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

Citation: Re Nickford, 2017 BCSECCOM 272 Date: 20170818

Lynne Rae Nickford
(aka Lynne Rae Zlotnik dba Lynne Zlotnik Wealth Management)

Panel	Suzanne K. Wiltshire	Commissioner
	Judith Downes	Commissioner
	Don Rowlatt	Commissioner
Hearing Dates	September 26, 27, 28 and 29, 2016 January 19, 2017	
Submissions Completed	January 19, 2017	
Date of Findings	August 18, 2017	

Appearing

Jennifer Whately Joyce Johner	For the Executive Director
Lynne Rae Nickford	For herself

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 dated July 30, 2012, the executive director alleged that the respondent, Lynne Rae Nickford, who is also known as Lynne Rae Zlotnik and who carried on business as Lynne Zlotnik Wealth Management (LZWM), perpetrated fraud contrary to section 57(b) of the Act when:

- between January 1, 2009 and March 31, 2010 (the relevant period), she raised approximately $2 million from 13 investors by issuing approximately $1.4 million of promissory notes in the name of LZWM, with the balance coming from investors who believed they were making loans to or investing in LZWM; and,

- during the relevant period, she transferred approximately $1.3 million of investor money from her business account to her personal account; then withdrew these funds from her personal account to pay for personal expenses, including food, clothing and rent payments and also withdrew a total of approximately $973,000 in cash from her personal account, using some or all of it, to gamble at local casinos.

[3] During the hearing the executive director called a Commission investigator, a BC Lottery Corporation investigator and four investor witnesses and tendered documentary evidence. The executive director also made written and oral submissions.

[4] The respondent did not call any witnesses but filed a document entitled "Lynne Nickford's Report" dated October 13, 2016 and tendered other documentary evidence. The respondent also made written and oral submissions.

II. Background

The respondent

[5] The respondent was the sole proprietor of LZWM during the relevant period.

[6] Prior to operating LZWM, the respondent worked for approximately 18 years in an associate capacity as an insurance and mutual fund salesperson at the financial services firm started by her father and subsequently operated by her brothers (family firm).

[7] The respondent was registered under the Act from 1991 to 1993 as a salesperson for scholarship funds and from 1998 to 2008 as a salesperson for mutual funds. During the relevant period, she was no longer registered under the Act, but was licensed as a life and accident and sickness insurance agent.

[8] In early 2006, the respondent left the family firm. She registered her sole proprietorship, LZWM, in March 2006.

[9] Through LZWM, the respondent offered a variety of investment and insurance services. She promoted her business to women in particular, using seminars, YouTube videos and promotional materials addressing topics such as the financial success of women and their families, investing for women and financial eldercare.

[10] The respondent operated a business bank account under the name of LZWM and was recorded on the business account bank records as the owner of the firm. The respondent also had a personal bank account.

[11] The respondent made an assignment into bankruptcy on April 12, 2010.

Investors

[12] During the relevant period eleven individuals and two couples loaned money to or invested in the respondent's business LZWM. These are the 13 investors referred to in the notice of hearing and these findings.

[13] Three investors and the daughter of one elderly investor testified at the hearing. The executive director also entered into evidence transcripts of interviews conducted by the Financial Institutions Commission (FICOM) and case notes and memoranda of interviews conducted by Commission investigators with most of the investors.

[14] As a group, the investors stressed that they had come to trust the respondent whom they saw as their financial advisor and whom many also considered a friend. Some had long standing relationships with the respondent, others less so. Several had previously invested through the respondent in conventional products provided by third parties such as segregated funds before being persuaded by the respondent to invest in her business, LZWM. Others attended financial seminars put on by the respondent where she took a personal interest in them and befriended them and they came to trust her and were then persuaded by her to invest in her business, LZWM. The respondent stressed the need for investors to keep their investments in her business confidential.

[15] The respondent told the 13 investors LZWM was expanding rapidly and offered investors varying rates of return ranging generally from 12% to 16% (although one investor obtained a rate of 18% and another a rate of 25%). The investors understood that monies invested were to be used for LZWM's business operations and to grow the business.

[16] Some investors were persuaded by the respondent to use monies they had invested in conventional third party products either on their coming due or by redeeming them for investment in her business. One couple used proceeds from the sale of their home after being discouraged by the respondent from purchasing another property. Others borrowed on a personal line of credit, used an inheritance or used their life savings to invest in the respondent's business.

Monies paid by investors to LZWM

[17] During the relevant period, the 13 investors paid a total of $1,989,750 to LZWM.

[18] LZWM issued either promissory notes or "private investment" documents covering $1,518,750 of the amounts paid by the 13 investors to LZWM.

[19] The promissory notes set out the amount loaned to LZWM, interest rate, term of the loan and other provisions relating to the investment. Each promissory note stipulates that the amount loaned to LZWM is to be used only for the business operations of the respondent.

