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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
MONCASA CAPITAL CORPORATION and
JOHN FREDERICK COLLINS

REASONS AND DECISION

Hearing:	January 21, 22, 23, 24 and March 13, 2013	
Decision:	May 17, 2013	
Panel:	Edward P. Kerwin	-Commissioner
Appearances:	Tamara Center Jed Friedman	-For the Ontario Securities Commission
		-No one appeared for the respondents Moncasa Capital Corporation and John Frederick Collins

TABLE OF CONTENTS

REASONS AND DECISION

1. OVERVIEW

A. BACKGROUND

[1] This was a hearing before the Ontario Securities Commission (the "Commission"), pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether John Frederick Collins ("Collins") and Moncasa Capital Corporation ("Moncasa") (collectively, the "Respondents") breached the Act and acted contrary to the public interest.

[2] A Statement of Allegations was filed by Staff of the Commission ("Staff") on March 6, 2012, and a Notice of Hearing was issued by the Commission on that same day. Staff filed an Amended Statement of Allegations on December 3, 2012. In the Amended Statement of Allegations, Staff alleges that during the period between April 1, 2008 and May 16, 2011 (the "Material Time"), the Respondents sold Moncasa securities to more than 50 investors in Ontario and elsewhere in Canada, raising approximately $1,200,000, purportedly to be used to purchase luxury vacation properties in the Caribbean that would be available for rental purposes. It is alleged that the Respondents have ignored investors' requests to return their investment and that as of May 16, 2011, Moncasa did not own any properties and all but $7,650 of the funds raised from investors had been expended.

[3] Staff alleges that the Respondents' conduct breached subsections 25(1)(a) (in force before September 28, 2009) and 25(1) (in force on and after September 28, 2009) of the Act (trading without registration), subsection 53(1) of the Act (illegal distribution of securities), section 19 of the Act (failure to keep proper books, records and other documents) and subsection 126.1(b) of the Act (fraud). Staff also alleges that Collins breached subsection 122(1)(a) of the Act (making false and/or misleading statements to the Commission). Staff further alleges that the Respondents' conduct was contrary to the public interest and harmful to the integrity of Ontario capital markets. In addition, Staff alleges that, as the sole officer and director of Moncasa, Collins authorized, permitted or acquiesced in breaches of sections 19, 25(1)(a) (in force before September 28, 2009) and 25(1) (in force on and after September 28, 2009), 53(1) and 126.1(b) of the Act by Moncasa and accordingly Collins is deemed to also have not complied with Ontario securities law pursuant to section 129.2 of the Act.

[4] During closing submissions on the merits, Staff withdrew their allegations under section 19 of the Act and their allegations relating to Form 45-106F1 brought under section 122(1)(a) of the Act.

B. HISTORY OF THE PROCEEDING

[5] The first appearance in this matter was held on April 4, 2012. Subsequent to that, five pre-hearing conferences were held on May 28, 2012, August 9, 2012, September 27, 2012, November 28, 2012 and December 17, 2012. At the May 28, 2012 pre-hearing conference, the hearing on the merits was set down to commence on January 21, 2013.

[6] The Respondents were represented by Wardle Daley Bernstein LLP until August 22, 2012. On that date, the Commission granted Wardle Daley Bernstein LLP leave to withdraw as counsel for the Respondents, in accordance with Rule 1.7.4 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017.

[7] Since the withdrawal of their counsel, the Respondents have been unrepresented and have not appeared at, or participated in, any subsequent appearances prior to the hearing on the merits. In addition, the Respondents did not appear at, or participate in, the hearing on the merits.

[8] The hearing on the merits commenced on January 21, 2013. Evidence was heard on January 21, 22, 23 and 24, 2013. By order dated January 24, 2013, the Commission set out the timing for filing written closing submissions and the date of March 13, 2013 for the hearing of oral closing submissions. Staff was ordered to file written closing submissions by February 15, 2013, and the Respondents were ordered to file written closing submissions by March 1, 2013 (if any). Oral closing submissions were heard on March 13, 2013, and only Staff was in attendance.

C. THE RESPONDENTS

i. Moncasa Capital Corporation

[9] The corporate respondent is an Ontario corporation, which was incorporated on January 3, 2008 and changed its name to Moncasa effective April 10, 2008. Moncasa has never been registered with the Commission in any capacity.

[10] The registered head office of Moncasa was always 1 Yonge Street, Suite 1801, which is the address of Telsec Business Centres Inc. ("Telsec"), a company which provides virtual office space.

ii. John Frederick Collins

[11] Collins is a resident of Pickering, Ontario and was, throughout the Material Time, and is, the president and sole director of Moncasa.

[12] Collins was not registered in any capacity with the Commission during the Material Time, although he had been registered as a salesperson with Marchment & Mackay Limited from February 2, 1994 to November 21, 1997 and with C.J. Elbourne Securities Inc. from November 28, 1997 to June 30, 2000.

2. PRELIMINARY ISSUE

A. THE FAILURE OF THE RESPONDENTS TO APPEAR AT THE HEARING

[13] Neither of the two Respondents appeared at, or participated in, the hearing on the merits, in person or by counsel.

[14] Subsection 6(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "SPPA") requires that the parties to a Commission proceeding be given reasonable notice of the hearing.

[15] The SPPA permits the Commission to proceed in the absence of any party that has been given reasonable notice of the hearing. Subsection 7(1) of the SPPA states:

> Effect of non-attendance at hearing after due notice
>
> 7. (1) Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

[16] Similarly, the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "Commission's Rules") state:

> Rule 7.1 – Failure to Participate:
>
> If a Notice of Hearing has been served on any party and the party does not attend the hearing, the Panel may proceed in the party's absence and that party is not entitled to any further notice in the proceeding.

[17] Staff filed affidavits of service to establish that the Respondents were served and provided with:

1. The Notice of Hearing (affidavit of service from Laura Filice, dated March 22, 2012);
2. The Statement of Allegations (affidavit of service from Laura Filice, dated March 22, 2012);
3. The dates of the merits hearing (affidavit of service from Maria Montalto, dated September 26, 2012);
4. Hearing briefs (affidavit of service from Yolanda Leung, dated December 7, 2012);
5. The Amended Statement of Allegations (affidavit of service from Maria Montalto, dated December 14, 2012); and
6. A witness list and witness summaries (affidavit of service from Yolanda Leung, dated January 17, 2013).
7. Notice of the oral closing arguments and the written submissions of Staff (affidavit of service from Tamara Center, dated March 13, 2013).

[18] Staff also provided an email, dated October 9, 2012, which was sent to the Respondents providing notice of a pre-hearing conference that took place on November 28, 2012. The email included the Commission's order from September 27, 2012, which contains the dates for the merits hearing that were set down at a pre-hearing conference on May 28, 2012. Further, I note that at the time the dates for the merits hearing were set on May 28, 2012, the Respondents were represented by counsel and their counsel was aware of the dates for the hearing on the merits.

