

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

Citation: Re Donald Bergman and others, 2021 BCSECCOM 302 Date: 20210728

All Canadian Investment Corporation and Donald Bergman

Panel	Judith Downes Gordon Johnson Deborah Abbey	Commissioner Vice Chair Commissioner
Hearing dates	March 8, 9, 10, 11, 12 and May 14, 2021	
Submissions Completed	May 14, 2021	
Date of Findings	July 28, 2021	
Appearing		
Deborah W. Flood Beverly Ma	For the Executive Director	
Donald Bergman	For himself	
Jeremy West	For All Canadian Investment Corporation	

Findings

I. Introduction

- [1] This is the liability portion of a hearing under sections 161, 162 and 174 of the *Securities Act*, RSBC1996, c. 418 (Act).
- [2] In this proceeding the executive director alleges that All Canadian Investment Corporation (ACIC) contravened section 168.1(1)(b) of the Act by making false or misleading statements in documents required to be filed under the Act and section 50(1)(d) of the Act by making misrepresentations in an Offering Memorandum dated January 2014, a second Offering Memorandum dated February 2015 and a third Offering Memorandum dated June 2015 (collectively, the OMs). The executive director also alleges that Donald Bergman is liable under section 168.2(1) of the Act for authorizing, permitting or acquiescing in ACIC's contraventions.

II. Factual Background

- [3] ACIC was a mortgage investment company that was in the business of providing loans to owners and developers of single- and multi-family residential, commercial, office and industrial real estate properties secured by mortgages of the property. It is undisputed that Bergman was its founder, sole director, president and the individual with sole authority for all decisions of ACIC which are relevant to this proceeding.

- [4] From January 2014 to December 2015, ACIC raised over \$1.602 million from 56 investors in reliance on the offering memorandum exemption in section 2.0 of National Instrument 45-106 – *Prospectus Exemptions*. It is a condition of this exemption that offering memorandums are filed with the Commission.
- [5] Bergman prepared the OMs. He also approved the OMs in his capacity as ACIC’s director and signed the required certificates in the OMs that they did not contain a misrepresentation. He was responsible for filing the OMs on behalf of ACIC with the Commission.
- [6] Pursuant to the OMs, ACIC offered investors units (Units) comprising one preferred share and one warrant. The preferred shareholders were to receive quarterly dividends on their investment. ACIC filed all of the OMs with the Commission.
- [7] ACIC promoted its offering to investors by word of mouth and newspaper ads. ACIC sales representatives met with investors on behalf of ACIC. Investors received the relevant offering memorandum and other documents from sales representatives and some investors also received an executive summary.
- [8] In the OMs, ACIC described its loan portfolio as consisting of mortgage loans and unsecured investments. Each of the OMs contained the following representation (the Registration Representation) about ACIC’s mortgage loans:

Investment Guidelines – Mortgage Loans

All Mortgage Loans will be made pursuant to the following investment guidelines that have been established by the Company:

- (a) the Company will make loans so as to maintain its status as a “mortgage investment corporation” under the Tax Act;
 - (b) all Mortgage Loans will be secured in favour of the Company or its agent, either as sole mortgagee or co-mortgagee, and each Mortgage will be registered in the appropriate land title office as a charge against the real property subject to the Mortgage...
- [9] Item (i) of the investment guidelines made it clear that the Registration Representation in item (b) of the investment guidelines was not one of the guidelines that could be waived or deviated from by ACIC management:
- (i) the Company’s director may waive the provisions of paragraphs (e), (f) or (g) above in relation to any Mortgage Loan, but will not otherwise deviate from the investment guidelines set out above.
- [10] Each OM contained schedules summarizing ACIC’s mortgage portfolio as of the date of each OM. The mortgage portfolio schedules were included under the heading “2.7

Material Agreements.” The schedules included a priority ranking of each of ACIC’s mortgages. The schedules ranked all of ACIC’s mortgages in either first or second priority (the Priority Representation).