[20] The "private investment" documents are on LZWM letterhead and marked "Private and Confidential". They specify the amount loaned to LZWM, interest rate and term of the investment, as well as the maturity date and the amount to be paid at maturity. The "private investment" documents do not state what the amounts loaned are to be used for. Three of the five investors holding "private investment" documents were interviewed by FICOM. All stated these were not personal loans to the respondent but were to be used to expand and build up LZWM's business.

[21] The remaining amounts paid (those that were not documented by either a promissory note or "private investment" document) total $471,000 and were paid by two of the investors, RK and KL, both of whom held promissory notes for other amounts they had paid to LZWM.

[22] RK made eight such payments totaling $451,000. Cancelled cheques and bank drafts, and deposit records establish the payments were made to LZWM and deposited to the respondent's business account.

[23] In a voluntary interview conducted by the Commission investigator, RK explained that she first met the respondent when the respondent was working at the family firm. The respondent subsequently invited her to an investment seminar and she continued going to seminars to learn more, but did not have funds to invest until after the respondent had left the family firm. However, when RK did have funds, the respondent became her financial adviser and she invested her funds through the respondent.

[24] RK said that, at first, her monies were invested by the respondent in third party products with companies such as Manulife and other like companies. As she used to be an event planner, RK also began to provide consulting services to assist the respondent with the organization of seminars. At some point, the respondent told RK she was offering investments in her company and RK would get her full principal back after five years, plus interest. So on November 26, 2008, RK said she loaned the respondent $200,000 and started to receive interest payments monthly of $2,000 beginning in January 2009. This was her first investment in the respondent's business. (This 2008 loan is not included in the amounts paid by RK for the purpose of the matter before us as it was made outside the relevant period to which the allegations relate.)

[25] RK said she invested in the respondent's business because the respondent was very excited and very positive about her business, LZWM. The respondent also told RK that other people had invested in the respondent's business in the past and they had all been paid out and some were on their second round of investments with her. RK identified an unsigned copy of a promissory note she was shown as the note she and the respondent had signed in November 2008, but said she had no signed copy because the respondent kept the signed copy. RK confirmed it was her understanding that her monies were to be used for the respondent's business.

[26] RK said the respondent told her she was going to train other women to do the seminars which were bringing in a lot of clients and that the respondent "was going after the 'big fish' to get people with large amounts of money to invest". RK added, "So, I mean, we all understood this was an investment into something that we all bought in and believed that she was going to be successful based on our own experiences with her – her seminars and how, you know, we – I mean, she is really a good teacher and had good advice and had everything all organized and all the work books and you know what I mean?"

[27] As to how the respondent would generate revenues, RK said the respondent had told her revenues would come from the commissions and other earnings from the sale of third party products such as life insurance, and that the purpose of the company was to get as many new clients as possible who would buy products and the money earned from the sale of products would pay the investors back and start paying for the business. RK noted that the respondent was "almost like an evangelist … she just got everybody so pumped up about this new business and it was going to be so great ...".

[28] With respect to the eight payments RK made during the relevant period totaling $451,000, at her interview RK was initially uncertain as to the nature of the first two payments she made to LZWM of $185,000 on February 12, 2009 by bank draft and $115,000 on March 3, 2009 by cheque. At first she thought these might have been paid to the respondent to purchase investments from third parties. While RK was not completely certain of this, she distinguished these payments from loans she had made to the respondent's business noting she had not included these amounts on the spreadsheet she had prepared from her records of loans to LZWM and personal loans to the respondent. After being shown a copy of the cheque for the $115,000 payment and seeing the note on its face "2nd instalment of investment", RK said "…that's the thing that's confusing me. This says 'second instalment of investment'. This leads me to believe that I did give this to her to invest in her company, because of what it says."

[29] Subsequently, RK examined her records at home and provided a copy of a bank transaction record dated February 12, 2009 for the purchase of the $185,000 draft on which she had written next to the draft amount "To LZ Wealth ½ buy-in". RK also provided copies of entries she had made in her banking transactions register that described the $115,000 cheque for the second payment in early March as being "LZ Wealth 2nd ½ $ inv.". This transaction followed RK's entry of a deposit of more than $122,000 noted by RK in the register as being "From Canada Life for ½ Wealth buy-in".

[30] While RK had no documents to support any formal arrangement, such as a partnership or other interest in the respondent's business, the Commission investigator pointed out a reference to RK as "an owner" in a March 2, 2009 letter from LZWM to RK signed by the respondent, asking RK "to have the money order ready for us tomorrow in the amount of $115,000 made out to Lynne Zlotnik Wealth Management." Other LZWM documents entered in evidence by the executive director describe RK as a business partner. A draft LZWM Organization Chart identifies RK as "Associate, Business Partner" under the "Corporate Division". Another document is with respect to RK's "Employment Relationship: Business Partner & Consultant". A third document is a draft job description for RK as "Associate Business Partner".