[19] It is important to note that it is Staff's responsibility to demonstrate that Staff has taken all reasonable efforts to serve the Respondents themselves. Staff has the responsibility to prove that they served the Respondents with documentation to inform them of the hearing dates and that all reasonable steps were taken to do so.

[20] In the circumstances, I am satisfied that notice of the hearing dates was served on the Respondents, that Staff took all reasonable steps available to provide reasonable notice of this proceeding to the Respondents and that I am entitled to proceed in their absence in accordance with subsection 7(1) of the SPPA and Rule 7.1 of the Commission's Rules.

3. ISSUES

[21] Staff's allegations raise the following issues for consideration:

1. Did the Respondents trade in securities without registration in breach of subsection 25(1)(a) of the Act (for the time period from April 1, 2008 to September 27, 2009) and subsection 25(1) of the Act (for the time period from September 28, 2009 to May 16, 2011) and contrary to the public interest?

2. Did the Respondents engage in a distribution of securities without a prospectus in breach of subsection 53(1) of the Act and contrary to the public interest?

3. Did the Respondents engage in fraud in breach of subsection 126.1(b) of the Act and contrary to the public interest?

4. Did Collins make false and/or misleading statements to the Commission in breach of subsection 122(1)(a) of the Act and contrary to the public interest?

5. Did Collins authorize, permit or acquiesce in breaches of subsections 25(1)(a) (during the time period from April 1, 2008 to September 27, 2009), 25(1) (during the time period from September 28, 2009 to May 16, 2011), 53(1) and 126.1(b) of the Act by Moncasa, such that he is deemed to also have not complied with Ontario securities law pursuant to section 129.2 of the Act?

[22] The standard of proof in this hearing is the civil standard of proof on a balance of probabilities. I need to assess each of these issues by examining the evidence in this matter and determining whether on a balance of probabilities "…it is more likely than not that the event occurred" (*F.H. v. McDougall*, [2008] 3 S.C.R. 41 at para. 44 ("*McDougall*")). As stated by the

Supreme Court of Canada, "…evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall*, *supra* at para. 46).

4. EVIDENCE

A. EVIDENCE PRESENTED

[23] Staff submitted to us documentary evidence, a total of 11 binders containing 68 documents marked as exhibits, and called 8 witnesses:

- Craig Gallacher, a senior investigator from the Commission's Enforcement Branch;
- Naomi Chak, a senior forensic accountant from the Commission's Enforcement Branch;
- S.I., Moncasa's former Brand Manager;
- M.C., co-founder and former Chief Strategic Officer of Moncasa;
- D.E., principal of Tri Palms Equity; and
- 3 Moncasa investors, L.M., J.M. and C.H.

[24] Staff also relied on one transcript from a voluntary interview of Collins before Commission Registration Staff on December 9, 2008, and transcripts of two compelled interviews of Collins before Enforcement Staff on May 5, 2011 and May 25, 2011, as well as excerpts from the transcript of a voluntary interview of J.B., a former salesperson at Moncasa, before Enforcement Staff on March 22, 2011. Transcripts of these examinations were filed as evidence after the hearing pursuant to the Commission's order of January 24, 2013.

[25] In order to protect the privacy of the investor witnesses and certain Moncasa employees, their names and personal information have been anonymized and we required that Staff provide a redacted version of the record in accordance with the Commission's *Practice Guideline – April 24, 2012 - Use and Disclosure of Personal Information in Ontario Securities Commission's Adjudicative Proceedings.*

B. OVERVIEW OF THE INVESTMENT SCHEME

[26] From April 15, 2008 to April 29, 2011, the Respondents sold securities to the public that had not been previously issued. These securities were units (made up of a share and a warrant) in Moncasa.

[27] Neither of the Respondents was registered with the Commission during the Material Time, and neither of them was exempt from the registration or prospectus requirements. No prospectus was filed and no receipt was issued by the Director to permit the sales of securities by Moncasa.

[28] Throughout the Material Time, Collins was the President, sole director and principal owner of Moncasa and was its directing mind. Collins solicited investors directly and paid commissions to others who solicited investors on behalf of Moncasa. Collins received and, in his sole discretion, directed the use of investor funds.

[29] The Respondents told investors that their funds would be used to invest in, purchase and develop vacation properties in the Caribbean and provided investors with sophisticated and professional promotional materials which created the illusion that Moncasa was in fact doing so.

[30] Moncasa's website and marketing materials contained misleading information, including logos of hotels with which Moncasa had no business relationship, pictures of islands where Moncasa did not own any property, floor plans of properties Moncasa did not own, as well as press releases which were misleading.

[31] Further, in order to induce investors to invest in Moncasa, the Respondents and individuals hired by the Respondents to sell Moncasa securities (none of whom was registered under the Act during the Material Time) used high pressure sales tactics, including making representations regarding the future value or price of the Moncasa shares and regarding Moncasa's shares being listed on a stock exchange. Abel Da Silva ("Da Silva"), one of the individuals hired by the Respondents to sell securities to investors, was a recidivist boiler room salesperson who had been sanctioned numerous times by the Commission for violations of the Act at the time he sold Moncasa shares.

[32] During the Material Time, Moncasa raised a total of $1,231,800 from 57 investors through the sale of shares and warrants of Moncasa and almost half of the investors were induced to make multiple investments in Moncasa. Investor funds were deposited into a bank account held in the name of Moncasa. Investor deposits were the main source of funds deposited to the Moncasa bank account during the Material Time.

[33] Of the funds deposited by investors into Moncasa's bank account, approximately 6% was spent on purchasing a right to use one property for four weeks annually. Further, approximately 26.6% of the funds provided by investors went to pay personal expenses of Collins, including personal credit cards, cash withdrawals as well as to a company owned by Collins and unrelated to Moncasa. Collins' personal finances were comingled with the finances of Moncasa.

[34] Despite repeated requests, investors did not receive any portion of their investments back and all of their money has been lost.

5. ANALYSIS

A. DID THE RESPONDENTS TRADE IN SECURITIES WITHOUT REGISTRATION IN BREACH OF SUBSECTION 25(1)(a) OF THE ACT (FOR THE TIME PERIOD FROM APRIL 1, 2008 TO SEPTEMBER 27, 2009) AND SUBSECTION 25(1) OF THE ACT (FOR THE TIME PERIOD FROM SEPTEMBER 28, 2009 TO MAY 16, 2011) AND CONTRARY TO THE PUBLIC INTEREST?

i. The Applicable Law

September 2009 Amendments to Section 25 of the Act

[35] Staff allege that the Respondents breached subsections 25(1)(a) and 25(1) of the Act during the Material Time. On September 28, 2009, which falls within the Material Time, the Act was

amended, and so it is important to consider the wording of the Act both before and after the amendment came into effect.