[11] These tables state:

[12] From the January 21, 2014 OM:

2.7 Material Agreements

a) *Mortgage Portfolio Schedule as at January 21, 2014*

Property Type	Location	Priority Ranking	Interest Rate	Payment Terms	Due Date	Balance	Property Value	LTV
Residential	Sunshine Coast, BC	1st	12%	IO	On demand	\$ 2,700,000	\$ 3,590,000	76.0%
Hotel/Motel	Sunshine Coast, BC	1st	6%	IO	1-June-14	\$1,159,155	\$1,540,000	75.3%
Residential	Lower Mainland, BC	2nd	12%	IO	30-Apr-14	\$1,403,972	\$2 550,000	63.8%
Commercial	Lower Mainland, BC	1st	10%	IO	On demand	\$400,000	\$5,700,000	35.1%
Residential	Vancouver Island, BC	2nd	12%	IO	30-Nov-14	\$600,000	\$2,324,000	77.8%
Residential	Lower Mainland, BC	2nd	12%	IO	31-May-15	\$2,819,543	\$9,450,000	73.2%
Residential	Sunshine Coast, BC	1st	12%	IO	On demand	\$936,786	\$2,835,000	33.0%
Hotel/Motel	Northern AB	1st	12%	IO	10-Aug-14	\$290,000	\$575,000	54.1%
Residential	Lower Mainland, BC	2nd	12%	IO	On demand	\$6,846,494	\$10,100,000	87.1%
Commercial	Lower Mainland, BC	2nd	65%	IO	1-June-14	\$1,232,180	\$2,487,000	85.7%
Residential	Lower Mainland, BC	2nd	12%	IO	30-Apr-14	\$1,074,773	\$4,044,000	81.0%
Residential	Lower Mainland, BC	2nd	12%	IO	30-Mar-14	\$1,650,180	\$9,050,000	86.8%
Total Balance						\$ 21,113,083		

[13] From the February 12, 2015 OM:

2.7 Material Agreements

a) *Mortgage Portfolio Schedule as at February 12, 2015*

Property Type	Location	Priority Ranking	Interest Rate	Payment Terms	Due Date	Balance	Property Value	LTV
Residential	Sunshine Coast, BC	1st	12%	IO	On demand	\$ 2,700,000	\$ 3,364,000	80.0%
Hotel/Motel	Sunshine Coast, BC	1st	6%	IO	1-June-15	\$1,159,155	\$1,540,000	75.3%

Residential	Lower Mainland, BC	2nd	12%	IO	On demand	\$933,267	\$2 550,000	67.9%
Residential	Vancouver Island, BC	2nd	12%	IO	30-Nov-16	\$600,000	\$2,190,000	82.2%
Residential	Lower Mainland, BC	2nd	12%	IO	31-May-15	\$8,628,863	\$47,000,000	80.3%
Hotel/Motel	Northern AB	1st	12%	IO	10-Aug-16	\$290,000	\$575,000	54.1%
Residential	Lower Mainland, BC	2nd	12%	IO	On demand	\$5,690,892	\$18,900,000	75.8%
Commercial	Lower Mainland, BC	2nd	12%	IO	1-June-15	\$798,000	\$2,700,000	74.0%
Residential	Lower Mainland, BC	2nd	12%	IO	30-Apr-16	\$946,000	\$3,730,000	89.7%
Residential	Lower Mainland, BC	2nd	12%	IO	30-Mar-15	\$2,010,037	\$9,850,000	87.4%
Total Balance						\$ 23,996,214		

[14] From the June 22, 2015 OM:

2.7 Material Agreements

a) *Mortgage Portfolio Schedule as at June 1, 2015*

Property Type	Location	Priority Ranking	Interest Rate	Payment Terms	Due Date	Balance	Property Value	LTV
Residential	Sunshine Coast, BC	1st	12%	IO	On demand	\$ 2,700,000	\$ 3,364,000	80.0%
Hotel/Motel	Sunshine Coast, BC	1st	6%	IO	On Demand	\$1,159,155	\$1,540,000	75.3%
Residential	Lower Mainland, BC	2nd	12%	IO	On Demand	\$973,000	\$2 550,000	67.9%
Residential	Vancouver Island, BC	2nd	12%	IO	30-Nov-16	\$600,000	\$2,190,000	82.2%
Residential	Lower Mainland, BC	2nd	12%	IO	31-Mar-17	\$8,813,863	\$47,000,000	80.3%
Residential	Estevan, Sask	1st	12%	IO	30-Sept-16	\$360,000	\$480,000	75%
Hotel/Motel	Northern AB	1st	12%	IO	10-Aug-16	\$290,000	\$575,000	54.1%
Residential	Lower Mainland, BC	2nd	12%	IO	On demand	\$5,690,892	\$18,900,000	75.8%
Commercial	Lower Mainland, BC	2nd	12%	IO	1-June-6	\$708,000	\$2,700,000	74.0%
Residential	Lower Mainland, BC	2nd	12%	IO	30-Apr-16	\$946,000	\$3,730,000	89.7%
Residential	Lower Mainland, BC	2nd	12%	IO	30-Mar-16	\$2,140,037	\$9,850,000	87.4%
Total Balance						\$ 24,380,947		

- [15] Starting in 2015, dividends to ACIC investors dwindled. Since the start of 2017, ACIC has not paid any dividends. As a result, the majority of investors sent redemption notices to ACIC. ACIC was unable to meet the demands of its creditors or satisfy the redemption requests.
- [16] In November 2017, ACIC petitioned the Supreme Court of British Columbia seeking a stay of proceedings to implement a wind down of the company and develop a plan of arrangement under the *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36 (CCAA). The court consented and appointed a monitor to assist ACIC in the liquidation of ACIC's assets and the winding up of ACIC's business. ACIC remains under the protection of the CCAA and is in the final stages of liquidating its assets.
- [17] By court order in the CCAA proceedings dated November 9, 2018, Bergman's power and authority with respect to ACIC's business and property, by virtue of being a director, officer or in management, was suspended and ACIC became a company under the direction of the monitor.
- [18] As ACIC's financial difficulties deepened it became apparent that there were questions about the accuracy of some of the statements in the OMs. It emerged that some of the mortgages had lower priorities than had been identified in the schedules to the OMs and that some of the mortgages were not registered at all.
- [19] The monitor, acting under the supervision of the British Columbia Supreme Court, has conducted an orderly wind up of the business of ACIC. The final net recovery to preferred shareholders was not clear as of the date of the hearing in this matter because one final property remained unsold at that time. The monitor provided an affidavit estimating that total recoveries for preferred shareholders would fall in the range of 3.88% and 18.05%. This implies that losses for preferred shareholders will fall into the range of 81.95% and 96.12%.
- [20] The Notice of Hearing in this proceeding was issued January 20, 2020 (2020 BCSECCOM 22). ACIC, acting with the approval of the British Columbia Supreme Court which had been applied for by ACIC's monitor, entered into an agreed statement of facts with the executive director dated March 21, 2021. Bergman did not enter into an agreed statement of facts.
- [21] Bergman represented himself at the evidentiary hearing and during the presentation of submissions regarding liability. After confirming the admission into evidence of the agreed statement of facts, counsel for ACIC left the hearing room with leave of the panel. ACIC did not participate further in this proceeding.
- [22] The executive director called seven witnesses: a staff investigator, four investor witnesses and a former ACIC employee who was a sales representative for ACIC. The executive director also tendered an expert witness. The panel accepted the expert's qualifications. The executive director also provided an affidavit from ACIC's court-appointed monitor.

[23] We need not summarize the evidence of these witnesses except to note that the executive director’s expert witness explained why it is industry practice for managers of mortgage investment companies to register all mortgages at the time of funding and to maintain and enforce that registration because the fact of registration provides significant benefits and protections to mortgage lenders.

III. Applicable Law

A. Standard of Proof

[24] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), 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.

[25] The Court also held that the evidence “must always be sufficiently clear, convincing and cogent” to satisfy the balance of probabilities test. The executive director does not have to prove each evidentiary element on a balance of probabilities. The totality of the evidence must establish that the events at issue are more likely than not to have occurred in order to satisfy the balance of probabilities test.

B. Contraventions Alleged and Materiality

(i) False or Misleading Statements Prohibited

[26] All references are to statutory provisions in effect at the time the Notice of Hearing was issued.

[27] Section 168.1(1)(b) of the Act states:

A person must not

(b) make a statement or provide information in any record required to be filed, provided, delivered or sent under this Act that in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading.