[31] Finally, there is the evidence in the bank records that these two payments, totaling $300,000, were deposited in the LZWM business account, and co-mingled with and treated no differently than other funds in that account, being used to pays bills, transferred to the personal account or withdrawn in cash. There is no evidence, other than RK's initial confused recollection, that these funds were directed to conventional investment products.

[32] We consider RK's later recollection, prompted by seeing her notation on the cheque for $115,000, that the purpose of these two payments was to invest in the respondent's business to be the correct one. This accords with the subsequently located entries made at the time of these payments on the bank transaction record she received when purchasing the draft for the $185,000 payment and in her banking transactions register that these payments were made to buy into the respondent's business, LZWM, in two instalments. This is also consistent with the references to RK as an "owner" and "business partner" in the various LZWM documents.

[33] In her voluntary interview, RK described the next five payments she made to LZWM from November 23, 2009 through February 23, 2010, ranging from $10,000 to $62,000 for a total of $147,000, as short term loans the respondent had asked for "to keep the business going to pay the rent, the payroll, the whatever …". RK said the respondent was to quickly pay back the amounts loaned from funds the respondent was waiting to receive from third parties for sales of their products. RK's evidence was contradictory as to whether or not interest was to be paid on these loans. She said interest wasn't "so much of a big deal" because these loans were supposed to be repaid quickly. RK confirmed no loan documents were ever signed.

[34] The last payment to LZWM for $4,000 was made by cheque dated March 8, 2010. Despite having made the cheque out to LZWM, RK stated in her voluntary interview that this payment for $4,000 was a personal loan and noted she had described it as such in the spreadsheet she had prepared from her records.

[35] The second individual, KL, made two payments to LZWM totaling $20,000 for which she had no loan documents. The cancelled cheques and deposit records establish the payments were made to LZWM and deposited to the respondent's business account. The only evidence as to the intended use of the $20,000 is the Commission investigator's case note in which she recorded KL as stating the two payments were supposed to be for a land purchase in Arizona and the respondent had promised her interest on the $20,000.

Source and use of funds in business account

[36] Funds on hand and deposited into the LZWM business account in the relevant period totaled $2,469,125. This amount includes the $1,989,750 received from the investors and deposited in the business account. The other funds in the business account consisted of cash on hand at the beginning of the relevant period and amounts attributed by the investigator to business and commission income, personal loans, deposits from the respondent or transfers from her personal account, and unknown.

[37] During the relevant period, the respondent transferred a total of $1,273,468 from the business account into her personal account.

[38] Of the expenditures from the business account during the relevant period, the Commission investigator was able to attribute $463,117 to identifiable business expenditures. The investigator attributed the remaining expenditures to a variety of items including investor payments, credit card payments, cash withdrawals, personal loan payments, taxes, personal expenses, unknown, cash withdrawals indicated as "Casino and Las Vegas" and payments to local casinos, vehicle, gifts, restaurants, travel, bank charges, and phone. At the end of the relevant period, the balance in the account was $9,377.

Source and use of funds in personal account

[39] Funds on hand and deposited in the personal account in the relevant period totaled $1,421,904. This amount includes the $1,273,468 transferred from the business account. The other funds in the personal account consisted of cash on hand at the beginning of the

relevant period and amounts attributed by the investigator to income tax and GST refunds, $75,000 from Edgewater Casino, commissions, a refund for a cruise, amounts deposited by the respondent and unknown.

[40] All of the funds in the personal account were spent during the relevant period. The funds were used as follows:

(i) The respondent withdrew a total of $972,700 in cash.

(ii) The investigator identified $82,259 as personal expenses.

(iii) The investigator identified $53,000 as personal loan payments

(iv) The investigator identified $8,993 as payments to casinos.

(v) The remaining expenditures were attributed by the investigator to investor payments, identifiable business expenses of $53,301, bank charges, vehicle, donations, unknown, restaurants, credit card payments, taxes, and payments to the respondent and her daughter.

[41] The Commission investigator was unable to trace how the cash withdrawals of $972,700 were spent. Her analysis of bank records showed payments to and from local casinos as well as casinos in Las Vegas. Information provided by FICOM indicated suspected gambling activity. Payouts or winnings of more than $10,000 paid to the respondent were identified in BC Lottery Corporation (BCLC) large cash transaction reports (LCT reports) forwarded to FINTRAC (Financial Transactions & Reports Analysis Centre). But, since the respondent primarily played slot machines, there was no record of the amounts the respondent had put into the machines.

Respondent's gambling

[42] The document the respondent entered in evidence entitled "Lynne Nickford's Report," refers to the respondent's "gambling addiction" and attributes it to a mental illness. Also, pursuant to a June 26, 2012 Bankruptcy Order, the respondent entered into the BCLC's self-exclusion program on July 17, 2012.