[36] Prior to September 28, 2009, subsection 25(1)(a) of the Act read as follows:

> 25. (1) No person or company shall,
>
> (a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer ...
>
> ...
>
> and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[37] As of September 28, 2009, subsection 25(1) came into force and provides as follows:

> 25. (1) Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in or hold himself, herself or itself out as engaging in the business of trading in securities unless the person or company,
>
> (a) is registered in accordance with Ontario securities law as a dealer; or
>
> (b) is a representative registered in accordance with Ontario securities law as a dealing representative of a registered dealer and is acting on behalf of the registered dealer.

[38] The language of subsection 25(1) has become more broad as a result of the 2009 amendments; accordingly, if the Panel determines that the evidence indicates that the Respondents' actions prior to September 28, 2009 were contrary to the predecessor provision, then the same behaviour post-September 28, 2009 will also be in violation of the more broadly worded successor provision of the Act. The same does not hold true in reverse; namely, acts that are found to be in contravention of the amended subsection 25(1) of the Act post-September 28, 2009 are not necessarily in contravention of the predecessor subsection 25(1)(a) pre-September 28, 2009. In this case, Staff have alleged that the Respondents' behaviour and activities were the same throughout the Material Time and contravened the applicable provisions both before and after September 28, 2009.

[39] The phrase "engage [or engaging] in the business of trading" indicates that the Commission must find that the activity of trading in securities is carried out for a business purpose in determining whether a person or company needs to be registered pursuant to subsection 25(1) of

the Act, as amended. Section 1.3 of Companion Policy 31-103CP provides the following guidance:

> **Business trigger for trading and advising**
>
> We refer to trading or advising in securities for a business purpose as the "business trigger" for registration.
>
> We look at the type of activity and whether it is carried out for a business purpose to determine if an individual or firm must register. We consider the factors set out below, among others, to determine if the activity is for a business purpose. For the most part, these factors are from case law and regulatory decisions that have interpreted the business purpose test for securities matters.

[40] The policy goes on to enumerate the following factors that are considered relevant in determining whether an individual or firm is trading or advising in securities for a business purpose and subject to the dealer or advisor registration requirement:

> a) Engaging in activities similar to a registrant;
> b) Intermediating trades or acting as a market maker;
> c) Directly or indirectly carrying on the activity with repetition, regularity or continuity;
> d) Being, or expecting to be, remunerated or compensated; and
> e) Directly or indirectly soliciting.

[41] The policy notes that the enumerated factors are not exhaustive and that no one factor on its own will determine whether an individual or firm is in the business of trading or advising in securities.

[42] It should be noted that the Companion Policy 45-106CP also addresses this issue and explains that a company that has even one dedicated salesperson will be "in the business of selling securities".

[43] Both the predecessor provision section 25(1)(a) and the successor provision section 25(1) of the Act refer to a trade or trading in a security. The terms "trade" or "trading" are defined in subsection 1(1) of the Act as:

> "trade" or "trading" includes,
>
> > (a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in clause (d), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,

> […], and
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing; ("opération")

[44] Cases considering the issue of acts in furtherance of trading reflect a contextual approach that examines the totality of the conduct and the setting in which it occurs. In this analysis, the primary emphasis is on the intended effect of the acts on those at whom they are directed, and on the proximity of the acts to an actual or potential trade in securities (*Richvale Resource Corp. (Re)* (2012), 35 O.S.C.B. 4286 at para. 69 ("*Richvale*"); and *Momentas Corp. (Re)* (2006), 29 O.S.C.B. 7408 at para. 77 ("*Momentas*")).

[45] In previous cases, the Commission has found that a variety of activities, such as those that the Respondents engaged in, constitute acts in furtherance of trading, including:

- Accepting money from investors and depositing investor cheques for the purchase of shares in a bank account;

  (*Limelight Entertainment Inc., (Re)* (2008), 31 O.S.C.B. 1727 at para. 133 ("*Limelight*"))

- Providing potential investors with subscription agreements to execute;

- Distributing promotional materials concerning potential investments;

- Issuing and signing share certificates;

- Preparing and disseminating forms of agreements for signature by investors;

- Meeting with individual investors; and

  (*Momentas, supra* at para. 80)

- Preparing and disseminating promotional materials describing investment programs, including posting materials and information on websites.

  (*Richvale, supra* at paras. 70, 79-80; *Momentas, supra* at para. 80; and *First Federal Capital (Canada) Corp. (Re)* (2004), 27 O.S.C.B. 1603 at paras. 45-46 ("*First Federal Capital*"))

[46] The Commission has held that the existing jurisprudence on acts in furtherance of a trade continues to apply in determining whether the business purpose test established by section 25(1) of the Act has been met (*Hibbert (Re)* (2012), 35 O.S.C.B. 8583 at paras. 71-72 ("*Hibbert*"); and *Richvale, supra* at paras. 66-71, 79-80, 84-87 and 90).

ii. Discussion

Registration

[47] Staff tendered into evidence certificates issued under section 139 of the Act, which set out the Respondents' registration history, if any.

[48] Moncasa was never registered with the Commission in any capacity.

[49] Collins was not registered in any capacity with the Commission during the Material Time, although he was registered as a salesperson with Marchment & Mackay Limited from February 2, 1994 to November 21, 1997 and with C.J. Elbourne Securities Inc. from November 28, 1997 to June 30, 2000.

[50] In addition, Staff provided evidence that Collins had applied for registration as a registered representative, which was denied by the Commission's Director of Registration by letter dated September 13, 2000, for the reason that "…while employed at Marchment & MacKay Limited, [Collins] failed to deal fairly, honestly, and in good faith with clients."

[51] Further, testimony from Staff's investigator, Gallacher, revealed that Collins applied for registration again in 2007 in connection with a dealer named Ploutos Securities Ltd. and in 2008 to purchase a limited market dealer named Tri Palms Equity Inc. Neither of these applications for registration resulted in actual registration for Collins.

[52] In addition, Staff provided section 139 certificates relating to Moncasa's salespersons, J.B., P.P. and Da Silva, and these certificates show that none of them was registered during the Material Time, however P.P. had been previously registered.

Moncasa

[53] I find that Moncasa's conduct breached subsection 25(1)(a) of the Act during the time period from April 1, 2008 to September 27, 2009 and subsection 25(1) of the Act during the time period from September 28, 2009 to May 16, 2011.

[54] Specifically, evidence was provided which demonstrated that:

- Investors were provided with and signed subscription agreements for Moncasa securities. These subscription agreements were for the purchase of units of Moncasa comprised of one common share and one common share purchase warrant. The subscription price was $1 per unit. The common share purchase warrant was exercisable for one common share at a price of $1.25 until six months after the closing date. Moncasa was offering up to 2,000,000 units which potentially would result in aggregate proceeds of up to $2,000,000. The minimum purchase was 5,000 units.

- Investors provided cheques to Moncasa for their investment.

- 26 of the investors who invested with Moncasa made subsequent investments in Moncasa. As admitted by Collins during his compelled examination with Enforcement Staff on May 5, 2011, Moncasa made subsequent offerings at $0.25 and $0.50 per share and other Moncasa investors were not made aware of subsequent investments made at the lower price.