[28] Section 168.1(2) provides that a person does not contravene subsection (1) if the person:

- a) did not know, and
- b) in the exercise of reasonable diligence, could not have known that the statement or information was false or misleading.

[29] Whether a statement is material involves two aspects. First, it requires an assessment of how far the statement departs from the truth. This requires a comparison of the information that was given, to the facts that were known to the person giving the

information at the time the person gave it. Second, it measures the significance of the information that is false or misleading.

(ii) Misrepresentation

[30] Section 50(1)(d) of the Act stated, in part:

A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not do any of the following:

(d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation.

[31] Section 1 of the Act defines “security” to include:

- (a) a document, instrument or writing commonly known as a security,
- ...
- (c) a document evidencing an option, subscription or other interest in or to a security,
- (d) a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than
 - (i) a contract of insurance issued by an insurer, and
 - (ii) an evidence of deposit issued by a savings institution,
- ...

[32] Section 1 of the Act defines “trade” to include “a disposition of a security for valuable consideration” and “any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of” a disposition of a security for valuable consideration.

[33] Section 1 of the Act defines “misrepresentation” as:

- a) an untrue statement of a material fact, or
- b) an omission to state a material fact that is
 - (i) required to be stated, or
 - (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made.

[34] “Material fact” is defined in section 1 of the Act as follows:

When used in relation to securities issued or proposed to be issued, a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

[35] The test for materiality under section 50(1)(d) is an objective market impact test. In *Re Canaco Resources Inc.*, 2013 BCSECCOM 310, this Commission held at paragraphs 84 and 92:

The reasonableness of market impact is assessed from the point of view of the reasonable investor, that is, would a reasonable investor expect that the market

price or value of the securities would be affected by the fact or event?... The definitions of material fact and material change measure the impact on the “market price or value” of the issuer's securities. The implication is that “market price” and “value” can be affected differently by a given fact or event.

(iii) Materiality

- [36] As is explained below, the test for materiality in the context of the “material fact” analysis under section 50(1)(d) is very different from the test for materiality in the context of the “in a material respect” analysis under section 168.1(1).

(iv) Personal liability under section 168.2

- [37] 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.”
- [38] There have been numerous decisions that have considered the meaning of the terms “authorize, permit or acquiesce.” In sum, these decisions require that the respondent have the requisite knowledge of the corporate contraventions and the ability to influence the actions of the corporate entity through action or inaction.
- [39] In *Re Momentas Corp.*, 2006 ONSEC 15, the Ontario Securities Commission considered the meaning of “authorized, permitted or acquiesced” for a director or officer’s liability for the issuer’s non-compliance with the Act, and stated at paragraph 118:

Although these terms have been interpreted to include some form of knowledge or intention, the threshold for liability under section 122 and 129.2 is a low one as merely acquiescing the conduct or activity in question will satisfy the requirement of liability. The degree of knowledge of intention found in each of the terms “authorize”, “permit” and “acquiesce” varies significantly. “Acquiesce” means to agree or consent quietly without protest. “Permit” means to allow, consent, tolerate, given permission, particularly in writing. “Authorize” means to give official approval or permission, to give power or authority or to give justification.

IV. Positions of the Parties

- [40] The executive director takes the position that the key elements of its allegations are established by the agreed statement of facts, by certain admissions of Bergman and also by the documentary evidence and the testimony of witnesses who appeared during the hearing.
- [41] The executive director submits that both the Registration Representation and the Priority Representation are false.
- [42] The executive director submits that section 168.1(1)(b) applies to each representation because:

- a) ACIC made the representations in the OMs;
- b) the OMs were required to be filed under the Act; and
- c) the representations were, in a material respect and at the time and in light of the circumstances under which they were made, false or misleading.

[43] The executive director submits that section 50(1)(d) applies to each representation because:

- a) shares in ACIC were “securities” as defined under the Act;
- b) ACIC intended to effect trades in its securities when it relied upon the OMs to solicit investors, and entered into trades with investors; and
- c) the representations were untrue statements of material fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

[44] The executive director submits that the representations were material to both of the breaches alleged because:

- a) with respect to the section 50(1)(d) allegation, the representations meet the relevant objective market impact test; and
- b) with respect to the section 168.1(1)(b) allegation, the representations deviated significantly from the truth and were significant information.