[43] During the investigation, a BCLC slots manager at the Edgewater Casino in Vancouver, where most of the LCT reports were generated during the relevant period, told the Commission investigator that the respondent:

- played daily and sometimes multiple times a day
- usually played slot machines and liked the Wild Taxi machine
- would play approximately $5,000 to $10,000 per day, more if she stayed longer
- always chose cash payouts and carried cash in her handbag
- was the "highest" player at the time and "in a league of her own"
- played alone.

[44] A senior BCLC investigator testified as to the various reports produced in response to the Commission's order for production. While he did not know the respondent personally, he stated he knew of her and had spoken to other employees at the Edgewater Casino about the respondent. He noted the respondent liked to play quarter machines at the "max" which would mean about $50 per spin per machine, with at least two machines on the go at a time. When she won and a machine was locked for payout, the respondent would go to another machine and play there until the machines she preferred were free to play again.

[45] Based on his review of the LCT reports, the BCLC investigator testified that in a 14 month period the respondent had won over $10,000 on 108 occasions totaling almost $4 million. He noted that the respondent liked the Wild Taxi machine and LCT reports for November 26, 2009 showed she won a $100,000 jackpot on that machine as well as an additional $40,000 in the 24 hour period covered by the LCT reports on that date.

[46] The BCLC investigator stated that very few people play on the scale and to the amount played by the respondent in BCLC casinos. He described the respondent as being in the top 1% of all slot players. Because she was considered a "high limit" player, she required a subject ID number be assigned to her.

[47] The BCLC investigator testified that the respondent had a BC Gold Card (now called an Encore Card) that tracked the "complimentaries" earned as a result of her play and that by current standards she would be categorized as a "triple diamond player" entitling her to special deals and rewards. The respondent's cash reward payouts that he had reviewed were limited to the Grand Villa Casino in Burnaby. These indicated significant play even though they did not include "complimentaries" pertinent to the Edgewater Casino she most often attended.

Evidence respecting business expenses

[48] The Commission investigator attributed approximately $463,117 paid from the business account to business type expenses. She noted this amount is similar to the $417,247.81 claimed in the respondent's 2009 tax return as business expenses. The investigator also attributed a further $53,301 paid from the personal account to business-related expenses.

[49] The Commission investigator identified $972,700 in cash withdrawals from the personal bank account for which there are no receipts or other indications as to their use.

[50] In a September 2012 report to her creditors prepared by the respondent in connection with her bankruptcy (report to creditors), the respondent noted that both her personal and business accounts had been used for business and provided what she termed a "breakdown" of what the approximately $973,000 in cash withdrawals was used for. The respondent grouped the alleged expenditures into broad categories providing no receipts or other documents to substantiate the amounts claimed saying that all the receipts for her business had been in a rented storage locker, the contents of which were sold or destroyed in July 2010 after the bankruptcy when the rental for the locker was not paid.

[51] The Commission investigator observed the respondent's explanation for the lack of receipts was odd because the alleged destruction of the receipts would have occurred when the 2009 tax return was being prepared and filed in 2010 and the accountant preparing the return would have required business-related receipts for 2009.

[52] The Commission investigator also noted that the business expenses claimed by the respondent in the 2009 tax return only totaled $417,000. The investigator further pointed out that the 2009 tax return had been prepared by the respondent's accountant from information as to business expenses set out in a summary schedule provided by the respondent.

[53] The Commission investigator identified the lack of any detail for the groups into which the respondent had broken down the expenditures and the lack of any payment dates for the claimed expenditures made it difficult to follow or look to see where amounts might be in bank records or the general ledger for the business.

[54] The Commission investigator, however, did point to some groupings where she was able to conclude, through examination of bank and other records, that the payments claimed by the respondent to have been paid using cash withdrawn from the personal bank account had not come from the $972,700 identified as cash withdrawals from the personal account. These included payments of interest to two of the 13 investors made by cheque or draft out of the business account, bank charges taken directly from the personal bank account by the bank, and payments to the Canada Revenue Agency paid by cheques drawn on the business and personal bank accounts.

[55] We have reviewed the respondent's report to creditors and relevant bank and other records and agree with the Commission investigator that the above payments were not paid from the $972,700 in cash withdrawals from the personal bank account despite the respondent's claim that they had been paid from the cash withdrawals.

[56] We have also been able to identify additional payments claimed by the respondent as having been paid from the $972,700 in cash withdrawals that, in fact, were paid from other sources. These include interest payments to some other investors and other lenders made by cheque or draft out of the business or personal bank accounts, payments on credit cards that the investigator separately accounted for and did not include in the $972,700 of cash withdrawals, and payments for a vehicle lease, maintenance and gas that the investigator separately accounted for and did not include in the $972,700 of cash withdrawals.