- Investors were provided with marketing materials for Moncasa, such as brochures and postcards, which promoted Moncasa as "The First All Caribbean Real Estate Portfolio" and a "Private Club Residence" with "20 islands", "80 properties", and "30 destinations".

- Investors received emails from Moncasa sales representatives, such as a salesperson named "Jim Wilson", which encouraged investors to review Moncasa's press releases. Moncasa issued a number of promotional press releases which stated the following: "If you don't [invest], as an investor you are going to be very, very disappointed in the years to come." and "Anyone who is able to get themselves involved in any form of capital appreciating investments stand to benefit over the next 2-3 years."

- Moncasa employed individuals as salespersons to sell Moncasa securities, whose primary job function was to sell Moncasa securities and whose compensation was based on their sale of Moncasa securities. For example, evidence was provided that one salesperson, Da Silva, sold Moncasa securities to 12 investors. Da Silva was paid, in cash, sales commissions equal to approximately 20% of the amounts invested in the Moncasa securities he sold, which sales commissions amounted to approximately $44,000 (*R v. Da Silva* [2012] O.J. No. 2073 ("*R v. Da Silva*") at para. 3). There is clear and cogent evidence that the primary job function of the salespeople at Moncasa was to actively solicit members of the public for the purposes of selling Moncasa's securities. Further, the fact that the salespeople were paid, at least in part, by way of commissions commensurate with their sales of Moncasa securities, is extremely telling about what their function was at Moncasa. In addition, the fact that Collins misled Staff by overtly denying paying any form of commission to the salespeople, tends to demonstrate that he knew that Moncasa was carrying out registrable activity.

- In his voluntary examination with Registration Staff on March 22, 2011, J.B., a Moncasa sales representative, stated that Collins provided him with lists of potential investors to call which was a printed list including names and phone numbers, where the person worked and what province they lived in. No information regarding income was indicated on the list. Another Moncasa employee, S.I., also testified at the hearing that there was a list from which investors were called and that it was a list of 5,000 names that the Respondents had purchased from Dunhill, which is a company that compiles lists with the contact information of potential investors.

- Moncasa had two websites, www.moncasacapital.com and www.clubmoncasa.com. Evidence was provided that Collins registered both websites and was responsible for the material on the websites. S.I., who Collins had employed to design and develop the websites, testified that the "Moncasa Capital" website was supposed to have a "corporate investor look" whereas "Club Moncasa" was geared toward attracting families to the "white glove" vacation service. These websites were used as a tool to solicit investors, and Moncasa salespeople referred investors to these websites.

[55] In addition, I was provided with a list of investors from TD Bank (where Moncasa had its corporate bank accounts) that listed 57 investors and the amount each investor individually invested, which came to a grand total of $1,231,800. Further, I was provided with evidence of two lists of Moncasa security holders from the transfer agent, Equity Transfer & Trust Company ("Equity Transfer"), one as of August 21, 2009, which lists 53 shareholders, including Collins, M.C. (a co-founder and officer of Moncasa) and investors, and one as of April 7, 2011, which lists 59 shareholders, including Collins, M.C. and investors.

[56] At the hearing, we heard from the following investors who invested the amounts described below:

> Investor L.M.
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> Investor L.M. was introduced to Moncasa at a breakfast meeting that was attended by himself, another Moncasa investor, and Collins. L.M. testified that, based on what he had learned at the breakfast meeting, "[Moncasa] just sounded like it might be a good spot to put some money in for future investments when you retire." (Transcript, Jan. 23, 2013, testimony of L.M, p. 581, lines 7-9). L.M. testified that he made seven investments at four different prices in Moncasa Capital Corporation. The prices were: $1 dollar per share, $1.25 per share, $0.50 per share, and $0.25 per share (Transcript, Jan. 23, 2013, testimony of L.M., pp. 595-614).
>
> Investor C.H.
>
> Investor C.H. was initially contacted by P.P., who was a salesperson at Moncasa. C.H's first investment was for $5,000. C.H. testified that one of the factors that drove him to make the investment was that he was told by P.P. that his investment "should double right away" (Transcript, Jan. 24, 2013, testimony of C.H., p. 752, lines 11-14). After being contacted by Collins, C.H. invested in more shares. C.H. invested a total of $20,000 in Moncasa.

[57] As a result of Moncasa's investment solicitation activities, a total of 57 investors invested a total of $1,231,800 in Moncasa securities.

[58] Furthermore, I note that the Ontario Court of Justice in *R v. Da Silva* made findings regarding investor funds received by Moncasa. Paragraph 2 of the decision states:

> The parties have filed an agreed statement of fact, which states that between April 1, 2008, and May 16, 2011, securities of *Moncasa* were sold to 57 investors in Ontario and throughout Canada, raising approximately $1.2 million, none of which has been returned to the investors. *Moncasa* shares were sold to the public on the pretence the capital raised would fund the acquisition of luxury properties in the Caribbean for use as rental units. *Moncasa* has never been registered with the Commission or elsewhere in Canada and shares were sold to the public without a prospectus, purportedly in reliance on the private issuer exemption
>
> *(Da Silva, supra* at para. 2)

[59] I conclude that Moncasa engaged in trades and acts in furtherance of trades in its securities in Ontario within the meaning of the Act. Moncasa also used its website to advertise and portray Moncasa as a legitimate company to excite investors and induce them to invest. Moncasa and its representatives were not registered in any capacity with the Commission and Moncasa and its salespersons actively engaged in the business of trading Moncasa securities. Moncasa contravened subsection 25(1)(a) of the Act during the time period from April 1, 2008 to September 27, 2009 and subsection 25(1) of the Act during the time period from September 28, 2009 to May 16, 2011, and there were no registration exemptions available to it, as discussed below.

Collins

[60] I find that Collins' conduct in connection with Moncasa breached subsection 25(1)(a) of the Act during the time period from April 1, 2008 to September 27, 2009 and subsection 25(1) of the Act during the time period from September 28, 2009 to May 16, 2011.

[61] As the directing mind of Moncasa, Collins:

- planned, was aware of and participated in the sale of Moncasa securities to the public;
- hired the salespeople to sell Moncasa securities to the public;
- met with investors to discuss the Moncasa investment;
- prepared and disseminated promotional materials relating to the Moncasa investment;
- directed potential investors to the websites in furtherance of selling Moncasa securities;
- provided subscription agreements to investors with instructions on how to complete the agreement;
- received funds from investors for the purpose of investing in Moncasa;
- was the sole signatory to the bank account into which investor funds were deposited;
- caused Moncasa's transfer agent to issue share certificates to purchasers of Moncasa's shares;
- signed Moncasa share certificates and delivered the share certificates to investors; and

- was responsible for the Moncasa websites that investors were referred to for information about the company when solicited to invest in Moncasa.