[45] The executive director submits that Bergman is personally liable under section 168.2 for ACIC’s contravention of section 50(1)(d) because he:

- a) was the only decision maker of ACIC;
- b) controlled ACIC and its activities with respect to mortgage loan registration, priority, and cancellation; and
- c) was responsible for preparation, execution, filing and dissemination of the OMs containing the misrepresentations.

[46] The executive director submits that Bergman is personally liable under section 168.2 for ACIC’s contravention of section 168.1(1)(b) because:

- a) the directors and officers of a reporting issuer are ultimately responsible for ensuring the accuracy of records filed under the Act;

- b) as president and a director of ACIC, Bergman bore a high degree of responsibility for ensuring that the company filed its OMs and for ensuring the OMs did not contain false or misleading statements; and
- c) because Bergman was responsible for preparing and filing the OMs, and signed the certificate for each of the OMs, he had the required involvement necessary to ground a finding of liability under section 168.2.

[47] The executive director submits that the agreed statement of facts accepted by ACIC applies to Bergman because it forms the evidentiary basis for the first of two required findings for liability under section 168.2(1)(b) of the Act, contraventions of the Act by a corporate respondent. The second finding required to ground liability under section 168.2(1)(b), discussed below, is that Bergman authorized, permitted, or acquiesced in the alleged contraventions.

[48] Bergman disputes that the agreed statement of facts should apply to him. He notes that he challenges many of the facts which ACIC agreed to and he notes that ACIC's current representatives were not involved in the events in question.

[49] Regarding the accuracy of the Registration Representation and the Priority Representation, Bergman points to language in the OMs which makes it clear that ACIC was operating an active, ongoing mortgage investment business. Bergman notes that mortgage borrowers sometimes have issues, particularly during construction financing, and in such circumstances it is often in the financial interests of a lender to make special arrangements with borrowers. Those special arrangements can include allowing another mortgage to be registered ahead of ACIC's or even cancelling the registration of one of ACIC's mortgages. Bergman says that he agreed to special arrangements of these types from time to time because, based on his 30 years of experience in the mortgage lending business, that was in the best interests of ACIC at the time. Bergman says it was consistent with the OMs for him to take this approach because the OMs say that "each Mortgage will be registered", meaning initially registered at the time of loan underwriting, not that "each Mortgage will be registered and will be kept registered".

[50] Bergman also notes that in a small number of cases he made errors in the OMs in describing the priority of certain mortgages. Bergman seeks to explain those errors away as unintended oversights which are not material.

V. Analysis and Conclusions

[51] We find that the documentary and oral evidence presented on behalf of the executive director was sufficient to meet the standard of proof required. ACIC's formal admissions in the agreed statement of facts might be relied on to support a liability finding against ACIC regarding the allegations in the Notice of Hearing of contraventions of sections 50(1)(d) and 168.1(1)(b) but we find that such reliance is not necessary because the evidence tendered by the executive director independently supports the liability finding.

A. Materiality Generally

- [52] As noted above, the test for materiality in the “material fact” analysis under section 50(1)(d) is different from the test for materiality in the “in a material respect” analysis under section 168.1(1). We find that the executive director has met the required standard for materiality for each of ACIC’s two alleged breaches of the Act.
- [53] Under section 50(1)(d) the test for materiality is an objective market impact test. The question to be determined is whether the definition of a material fact as set out in section 1 of the Act has been met. That definition turns on whether the facts stated by ACIC would reasonably be expected to have a significant effect on the market price or value of ACIC’s preferred shares.
- [54] Under section 168.1(1)(b) the test for materiality has two parts. As stated in *Re Nuttall*, 2011 BCSECCOM 521 materiality is established based on the degree to which the information given is false or misleading in the sense of how far it departs from the truth. As noted in *Re CAAS*, 2017 BCSECCOM 296 there is another arm to the test which is focused on the significance of the information given.

B. Findings on Section 50(1)(d)

(i) Were the Units “securities”?