[57] The respondent's report to creditors also contains obvious errors such as attributing the source of the cash withdrawals to the business account rather than the personal account as established by bank records and asserting that $198,875 was paid in interest income to a number of investors and other lenders when the amounts listed only add up to $155,325 and most of that amount was clearly not paid by cash withdrawals but by cheques and drafts drawn on the business or personal bank accounts.

[58] We conclude the respondent's report to creditors cannot be relied on with respect to the use made by the respondent of the $972,700 she withdrew in cash from her personal account. It is lacking in sufficient detail and is replete with obvious errors and double counting of expenditures that can be identified from bank and other records as having not been paid from the $972,700 in cash withdrawals from the personal bank account. Therefore, we give the respondent's report to creditors no weight.

III. Applicable Law

Standard of Proof

[59] 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.

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

Circumstantial Evidence

[61] In *Brenner (Re)*, 2014 BCSECCOM 292 at paragraph 34, citing *De Gouveia (Re)*, 2013 ABASC 106, the Commission stated:

> The proof of contraventions of the Act may be established by direct evidence or by circumstantial evidence. A fact is established by circumstantial evidence when the trier of fact infers a fact in issue the existence of which is a deduction that is logically and reasonably drawn from a proved fact or group of facts. Inferences of fact may be drawn from the totality of the evidence.

Security

[62] Section 1(1) of the Act defines security to include, among other things, the following:

> …
> (d) a bond, debenture, note or other evidence of indebtedness, …
> (l) an investment contract…

[63] In *Re: FS Financial Strategies*, 2017 BCSECCOM 238, the Commission set out the analysis to be undertaken to determine whether a loan arrangement is a "security" under the Act.

[64] That case involved written loan agreements which the panel found would clearly qualify as "evidence of indebtedness" on a plain reading of the definition of "security". However, the panel did not find that to be determinative. The panel stated (at paragraphs 27 and 28):

> However, not all debtor/creditor arrangements have been found to give rise to "securities" under the Act… Loan arrangements (whether called notes, loan agreements, etc.) can arise in a wide spectrum of transactions, from arrangements that are principally

> investments in nature (which transaction would fall within the definition of "security") to those which serve a specific commercial purpose or support a specific commercial transaction (which transaction is less likely to fall within the jurisdiction of the Act).

[65] The panel found that there is a rebuttable presumption that loan arrangements are either notes or "evidences of indebtedness" within the definition of "security" and a purposive analysis is required to determine the issue. It adopted the approach set out in the United States Supreme Court decision in *Reves v. Ernst & Young*, 494 U.S. 56 (1990). This approach was applied by the British Columbia Court of Appeal in *British Columbia (Securities Commission) v. Gill*, 2003 BCCA 169 in determining whether the loan agreements in that case were "evidences of indebtedness" within the definition of "security".

[66] The panel in *FS Financial Strategies* listed the four factors considered by the court in *Reves* as relevant in determining whether an instrument is a security (at paragraph 32):

> a) the motivation that would prompt a reasonable seller and buyer to enter the transaction: if the seller's purpose is to raise money for general business purposes and the buyer's purpose is to profit from the returns the instrument is expected to generate, the instrument is likely a security;
> b) the intended distribution of the instrument: if it is one in which there will be "common trading for speculation or investment" it is likely a security;
> c) the reasonable expectations of the investing public: the more the public expects that an instrument will be a security and thereby regulated by the securities laws, the more likely it is a security; and
> d) the existence of another regulatory regime: if there is no other regulatory regime that significantly reduces the risk of the instrument, thereby rendering securities regulation necessary, the more likely it is a security.

[67] In considering the first factor, the panel cited the following passage from *Reves*:

> First, we examine the transaction to assess the motivations that would prompt a reasonable seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security". If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties or to advance some other commercial or consumer purpose,…the note is less sensibly described as a "security". [Emphasis added]

[68] Common law has developed a definition of an investment contract as an investment of money in a common enterprise with profits to come from the efforts of others. (See *SEC v. W.J. Howey Co.* 328 U.S. 293 (1946), *SEC v. Glenn W. Turner Enterprises, Inc.* 474 F. 2d 476 (1973), and *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario Securities Commission*, [1978] 2 SCR 112.)

[69] While *Howey* referred to "profits to come solely from the efforts of others", in *Pacific Coast Coin Exchange* the court adopted "a more realistic test" and also considered the meaning of "common enterprise", stating at page 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.* and to *SEC v. Glenn W. Turner Enterprises, Inc.* 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.

[70] Substance rather than form is the governing factor in determining what constitutes a security. The Act is remedial in nature and is to be construed broadly and read in the context of the economic realities to which it is addressed. (See *British Columbia (Securities Commission) v. Gill* 2003 BCCA 169, paras 45 to 50 and *Pacific Coast Coin Exchange* at page 127.)