[62] With respect to Moncasa's websites, evidence was presented that demonstrated that Collins created and controlled Moncasa's websites. Gallacher testified that he performed a domain name registration search of www.moncasacapital.com and www.clubmoncasa.com, which revealed that Collins owned www.clubmoncasa.com and that the owner of www.moncasacapital.com was protected by a privacy service (Transcript, Jan. 22, 2013, testimony of Gallacher, p. 282, lines 7-19). However, Collins admitted during his compelled interview on May 5, 2011, that he was also the owner of www.moncasacapital.com. (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 40, lines 19-23).

[63] In addition, Collins was the signing authority for Moncasa. He signed numerous documents on behalf of Moncasa. For example, Collins was the sole signatory when Moncasa opened its business account at TD Canada Trust, which received investor funds and was also the sole signatory on Moncasa's "Business Access Card Authorization" form submitted to TD Canada Trust. Similarly, Collins was the only party that signed for Moncasa when it entered into a purchase agreement to obtain the right to use its one and only property in the Caribbean for four weeks per year. By signing such documents, he authorized and made Moncasa's actions possible.

[64] Collins also played a very active role soliciting investors. Investor L.M. testified that Collins solicited investments from him over numerous meetings. Most of these meetings took place over breakfast and L.M testified that they occurred "on a regular basis" (Transcript, January 23, 2013, testimony of L.M., page 618, lines 4-5). L.M. invested a total of seven times in Moncasa (Transcript, January 23, 2013, testimony of L.M., page 617, line 8). L.M. testified that Collins offered him "some of his own shares at a reduced price" because L.M. "had been investing so much" (Transcript, January 23, 2013, testimony of L.M., page 615, lines 1-2).

[65] I conclude that Collins engaged in trades and acts in furtherance of trades in Moncasa securities in Ontario within the meaning of the Act. During the Material Time, Collins was not registered in any capacity with the Commission and his conduct demonstrates that he engaged in the business of trading Moncasa securities. He violated subsection 25(1)(a) of the Act during the time period from April 1, 2008 to September 27, 2009 and subsection 25(1) of the Act during the time period from September 28, 2009 to May 16, 2011, and there were no registration exemptions available to him, as discussed below.

Exemptions

[66] Once Staff has shown that the Respondents have traded without registration, the onus shifts to the Respondents to establish that one or more exemptions was available to them (*Limelight, supra* at para. 142 and *Re Ochnik* (2006), 29 O.S.C.B. 3929 at para. 67).

[67] The Respondents did not participate at the hearing and did not establish that they qualified for any exemptions in National Instrument 45-106 – *Prospectus and Registration Exemptions*

("NI 45-106") or part 8 of National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (which came into force on September 28, 2009).

[68] While there was some evidence that the Respondents purported to rely on the private issuer and accredited investor exemptions in NI 45-106 based on statements made by Collins during a voluntary interview of Collins before Commission Registration Staff on December 9, 2008, and two compelled interviews of Collins before Enforcement Staff on May 5, 2011 and May 25, 2011, the statements made by Collins at these interviews do not establish the fulfillment of the criteria for the private issuer and accredited investor exemptions.

[69] Section 2.4 of NI 45-106 sets out the private issuer exemption which allows a non-reporting issuer to distribute securities to 50 people (excluding current and former employees of the issuer or affiliates) who fall within certain categories. For example, permitted private issuer security purchasers include:

- directors, officers, employees, founders or control persons of the issuer,
- directors, officers or employees of an affiliate of the issuer,
- certain relatives of a director, executive officer, founder or control person and certain relatives of the spouse of a director, executive officer, founder or control person,
- a close personal friend or a close business associate of a director, executive officer, founder or control person,
- an existing security holder of the issuer,
- an accredited investor, and
- a person that is not the public.

[70] These types of investors listed above are generally thought to have a relationship to the issuer that allows them to, at least partially, mitigate the risks of the investment because of the closeness of the relationship or the fact that they have access to information from the issuer.

[71] The majority of Moncasa's investors did not fall into the categories of investors listed in section 2.4 of NI 45-106. For example, most investors did not have a close relationship with the company and/or Collins. Evidence demonstrated that investors were cold-called by Collins and Moncasa's salespeople and the majority of these investors were not known to the Respondents. Of the 25 investors that Staff provided evidence regarding the method of how they were contacted by Moncasa employees, 19 investors (including J.M.) indicted that they were cold-called, and only 6 investors indicted that they had any form of a previous relationship with Collins or the salespeople.

[72] Therefore, the private issuer exemption was not available to the Respondents because: (a) the majority of the first 50 Moncasa investors were cold-called and were not individuals captured by the categories set out in section 2.4 of NI 45-106; and (b) sales were made to more than 50 investors, which is the limit for the private issuer exemption.

[73] Section 2.3 of NI 45-106 provides an exemption if the purchaser is an "accredited investor" and is purchasing the security as principal. The exemption is premised on an investor being an institution or sophisticated organization, or an individual having the ability to withstand financial

loss or the resources to obtain expert financial advice. The term "accredited investor" is defined in section 1.1 of NI 45-106 and the following individuals fall under the definition of an accredited investor:

> "accredited investor" means
> …
> (j) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000,
>
> (k) an individual whose net income before taxes exceeded $200 000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300 000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year,
>
> (l) an individual who, either alone or with a spouse, has net assets of at least $5,000,000,
> …

[74] With respect to the accredited investor exemption, several investors in Moncasa were not accredited investors. During his compelled examination on May 5, 2011, Collins admitted to Enforcement Staff that Moncasa securities were sold to another investor, L.G., who "possibly would not be an accredited investor" (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 90, lines 2-3). In addition, we heard testimony from investor witnesses that they were not accredited investors. Specifically:

- C.H. was not an accredited investor. From 2007 to 2009 his annual income did not exceed $150,000 and his wife's income did not exceed $30,000. C.H. had total assets valuing between $400,000 and $500,000 in 2008 and between $650,000 and $700,000 in 2009. During this period, $175,000 of C.H.'s assets were in his home. Furthermore, C.H. testified that he filled out the AI Certificate (defined below) but did not understand the term "accredited investor" and that he was told by P.P. that the form was merely a formality.

- L.M. was not an accredited investor. In 2008 and 2009, L.M.'s net assets were worth between $1.5 and $2 million. In 2008, his non real estate assets were worth approximately $500,000 and consisted of farm machinery and livestock. In 2009, these assets were worth approximately $350,000. From 2008 to 2010, L.M.'s joint net annual income with his wife did not surpass $65,000. L.M. testified that he signed the AI Certificate (defined below) because "[he] guess [he] figured [he] had over a million dollars' worth of assets with [his] farm and everything." No one from Moncasa explained the definition of "financial assets" to L.M.

[75] Neither of these investors fulfilled the criteria of an accredited investor in section 2.3 of NI 45-106.