- [55] There was no dispute the Units are securities. We find they fall squarely within the definition of “security” as set out in section 1 of the Act.

(ii) Did ACIC intend to effect a trade in securities?

- [56] We find that the Registration Representation and the Priority Representation were made with the intent of effecting trades in the Units. Soliciting such trades was, without doubt, the primary purpose of the delivery of the OMs to investors.

(iii) Were the Registration Representation and the Priority Representation untrue?

- [57] We find that the Registration Representation and the Priority Representation were untrue statements.
- [58] The Registration Representation in the OMs stated that all mortgages “will be registered in the appropriate land title office...”. Many of ACIC’s mortgages were not registered as of the dates of the OMs or subsequently during the period of distribution of the Units. In particular, mortgages on the following properties were not registered at the dates indicated below:

Properties	Period not secured by a registered mortgage
Grant Manor	
PID 002-408-333	<ul style="list-style-type: none">February 14, 2013 onwards
Altezza	
PID 028-874-382	<ul style="list-style-type: none">January 9, 2014-November 18, 2014November 23, 2015 onwards

PID 028-874-391	<ul style="list-style-type: none"> • January 9, 2014-November 18, 2014 • November 23, 2015 onwards
Chisa	
PID 025-161-342	<ul style="list-style-type: none"> • May 16, 2014-November 18, 2014 • February 12, 2016 onwards
Beta	
PID 029-125-626	<ul style="list-style-type: none"> • March 10, 2014 onwards
Sperling	
PID 003-279-821	<ul style="list-style-type: none"> • April 3, 2014-November 18, 2014 • November 20, 2015 to April 12, 2018
PID 003-279-839	<ul style="list-style-type: none"> • April 3, 2014-November 18, 2014 • November 20, 2015 to April 12, 2018
Carleton	
PID 003-329-232	<ul style="list-style-type: none"> • March 31, 2016 onwards
PID 002-645-068	<ul style="list-style-type: none"> • May 10, 2016 onwards

[59] With respect to the Priority Representation, certain of the mortgages were lower in priority than stated in the OMs as of the date of the OMs and, in some cases, subsequently during the period of distribution of the Units. ACIC cancelled registration of six of the mortgage loans listed in the OMs and entered into priority agreements with other mortgagors. The result was loans that were unregistered or in lower priority than stated in the OMs.

(iv) Were the Registration Representation and the Priority Representation “material facts”?

[60] We find that the Registration Representation and the Priority Representation were “material facts”.

[61] There is no issue that the Registration Representation and the Priority Representation were material statements.

[62] The mortgage loans, which were the subject of these representations, were stated in the OMs to be material agreements.

[63] The two representations presented the mortgage loans to investors as investments secured by a registered interest against title to the properties subject to the loans to be held in first or second positions only. This would be material to an investor as the fact of registration provides the mortgage holder a level of security that an unregistered mortgage does not.

[64] Additionally, in practice, mortgages in first or second priority have a higher probability of being satisfied over mortgages in lower priority positions in foreclosure and sale situations.

- [65] The significance of the Registration Representation was highlighted by how ACIC treated this investment guideline. It was not included in the OMs in the list of investment guidelines which could be waived by management.
- [66] The significance of the Priority Representation was highlighted by the fact that ACIC included the priority ranking of its mortgage loans in the OMs which went to all investors and in its executive summary which went to some investors.
- [67] The only remaining issue is whether the fact that the Registration Representation and the Priority Representation were untrue had a significant effect on the value of the Units. We find that it did.
- [68] ACIC was a private issuer and there was no liquidity for its securities. As a result, the value of the ACIC preferred shares was primarily tied to dividends payable on those shares which was paid from ACIC's net income. By failing to register mortgage loans or entering into agreements to forgo registration priority, ACIC increased the risk that its net income would not be sufficient to pay dividends on or redeem the preferred shares.
- [69] The Registration Representation and the Priority Representation went to the heart of what a conservative investor was seeking, namely an investment with significant returns secured by registered interest in land in first or second priority. The falsity of these representations would affect the value an investor would attribute to the Units and the decision to invest.
- [70] We find that the respondents knew the Registration Representation and the Priority Representation were false. ACIC acted through Bergman as its president and sole director during the relevant period. Bergman's knowledge of the falsity of these representations was clear. He was responsible for preparing the OMs and signing off on them. He authorized the mortgage terms and registration and cancellation of the mortgage loans in issue.
- [71] Bergman's response to the allegations in the Notice of Hearing focuses on what he describes as the intent of the OM. Bergman argues that the circumstances of a mortgage borrower can change and sometimes it can be in the interest of a mortgage lender to take a flexible approach with a borrower. Sometimes the best strategy might be, as one example, to de-register a mortgage in order to allow a borrower to use the security of its property to obtain new funds in order to fund its operations. Bergman also references his significant experience in the mortgage lending business and the skill he has accumulated in that time.
- [72] Implicitly, Bergman is suggesting that investors are, in part, investing in his judgment in the management of ACIC's loan portfolio rather than an expectation that ACIC would take a strict approach in relying on the security and priority provided by registration. Bergman also notes that although the OMs reference the fact that ACIC would register its mortgages, the OMs do not say that ACIC would continue the registrations for any particular period of time. In the course of making this argument Bergman criticized the