Fraud

[71] Section 57(b) of the Act says:

> 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

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

IV. Analysis and Findings

A. Conduct relating to securities

Promissory notes and "private investment" documents for loans made in relevant period

[73] After considering the analysis outlined in *FS Financial Strategies,* we find the promissory notes and "private investment" documents are notes or other evidence of indebtedness, as well as investment contracts, and are therefore securities issued by the respondent in return for the loan of $1,518,750 to her sole proprietorship LZWM. Further, the respondent's solicitation of these loans, her receipt and deposit of these funds into the business account and the issue of the promissory notes and "private investment" documents to the investors all constitute "conduct relating to securities" as contemplated in section 57 of the Act.

$451,000 paid by RK in relevant period not documented by promissory notes or "private investment" documents

[74] We have concluded the first two payments of $185,000 and $115,000 were made by RK to obtain an interest in the respondent's business. They were RK's "buy-in" to a business that the respondent had presented to her as being a successful growing business continually seeking new clients to invest in a variety of investment and insurance products thereby earning commissions and fees for the business. As such, the total investment of $300,000 in two instalments in the respondent's business, LZWM, was an investment in a common enterprise with the profits to come primarily from the efforts of the respondent. Thus, this $300,000 investment by RK is an investment contract and therefore a security. The respondent's efforts to raise this capital and her receipt and deposit of these funds into the business account are all "conduct relating to securities".

[75] The next five RK payments totaling $147,000 (short term loans) were loans to keep the respondent's business going. RK said that she made these payments at the request of the respondent who said she was short on money for payroll, for rent "or whatever". These loans were to be repaid as soon as the respondent's cash flow resumed. RK couldn't recall whether she was to be paid interest on these loans. She said she believed that was the understanding but that, as the loans were supposed to be repaid quickly, interest "wasn't so much of a big deal". The only evidence that the advance of funds by RK was a loan transaction was RK's statements in her voluntary interview.

[76] The executive director submits that the short term loans are either "evidences of indebtedness" or "investment contracts" within the definition of "security".

[77] We need to consider how these loans fit within the analysis outlined in *FS Financial Securities*. Turning to the first factor, the purpose of these loans was clearly to correct for the respondent's short term cash flow difficulties. This is a type of transaction specifically identified in *Reves* as unlikely to constitute a security. Additionally, it is unlikely that RK's motivation in advancing the funds was to profit from returns on these loans, given her uncertainty regarding whether interest was payable and her dismissive comment about the amount of interest she would receive even if interest were payable.

[78] Analysis of two other factors in *FS Financial Securities* also contributes to the conclusion that the short term loans are not "securities". RK was the sole lender in these transactions and, given lack of documentation and the uncertainty regarding the terms of the short term loans, there was no potential for "common trading for speculation or investment". Also, given the foregoing and the other circumstances of the short term loans, it is unlikely RK had any expectation that these loans were securities regulated by the securities market.

[79] As to the fourth factor in *FS Financial Securities*, there is no other regulatory regime that would significantly reduce the risk related to the short term loans. However, given our conclusions in the analysis of the other factors, this factor alone is not sufficient in the current circumstances to find that the short term loans are "securities".

[80] For a transaction to be an investment contract, there must be an investment, in a common enterprise, with an intention to profit. Our finding that it is unlikely that RK's purpose in advancing the short term loans was tied to an expectation of profit from returns on the loans, means that the short term loans are not investment contracts.

[81] We find that the short term loans are not "securities" within the Act. Accordingly, we exclude the $147,000 in short term loans from the total amount invested by the 13 investors in respect of the alleged fraud.

[82] The eighth and final RK payment of $4,000 was identified by RK as a personal loan to the respondent both in the spreadsheet RK prepared and brought to her voluntary interview and in her statements during the interview. There is no evidence to the contrary. It is not possible on the evidence before us to conclude that this payment involved "conduct relating to securities". We exclude this payment from the total amount invested by the 13 investors in respect of the alleged fraud.

$20,000 paid by KL in relevant period not documented by promissory notes or "private investment" documents

[83] With respect to the two payments made by KL to LZWM totaling $20,000, the only evidence we have as to these payments is that they were loans in relation to a land purchase in Arizona. Without more evidence, we are unable to conclude that these payments, and the circumstances surrounding them, constitute "conduct relating to securities". We exclude these payments from the total amount invested by the 13 investors in respect of the alleged fraud.

[84] We therefore find the respondent engaged in conduct relating to securities during the relevant period in respect of loans to and investments in the respondent's sole proprietorship LZWM by the 13 investors totaling $1,818,750.

B. Prohibited Act

[85] The executive director submits that the respondent committed acts of deceit when she falsely told the investors their investments in her sole proprietorship would be used for "business operations" and to grow her successful business.

