until February 2014. He increased the rate to 10% from March until June. The respondent returned \$10,000 of the investment in June 2014. He continued to make interest payments at the 10% rate on the balance of the investment in July and August.
- [26] The investor testified that in August 2014, the respondent advised him that his investment had been lost. No further monies have been received by the investor.

### **III. Analysis and findings**

#### **A. Applicable law**

- [27] 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):

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.

- [28] The Court also held (at paragraph 46) that the evidence must be “sufficiently clear, convincing and cogent” to satisfy the balance of probabilities test.
- [29] 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.

#### ***Fraud***

- [30] 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.

- [31] 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).

**B. Analysis**

**(i) In respect of a security**

[32] In order to contravene section 57(b), the impugned conduct must relate to securities.

[33] "Security" is defined in section 1(1) of the Act to include:

- (d) a bond, debenture, note or other evidence of indebtedness..., and
- (l) an investment contract.

[34] The executive director submits that the agreement between the respondent and the investor is an investment contract within subparagraph (l) of the definition of "security".

[35] The executive director also submits that the verbal agreement between the respondent and the investor relating to the investment is evidence of indebtedness within subparagraph (d) of the definition of "security".

[36] We will consider first whether the transaction between the respondent and the investor was an investment contract.

[37] "Investment contract" is not defined in the Act. The leading case on its definition is *Pacific Coast Coin Exchange of Canada v. Ontario Securities Commission*, [1978] 2 S.C.R. 112; 1977 CanLII 37 (SCC). There, the Supreme Court held that an investment contract is:

- ... an investment of money in a common enterprise with profits to come solely from the efforts of others.

In doing so, the court adopted the reasoning from *S.E.C. v. W.J. Howey Co.*, (1946), 328 U.S. 293 (U.S.S.C.).

- [38] In *Pacific Coast Coin Exchange*, the Court recognized that “common enterprise” means “one in which the fortunes of the investor are interwoven with and dependent upon the efforts of and success of those seeking the investment or of third parties”, and “solely” means “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.”
- [39] In this case, there is no issue that the parties agreed that the investor was to advance funds to the Society with the intention that he would earn interest, or profit, on the advance.
- [40] The investor testified that the respondent told him that the interest would be paid from the profits realized by the Society from its resale of food and goods purchased with the investor’s funds. As noted above, this was confirmed by the respondent in his testimony.
- [41] The investment, as proposed to the investor, was a common enterprise between the investor and the respondent on behalf of the Society. The potential profit to be realized from the investor’s advance of funds, in this case, depended solely on the efforts of the respondent on behalf of the Society in sourcing and reselling the food and goods at a profit. We find that the agreement between the investor and the Society to be an investment contract within the meaning of the Act.
- [42] Having found the agreement between the respondent and the investor to be an investment contract, we do not need to consider whether it is also “evidence of indebtedness”.
- (ii) Actus reus of fraud**
- [43] The executive director says that the respondent committed the prohibited act of deceit when he deceived the investor by taking his funds for a purported investment in the Society and then used the money to pay personal expenses.
- [44] The respondent admits that he used the investor’s funds to pay his personal debt but says that he personally paid all of the Society’s expenses and that his personal debt included the Society’s expenses.
- [45] Regardless of whether some or all of the debt related to expenses incurred on behalf of the Society, the respondent did not advance the investor’s funds to the Society for the purchase and resale of food and goods to low income seniors as promised but instead deposited the funds into his own bank account and used them to pay his existing debt. We find that in so doing the respondent committed a deceit.
- [46] We also find that this deceit resulted in deprivation. As established in *R. v. Abramson*, [1983] B.C.J.No. 1305, the investor’s pecuniary interests were put at risk from the moment he provided his funds to the respondent based on this deceit. In this case, there has been actual deprivation as the funds, other than the \$10,000 repaid to the investor, have been lost.

*(iii) Mens rea of fraud*

- [47] The executive director says that the respondent had the requisite subjective knowledge of the deceit and deprivation.
- [48] We agree. The respondent was aware that he told the investor he would advance his funds to the Society for the purchase and resale of food and goods and he did not.
- [49] Additionally, we find that the respondent must have been aware that in using the investor's funds to pay his debt, there was a substantial risk of loss of the funds.
- [50] We find that the respondent perpetrated a fraud on the investor in the amount of \$50,000 in contravention of section 57(b) of the Act.
- [51] We direct the parties to make their submissions on sanctions as follows:

**By July 6, 2016**

The executive director delivers submissions to the respondent and to the secretary to the Commission

**By July 27, 2016**

The respondent delivers 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 August 4, 2016**

The executive director delivers reply submissions (if any) to the respondent.

June 15, 2016

**For the Commission**

Judith Downes  
Commissioner

Gordon L. Holloway  
Commissioner

Don Rowlett  
Commissioner