executive director for not considering the language in question in the context of the entire OM.

- [73] Bergman suggests that there is little difference in the value of a registered mortgage and an unregistered mortgage as long as the managers of the mortgagor keep a close eye on the situation and are confident that the borrower will not allow other lenders to register charges against the mortgaged property.
- [74] There are several reasons why Bergman's arguments are without merit. First, a consideration of the larger context for the "each mortgage will be registered" language supports the position of the executive director and not the position of Bergman. The larger context in each of the OMs includes a listing of each of the mortgages held by ACIC and in each case the listing suggests that every one of ACIC's mortgages had been and remained registered. This would not send a message to any reasonable reader of the OMs that any registration of a mortgage might be transient. Second, item (i) of the investment guidelines set out in the OMs lists which elements of the investment guidelines might be waived by management. Item (b) is not listed, and this would not send a message to a reasonable reader of the OMs that the registrations ACIC committed to might be transient.
- [75] Further, although Bergman's belief was that investors were to some extent relying on his judgment in which mortgage registrations to cancel instead of relying on the registrations themselves to protect investment returns, an investment made on such a basis would be a fundamentally different type of investment from one offered in the OMs. Bergman's reading of the OMs and his interpretation of the expectations of investors reflects his own subjective beliefs and not a fair, objective reading of the relevant clause in the OMs in the context of those documents as a whole and in the context of the normal expectations of investors in a mortgage investment company. For this latter inference we rely in part on the evidence of the expert as described above.
- [76] We have also considered Bergman's submissions regarding the materiality of the misrepresentations as it relates to the value of ACIC's preferred shares and particularly his suggestion that his skill and experience managing a mortgage portfolio over time, together with the flexibility he needed to make special arrangements with mortgagors from time to time was valuable to investors. We recognize that Bergman's position should be assessed based upon the information which existed at the time and not by reference to the economic losses that preferred shareholders subsequently suffered. We find Bergman's arguments completely unconvincing. Bergman might have found some investors for the business of ACIC had he disclosed how he intended to run it. However, we find that the expert evidence tendered regarding the value of registering mortgages and retaining the priority created by registration is consistent with common sense and sound business practice. Investors in ACIC were led to believe that its affairs would be conducted in accordance with standard expectations and practices in the mortgage investment field. Any suggestion that they would have placed a similar value on ACIC preferred shares had they known otherwise is completely unconvincing.

[77] We conclude that all elements of the alleged contraventions related to section 50(1)(d) have been established on the required standard.

C. Findings on Section 168.1(1)

[78] With respect to section 168.1(1), there is no issue that the Registration Representation and the Priority Representation were statements contained in the OMs which were required to be filed under the Act pursuant to section 2.9 of National Instrument 45-106.

[79] The only issue is whether the Registration Representation and the Priority Representation were, in a material respect and at the time and in light of the circumstances under which they were made, false and misleading.

[80] We find the Registration Representation was false and misleading. This representation stated the mortgage loans would be registered in the appropriate land title office as a charge against the real property subject to the mortgage. As outlined above, the evidence establishes that six of ACIC's mortgages were not so registered on various dates including the dates of the OMs or the dates of distributions of the Units.