[86] More specifically, in the notice of hearing the executive director alleges:

> 6. During the Relevant Period, Nickford transferred approximately $1.3 million of investor money from her business account to her personal account. She withdrew these funds from her personal account to pay for her personal expenses, including food, clothing and rent payments. Nickford also withdrew a total of approximately $973,000 in cash from her personal account, using some or all of it, to gamble at casinos in the Vancouver area.

[87] Since the allegation concerns the transfer of investor funds from the respondent's business bank account into her personal bank account, we must first determine the amount of investor funds transferred to the personal account. The difficulty in doing so arises from the fact that the total amount of funds on hand and deposited into the business bank account during the relevant period of $2,469,125 exceeds the amount of $1,818,750 we have determined to be the amount invested by the 13 investors in securities during the relevant period.

[88] The Commission investigator's analysis does not trace the investors' funds with respect to the $1,273,468 transferred from the business account to the personal account and the executive director's argument is not helpful in making the determination.

[89] Taking the approach most favourable to the respondent, we calculate that the total amount in the business account of $2,469,125, less $1,818,750 invested by the 13 investors, leaves $650,375 of funds that could have come from sources other than investor funds. As a result, $623,093 of the funds transferred to the personal account ($1,273,468 total transferred to the personal account, less $650,375 of funds from sources other than investor funds) **must** have come from investor funds. While more may have come from investor funds and less from other funds, the executive director has proved that at least $623,093 of investor funds was transferred to the respondent's personal account.

[90] Turning to the personal bank account, we need to determine the amount of investor funds spent on personal expenses.

[91] Again, the total funds on hand and deposited into the personal account during the relevant period of $1,421,904 exceed the $623,093 we have determined must be investor funds in the personal account. This leaves $798,811 as the maximum funds available in the personal account that were not investor funds.

[92] This leads to the next issue - for what purposes did the respondent use the $623,093 of investor funds that must have been transferred to the personal bank account.

[93] The onus is on the executive director to prove which expenditures were made from the personal bank account for purposes other than the business operations of LZWM and the growth of LZWM's business and that such expenditures were made from the $623,093 of investor funds transferred to the personal account.

[94] The respondent argues that the personal account was used for both business and personal expenses.

[95] Reviewing the expenditures from the personal bank account set out in the source and use of funds statements prepared by the Commission investigator, we conclude the executive director has proved the following expenditures totaling $144,252 were spent for purposes other than the business operations of LZWM and the growth of the LZWM business: personal loan payments, identifiable personal expenses, and cash withdrawals in Las Vegas and at local casinos as well as payments to local casinos.

[96] The Commission investigator has categorized a total of $180,547 was spent from the personal account for the following types of expenses: business, investor payments and transfers to the business account. These all appear to be business-related expenses or payments and we conclude they are not personal expenses.

[97] With the exception of the cash withdrawals discussed separately below, other expenses from the personal account as categorized by the Commission investigator in the source and use of funds statement for the personal account are either unknown as to purpose or fall in categories that, without more detail, could be either personal or business in nature. Accordingly, the executive director has failed to prove they are personal expenses.

[98] As for the cash withdrawals of $972,700 from the respondent's personal bank account, the executive director alleges that some or all of the $972,700 was spent on gambling and urges us to make that inference from the circumstantial evidence concerning the extent of the respondent's gambling.

[99] The respondent seemingly argues that she spent only $30,000 on gambling over a three year period based on her submission that when she first met the Trustee in bankruptcy, he told her that was what it looked like after going through her financial statements and bank accounts. The respondent, who did not testify, has entered no evidence in this regard.

[100] We agree with the executive director's submissions that there is no evidence the Trustee in bankruptcy came to any conclusions about the scope of the respondent's gambling over the relevant period and that in any event the evidence introduced at the hearing with respect to the respondent's gambling, shows her gambling to be much more extensive than she argues. That evidence shows the respondent had a serious gambling addiction that was untreated at the time. She was considered by casino staff to be one of the highest players, an impression corroborated by the cash reward payments she earned and her LCT reported winnings.

[101] The business expenses paid from the business bank account and the personal bank account identified by the Commission investigator total $516,418 during the relevant period of 15 months and are in line with the total business expenses of $417,247 claimed in the 2009 income tax return of the respondent for that 12 month period.

[102] What remains are the $972,700 in cash withdrawals the respondent made from her personal account during the relevant period, for which there are no receipts. The panel

does not accept that the $972,700, moved from a business account to a personal account, withdrawn in cash and subsequently spent on undocumented things, can be characterized as "legitimate business expenses". The only evidence before the panel as to what these cash withdrawals may have been spent on is the respondent's 2012 report to creditors that is rife with errors and wholly unreliable and we give it no weight. Further, it is clear from the evidence that during the relevant period, the respondent spent a significant amount of cash gambling at casinos. We therefore find that the entirety of the $972,700 that was withdrawn in cash from the personal bank account was not expended on legitimate business expenses; rather it was used for personal expenditures, some of which included gambling.