[76] In addition, the fact that these investors may have checked off and/or initialled the "Accredited Investor Certificate" which was appended to the subscription agreement (the "AI Certificate") is not relevant if they did so with the mistaken belief that they were, in fact, accredited. It was the responsibility of Moncasa and Collins to verify that investors satisfied the criteria for an accredited investor and they did not do this. In fact, Moncasa had an incorrect definition of accredited investor posted on its website www.moncasacapital.com, which defined an "accredited investor" as "an individual who has a net worth of $1,000,000 or has earned $200,000 per year in the preceding two years." This description does not conform to the definition of "accredited investor" as articulated in section 2.3 of NI 45-106.

[77] Therefore, the accredited investor exemption was not available to the Respondents.

iii. Findings

[78] Based on the evidence discussed above, I find that both of the Respondents breached subsection 25(1)(a) of the Act during the time period from April 1, 2008 to September 27, 2009 and subsection 25(1) of the Act during the time period from September 28, 2009 to May 16, 2011 by engaging in trades and/or acts in furtherance of trades, when neither of the Respondents was registered and no registration exemption was available to them. I further find that such breaches were contrary to the public interest.

B. DID THE RESPONDENTS ENGAGE IN A DISTRIBUTION OF SECURITIES WITHOUT A PROSPECTUS IN BREACH OF SUBSECTION 53(1) OF THE ACT AND CONTRARY TO THE PUBLIC INTEREST?

i. The Applicable Law

[79] Subsection 53(1) of the Act sets out the prospectus requirement for trades that comprise a distribution:

> No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company if the trade would be a distribution of the security, unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them by the Director.

[80] The definition of "distribution" is set forth in subsection 1(1) of the Act and states that:

> "distribution", where used in relation to trading in securities, means,
>
> (a) a trade in securities of an issuer that have not been previously issued
> […]

[81] As the Commission held in *Limelight*, a prospectus is fundamental to the protection of the investing public because it ensures that investors have full, true and plain disclosure of information to properly assess the risks of an investment and make an informed decision:

> The requirement to comply with section 53 of the Securities Act is important because a prospectus ensures that prospective investors have full, true and plain disclosure of information to properly assess the risks of an investment and make an informed investment decision. The prospectus requirements of the Act play a significant role in the overall scheme of investor protection. As stated by the court in *Jones v. F.H. Deacon Hodgson Inc.* (1986), 9 O.S.C.B. 5579 (H.C.) at 5590, "there can be no question but that the filing of a prospectus and its acceptance by the Commission is fundamental to the protection of the investing public who are contemplating purchase of the shares".
>
> (*Limelight*, *supra* at para. 139)

ii. Discussion

[82] As established above in my discussion of sections 25(1)(a) and 25(1) of the Act, the Respondents all engaged in trades and/or acts in furtherance of a trade, as defined in the Act. The Respondents have therefore met, and are caught by, the trading element under the first part of the definition of "distribution" under the Act.

[83] The second element of this definition is that the securities in question have not been previously issued. Moncasa's subscription agreement, which was provided to investors, states that the Moncasa securities were "part of a larger offering […] by [Moncasa] of up to 2,000,000 Units and will result in aggregate gross proceeds to [Moncasa] of up to $2,000,000." In Schedule "A" to the Moncasa subscription agreement, the terms and conditions of the subscription for the units clearly state that it is a "subscription for and offer to purchase the Units from [Moncasa]" and provide for the "issuance or delivery of the Offered Securities to the Subscriber". Also, the Transfer Agency Agreement entered into between Moncasa and its transfer agent, Equity Transfer, identifies Moncasa as the "**Issuer**", which "has appointed Equity as its transfer agent, registrant and disbursing agent of **its shares**" (emphasis added) and provides that upon receipt of documents from Moncasa authorizing the issuance of shares and instructions from Moncasa giving particulars of the owners of such shares, Equity Transfer shall register such shareholders and countersign and deliver certificates representing such shares in accordance with Moncasa's instructions. The language in the subscription agreement and in the transfer agency agreement indicates that Moncasa was selling and issuing securities that were not previously issued. The evidence showed that there is no record that Moncasa was a reporting issuer during the Material Time. In addition, Moncasa never filed a prospectus with the Commission. Further, there is no evidence that any investors were provided with a prospectus with respect to Moncasa.

[84] In addition, no prospectus exemption was available to the Respondents. As discussed above, while there was some evidence that the Respondents purported to rely on the private issuer and accredited investor exemptions in NI 45-106, based on statements made by Collins during a voluntary interview of Collins before Commission Registration Staff on December 9, 2008, and two compelled interviews of Collins before Enforcement Staff on May 5, 2011 and May 25, 2011, the statements made by Collins at these interviews do not establish fulfillment of the criteria for the private issuer and accredited investor exemptions. For the same reasons set out in paragraphs 66 to 77 of these reasons, we find that the Respondents did not establish that they qualified for any prospectus exemptions.

iii. Findings

[85] I conclude that both of the Respondents engaged in trades or acts in furtherance of trades. At the time of these trades, shares in Moncasa that were being traded had not previously been issued, and I therefore conclude that the trades constitute a distribution. Since no prospectus was filed for these trades, I find that both of the Respondents have contravened section 53(1) of the Act, as there were no valid exemptions available to the Respondents. I further find that such contraventions were contrary to the public interest.

C. DID THE RESPONDENTS ENGAGE IN FRAUD IN BREACH OF SUBSECTION 126.1(b) OF THE ACT AND CONTRARY TO THE PUBLIC INTEREST?

i. The Applicable Law

[86] Staff alleges that each of the Respondents engaged or participated in securities fraud, contrary to section 126.1(b) of the Act and contrary to the public interest.

[87] Section 126.1(b) of the Act provides as follows:

> A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know,
> . . .
> (b) perpetrates a fraud on any person or company.

[88] Section 126.1(b) of the Act was first considered by the Commission in *Re Al-tar* (2010), 33 O.S.C.B. 5535 ("*Al-tar*"), and the Commission set out the following statement of the law at paragraphs 214-221 of that decision:

> Fraud is "one of the most egregious securities regulatory violations" and is both "an affront to the individual investors directly targeted" and something that "decreases confidence in the fairness and efficiency of the entire capital market system" (*Re Capital Alternatives Inc.* (2007), A.B.A.S.C. 79 at para. 308 citing D. Johnston & K. D. Rockwell, *Canadian Securities Regulation*, 4th ed., Markham: LexisNexis, 2007 at 420).
>
> The term fraud is not defined in the Act. Due to the recent introduction of the fraud provision in the Act, there are no decisions from the Commission interpreting this provision. However, we can draw out guidance and principles from criminal and administrative law jurisprudence and decisions from other securities commissions.
>
> The British Columbia Court of Appeal addressed the application of the substantially identical fraud provision in the British Columbia *Securities Act,* R.S.B.C. 1996, c. 418, as amended (the "BC Act") in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 ("*Anderson*"). The Supreme

Court of Canada denied leave to appeal the *Anderson* decision ([2004] S.C.C.A. No. 81).