[81] We also find the Priority Representation was false and misleading. This representation was that the ACIC mortgage loans would be registered against properties subject to the mortgage loans in first or second priority. The land title records, the evidence of the investigator who assembled those records and the admissions of Bergman all establish that the ACIC mortgages on the Altezza, Sperling, Carleton and Daniel Point properties had priorities lower than those listed in the OMs. This was a misrepresentation which for the Altezza property existed in all three OMs, for the Sperling property existed in the January 2014 OM and for the Carleton and Daniel Point properties existed in the February 2015 and June 2015 OMs. The ACIC mortgage on Grant Manor was cancelled prior to the January 2014 OM and we have found that there was a misrepresentation made about the registration status of that property. However we do not have determinative evidence that there were intervening charges such that the priority had a lower priority than was represented in any of the OMs. As a result we do not make a finding that a false Priority Representation was made regarding the Grant Manor property.

[82] Of the four properties which did not have first or second mortgages, Bergman explains three as errors. For the others Bergman has rather complicated arguments which essentially amount to his assertion that although the land title office records indicate that ACIC's mortgages were not in first or second position, there are good explanations in that in the course of the relevant transactions ACIC was either voluntarily giving up some priority in return for a loan from a lender to ACIC or more than one of the loans in priority to ACIC's loans was from the same lender. None of those arguments are compelling. We are not inquiring into the motivation for ACIC's decisions for changing priority, we are inquiring into the accuracy of ACIC's statements in the OMs.

[83] The degree of divergence between how ACIC described in the Registration Representation and the Priority Representation whether mortgages would be registered,

were registered and had priority and the reality was substantial. This divergence between what was stated in the OMs and the truth related to a subject of fundamental importance to investors in making their investment decision as these representations went to the safety and security of their investment. Further, ACIC was fully aware of how it diverged from the statements set out in the OMs as Bergman, as its sole director and president, filed and cancelled the registration of the ACIC mortgages and drafted and signed the OMs.

[84] We find that all of the alleged contraventions related to section 168.1(1)(b) have been established on the required standard.

D. Personal Liability of Bergman

[85] Liability under section 168.2 of the Act will be established where the executive director proves:

- a) that a corporate respondent has breached the Act; and
- b) that an individual who is an employee, officer, director or agent of the corporate respondent “authorizes, permits or acquiesces in the contravention.”

[86] We have found that ACIC breached both section 50(1)(d) and section 168.1(1) of the Act. The remaining question is whether Bergman authorized, permitted or acquiesced in those contraventions. We find that he did.

[87] Bergman was ACIC’s decision maker. The evidence has established clearly that he controlled ACIC and its activities with respect to mortgage loan registration, priority, and cancellation. The evidence is also clear that Bergman was responsible for the preparation, execution, filing and dissemination of the OMs which contained the two misrepresentations. Bergman signed the required certificate for each of the OMs that they did not contain a misrepresentation.

[88] Having considered the totality of the evidence, we conclude that Bergman authorized ACIC’s contraventions of the Act. In the alternative, we find that Bergman permitted and acquiesced in ACIC’s contraventions of the Act.

VI. Conclusions and Orders

[89] In conclusion, we find that:

- a) ACIC made misrepresentations contrary to section 50(1)(d) of the Act and made false or misleading statements in documents required to be filed under the Act, contrary to section 168.1(1)(b); and
- b) Bergman authorized or permitted and acquiesced in ACIC’s contraventions of the Act and, by operation of section 168.2(1), contravened the same provisions as did ACIC.

VII. Submissions on Sanction

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

By August 30, 2021

The executive director delivers submissions to the respondents and to the Commission Hearing Office.

By September 27, 2021

The respondents deliver response submissions to the executive director and the Commission Hearing Office.

Any party seeking an oral hearing of the issue of sanctions so advises the Commission Hearing Office. The hearing officer will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).

By October 12, 2021

The executive director delivers reply submissions (if any) to the respondents and to the Commission Hearing Office.

July 28, 2021

For the Commission

Judith Downes
Commissioner

Gordon Johnson
Vice Chair

Deborah Abbey
Commissioner