[103] Adding together the previously identified personal expenditures of $144,252 and the $972,700 in cash withdrawals, we conclude the respondent spent a total of $1,116,952 on personal expenses, including gambling, from the personal bank account during the relevant period. As there was at most $798,811 of non-investor funds available in the personal account to pay these personal expenditures, there was a shortfall of at least $318,141 that would have had to be paid from investor funds.

[104] We therefore conclude that at least $318,141 of the investor funds were spent by the respondent on personal expenses and not for the operations or growth of the respondent's business, LZWM.

[105] By falsely telling the investors their funds would be spent on the business operations and growth of LZWM and instead spending at least $318,141 of the funds she raised from the investors on personal expenses, the respondent committed prohibited acts of deceit.

C. Deprivation

[106] The respondent's taking of the 13 investors' funds caused deprivation. The investors' funds were put at risk when all the funds were not used for the purposes of the respondent's business, LZWM, as intended. With the subsequent bankruptcy of the respondent and her business, the investors' funds were lost.

D. Subjective Knowledge

[107] As the person who solicited the funds from investors and controlled both the personal bank account and the business bank account, the respondent had subjective knowledge of the prohibited acts. She told the investors their funds would be used for the business operations and growth of her business, LZWM; she then transferred investor funds to her personal account and diverted some of those funds for personal use.

[108] The respondent knew that by diverting some of the investors' funds for her personal use she was depriving her business of funds needed for its operations. In doing so, she knew she was putting the investors' pecuniary interests at risk, and that as a consequence her business could fail and the investors could lose the funds they had invested.

[109] The respondent submits that she never intended to deceive or hurt the investors and that it was FICOM's actions in freezing her bank accounts that prevented her from continuing to run her business and resulted in her bankruptcy.

[110] We agree with the executive director's submission that the respondent's intention is not relevant to liability. As stated in *Theroux*, "Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons."

[111] Whether or not the respondent intended to deceive or hurt the investors, the logical consequence of her actions was to put the investors' funds at risk and ultimately those actions resulted in the investors losing all their funds.

[112] The respondent also submits that from 2008 to the beginning of 2010 she was suffering from mental and physical illness and that her "mental illness impacted how I dealt with the challenges in my life and my business". She argues that had she been diagnosed with the mental illness prior to 2008, "I would have been well enough to handle my business, I would not have gambled, and I would have continued to pay back my investors until they were paid back in full."

[113] We have considered the respondent's submission as raising the defence of this mental illness preventing her from forming the requisite mental intent (subjective knowledge of the acts of deceit and deprivation) to have committed fraud, even though she does not actually make this argument.

[114] The executive director submits there is an insufficient evidentiary nexus between the respondent's diagnosis, which occurred after the demise of her business and the discovery of the loss of the investors' funds, and the misconduct described in the notice of hearing. The executive director also argues there is no compelling or verifiable evidence that the respondent was suffering the mental disorder at the relevant time or that the nature of the mental disorder, if present at the relevant time, ought to negate a finding that she committed acts of deceit with respect to the investors.

[115] The evidence tendered by the respondent in support of her submission consists of a document entitled "Lynne Nickford's Report" entered by the respondent as evidence during the liability hearing phase of this matter, as well as copies of medical reports and letters filed in this proceeding and the bankruptcy proceeding.

[116] The "Lynne Nickford's Report" attributes the respondent's gambling addiction to this undiagnosed mental illness. This unsworn document states that it was assembled by the respondent's daughter according to the respondent's wishes. It is not even the respondent's own unsworn statement, but rather something assembled by her daughter. Given its nature we give this document little weight.

[117] The most relevant medical evidence as it is closest in time to the events during the relevant period are the initial consultation and follow-up reports of the treating psychiatrist from June through September 2010. We were not provided with any earlier medical reports or letters. Other letters provided by the respondent provide no additional information, or are not helpful as they are too removed in time from the relevant period.

[118] The medical evidence does not establish the respondent was suffering from the alleged mental illness during the relevant period. Nor does the medical evidence establish that if the respondent had been suffering from the alleged mental illness during the relevant period, that mental illness would have rendered her incapable of forming the requisite mental intent (subjective knowledge of the acts of deceit and deprivation) of fraud.

V. Conclusion

[119] We find the respondent perpetrated fraud on the 13 investors in the aggregate amount of at least $318,141, contrary to section 57(b) of the Act.

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

By September 11, 2017	The executive director delivers submissions to the respondent and to the secretary to the Commission.
By September 25, 2017	The respondent delivers her 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 October 2, 2017	The executive director delivers reply submissions (if any) to the respondent and to the secretary to the Commission.

August 18, 2017

For the Commission

Suzanne K. Wiltshire
Commissioner

Judith Downes
Commissioner

Don Rowlatt
Commissioner