In *Anderson*, the British Columbia Court of Appeal reviewed the legal test for fraud and relied on *R. v. Théroux*, [1993] 2 S.C.R. 5 ("*Théroux*"). In *Théroux*, Justice McLachlin (as she then was) summarized the elements of fraud as follows at paragraph 27:

> . . . 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)

Section 126.1 of the Act has the identical operative language as the fraud provision in the British Columbia Act. In interpreting the fraud provision in the British Columbia Act and with respect to the mental element, the British Columbia Court of Appeal in *Anderson* stated at paragraph 26 that:

> …[the fraud provision of the BC Act] does not dispense with proof of fraud, including proof of a guilty mind. . . . Section 57(b) [the fraud provision of the BC Act] simply widens the prohibition against participation in transactions to include participants who know or ought to know that a fraud is being perpetrated *by others*, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof of subjective knowledge of the facts constituting the dishonest act, by someone involved in the transactions. (emphasis in original)

The British Columbia Court of Appeal in *Anderson* further explained at paragraph 29 that:

> Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal law standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.

> The British Columbia Court of Appeal approach to the legal test in the context of securities fraud as set out in *Anderson* was adopted in *Re Capital Alternatives Inc.*, 2007 ABASC 79, which was affirmed in *Alberta (Securities Commission) v. Brost,* [2008] A.J. No. 1071 (C.A.).
>
> For a corporation, it is sufficient to show that its directing minds knew or reasonably ought to have known that the corporation perpetrated a fraud to prove a breach of section 126.1(b) of the Act.

[89] The Commission has adopted substantially the same analysis in a number of subsequent decisions which were provided by Staff, including *Re Lehman Cohort* (2010), 33 O.S.C.B. 7041 at paragraphs 86-100; *Re Global Partners* (2010), 33 O.S.C.B. 7783 at paragraphs 238-245; *Re Borealis International Inc.* (2011), 34 O.S.C.B. 777, at paragraphs 65-67; and *Re Richvale*, *supra* at paragraphs 102-105.

[90] Courts and securities tribunals have found that "other fraudulent means" include non-disclosure of important facts, unauthorized diversion of funds, use of corporate funds for personal purposes and unauthorized arrogation of funds or property. (*Théroux*, *supra* at para. 18; *Anderson*, *supra* at para. 30; *Re Lehman Cohort*, *supra* at para. 90; *Re Richvale*, *supra* at para. 105).

ii. Discussion

Moncasa

[91] I find that Moncasa engaged in many acts of deceit, falsehoods and other fraudulent means that deprived investors of their funds.

Use of proceeds

[92] First of all, investors were misled about Moncasa's business assets and how investor funds were to be used and were being used.

[93] Specifically, Moncasa misrepresented to investors how investment proceeds would be used, telling them their funds would be used to acquire and develop real estate properties in the Caribbean. This is consistent with Collins' own statement during his compelled examination on May 5, 2011, when he told Enforcement Staff that the initial Moncasa business plan was to "acquire luxury real estate homes and operate a destination club" (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 116, lines 17-18). This is also consistent with M.C.'s testimony that "the original investors were going to invest in a company that was raising money to invest in real estate and it would only be in real estate." (Transcript, Jan. 22, 2013, testimony of M.C., p. 445, lines 5-9).

[94] Investors informed Staff that they understood that their investments would directly fund real estate purchases or development. Of the 31 investors who provided Staff with responses to investor questionnaires regarding use of proceeds, 19 believed that Moncasa would use investor

funds to acquire properties in the Caribbean and an additional 9 believed that proceeds would be used to develop or invest in Caribbean real estate.

[95] The representations regarding the use of proceeds were made directly to investors by Collins and Moncasa's salespeople as well as through promotional materials and corporate documentation. For example, at Schedule "B" to the subscription agreement, the "Business of the Company" is stated as follows:

> **Business of the Company**
>
> The Corporation carries on business as a real estate holding company and, as part of its business, has an interest in the acquisition of land and the development of and/or upgrade of property relating to the hospitality industry. The Company is primarily focused on property acquisitions in the Dominican Republic.
>
> **Use of Proceeds**
>
> Proceeds from the issuance of the Units will be used to fund the Company's operations, and reduce mortgage debt on properties, so acquired […]
>
> (Exhibit 18 – Volume 2, Tab 16F, p. 97)

[96] With respect to how funds were actually used, which will be discussed further below, the evidence demonstrates that only a small portion of the monies raised was actually used to purchase an interest in real estate, which was a right to use a "One Bedroom Grand Bungalow King" unit for four one-week periods on a recurring annual basis. Even according to Collins' own figures, only $78,000 Canadian was spent on "Property Acquisition".

Promotional materials

[97] Moncasa mailed promotional postcards depicting photos of luxurious Caribbean vacation properties as well as three distinct floor plans. Along the bottom of one card it stated "20 islands, 80 properties, 30 destinations". On another card, the logos of Maxim Bungalows, Raffles, Westin, and Roco Ki were displayed and a number of Caribbean locations were indicated. The phrase "your personal chef" is underlined on one card and "personal concierge" on another. These promotional materials were completely false as Moncasa merely bought the right to use a single property for four one-week periods.

[98] The logos, brands and Caribbean islands indicated on the postcards were the same as those set out on Moncasa's website. However, in reality, Moncasa did not have any relationships with the brands and logos it associated itself with. Collins admitted that no agreements had been concluded with these hotels or islands and that Moncasa did not have permission to use their logos (Transcript, Dec. 9, 2008, voluntary interview of Collins before Commission Registration Staff, p. 38, lines 14-25 to p. 40, lines 1-3). S.I. testified that he thought that it was irresponsible for Moncasa to not notify the companies whose logos were being used on Moncasa's website.

[99] On the "Home" page of www.moncasacapital.com, along the bottom of the screen, there was a scrolling banner of logos of various high end vacation destinations in the Caribbean

islands, as well as prestigious hoteliers. Gallacher testified that Moncasa did not own property in the islands (other than the brief time interest in a vacation property unit in the Dominican Republic) and did not have a relationship with these hoteliers:

> Q. And what information did you find out regarding Moncasa's relationship, if any, with these hoteliers?
>
> A. Through the course of my investigation, I had communication with persons at the Ritz-Carlton, with Raffles, with Starwood Hotels & Resorts, with Westin, and I learned that Moncasa Capital had no business involvement with those hoteliers. I learned that Moncasa Capital had no authorization to use their logos with respect to those hoteliers.
>
> Q. What about the islands that are also streaming through the bottom of the website, are you aware whether Moncasa had any properties on those islands?
>
> A. I noted they are very prestigious tourist destinations, Barbados, the Cayman Islands, these sort of places, and it's known to me that Moncasa had no properties or interests in those islands.
>
> (Transcript, Jan. 22, 2013, testimony of Gallacher, p. 284, lines 6-25)

[100] The evidence received from investors made it clear that they were told and believed that Moncasa owned more property than it actually did when they invested in the company and this was based on Moncasa's corporate and promotional materials and website:

- Some investors believed that Moncasa already had an extensive real estate portfolio.
- After multiple conversations with Collins and a review of some of Moncasa's marketing materials, L.M. understood that Moncasa owned 80 properties in 30 destinations.
- After receiving Moncasa's Investor Update dated March 30, 2009, which stated "properties are on stream now and ready for use", J.M. understood that Moncasa had purchased properties in the Caribbean and that these properties were ready to be sold or used as a timeshare for the club.
- After receiving an email from Collins stating that he had "brought the family down to check out some of Moncasa's properties", C.H. understood that Moncasa owned multiple properties in the Caribbean.
- Some investors reported receiving emails that "made it sound like [Moncasa] owned several properties and they were buying some more".

[101] An example of one of Moncasa's misleading promotional materials is a press release, dated September 26, 2008, which was posted on www.moncasacapital.com. The press release states:

> Moncasa and their local knowledge of the Caribbean has been able to source exceptional real estate opportunities creating properties valued at under one million to $3 million. In turn Moncasa has structured the membership to be priced affordably thereby becoming readily attainable to a great many more Canadians.
>
> (Volume 6, Tab 10A, p. 84)

[102] The reality, however, was very different. The only purchase agreement ever signed by Collins on behalf of Moncasa on June 9, 2008, reflects Moncasa as the purchaser of the right to use and enjoy a "One Bedroom Grand Bungalow King" unit for four one-week periods on a recurring annual basis, for the price of USD$69,052.20.

[103] Also, at page 83 of the purchase agreement signed by Collins on behalf of Moncasa, it is stated that: "The Residential Beneficial Interests offered by Seller are for the personal use and enjoyment of Beneficial Owners and are not suitable for investment or intended for resale for profit." (emphasis in original) Moncasa told investors that the property was purchased specifically for investment purposes.

[104] Investors did report relying on the website information to make investments in Moncasa. For example, J.M. testified that he found the Moncasa website persuasive:

> It was very well done. It looked like a very good site. And the writing was excellent. When I look back on it now, it was a real snow job … I mean it was fraudulent … well, I mean, when you read the press releases, I mean, it was – none of it was true, but it was very well written. And if you were interested in participating, it made you feel pretty secure. But certainly after the fact, it was a snow job.
>
> (Transcript, Jan. 24, 2013, testimony of J.M., p. 700, line 25 to p. 701, line 13)

[105] In addition, many of the investors believed that their investment gave them a right to use the Moncasa properties:

- Collins told L.M. that investors could visit the properties and that L.M. could visit the properties by boat because his beliefs prevented air travel.

- Staff also provided documentary evidence showing that some investors believed that:

  (i) they would be able to trade Moncasa shares for membership in the club and the opportunity to vacation at the properties.

  (ii) their investment entitled them to use the Moncasa properties.

  (iii) Moncasa was partnering with Westin and Hilton and investors could rent these properties at reasonable rates. This

misrepresentation was supported by the unauthorized display of hotel logos on the Moncasa website and promotional materials.

[106] J.M. asked Collins for a list of Moncasa's property locations and contacts. However, his request was ignored, which is not surprising as the reality was that Moncasa did not own multiple Caribbean properties.

Corporate and financial documentation

[107] Moncasa's financial documentation was misleading and deceitful.

[108] For example, in emails, letters, and subscription agreements, Moncasa represented to investors that its shares would be registered with the appropriate authorities. Investor J.M. testified that these representations gave him comfort that "things were proceeding as they should" (Transcript, Jan. 24, 2013, testimony of J.M. p. 687, lines 4-5). However, in a voluntary interview on December 9, 2008, Collins admitted to Registration Staff that Moncasa never contacted securities regulators about the investments (Transcript, Dec. 9, 2008, voluntary interview of Collins before Commission Registration Staff, p. 62, lines 11-25 to p. 63, lines 1-7).

[109] In addition, Moncasa failed to provide proof of share ownership to its investors. For example, J.M. testified that repeated requests by him for Moncasa share certificates were ignored, and that he only received a share certificate in May 2009, which was one year after his initial investment. Similarly, M.C. (who was under the impression that he and Collins were "equal partners" in Moncasa) testified that he was never provided with proof of share ownership and was not even told how many shares he owned. According to the records of Moncasa's transfer agent, M.C. was the owner of 5,000,000 or 31.359% of Moncasa's shares whereas Collins was the owner of 10,000,000 or 62.366% of Moncasa's shares.

[110] Collins also co-mingled his own personal expenses with Moncasa's business expenses. In his interview with Enforcement Staff on May 5, 2011, Collins admitted that Moncasa paid the charges and expenses incurred on his personal credit card (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 176, lines 19-23).

Aliases

[111] Moncasa allowed one of its salespeople, Da Silva, to use the alias "Jim Wilson" to solicit investments from the public. As a result, investors did not actually know who they were really dealing with, specifically in this case, Da Silva who is a recidivist boiler room operator.

[112] Da Silva used this alias when contacting investors by telephone or email. At least 14 Moncasa investors dealt with Da Silva under his assumed alias. They purchased in excess of $220,000 worth of shares (*R v. Da Silva, supra* at para. 3).

[113] S.I testified that he also heard Da Silva refer to himself by another alias, "Samuel", when he was on the phone.

High pressure sales tactics

[114] Moncasa's salespeople used aggressive and high pressure sales tactics to solicit money from investors.

[115] S.I. testified that Moncasa's salespeople "were always driven to get the biggest and get a lot, you know, be rewarded type of thing" (Transcript, Jan. 22, 2013, testimony of S.I., p. 378, lines 23-25). He described the typical sales pitch as:

> You've got to get on board. There's limited space. It's like this club. You've got to invest in it. Get to use. So how much do you want to give, type of thing.
>
> (Transcript, Jan. 22, 2013, testimony of S.I., p. 386, line 23 to p. 387, line 1).

[116] In responding to Enforcement Staff's "Moncasa Capital Corp. Investor Questionnaire", one Moncasa investor stated that he "felt very pressured" and that he was told that he "should get on board before it's over".

[117] All three of the investors who testified at the hearing on the merits reported that high pressure sales tactics were used in order to induce them to invest. These tactics included misrepresentations about price appreciation, preferential share prices, future public listing of Moncasa's shares, and the speed with which Moncasa shares were being sold. For example:

- J.M. testified that he was told that his shares would be sold to other investors at a higher price and that the price of the shares could double in value (Transcript, Jan. 24, 2013, testimony of J.M., p. 679, lines 2-17).

- C.H. testified that was told that he would be able to sell half of his shares very quickly and recoup his initial investment (Transcript, Jan. 24, 2013, testimony of C.H., p. 766, p. 21-25).

- L.M. testified that he was told that Collins was selling him shares at a lower price out of his own holdings (Transcript, Jan. 23, 2013, testimony of L.M., p. 614, line 14 to p. 615, line 2).

- C.H. testified that, based on Collins' representations to him, he understood that Moncasa would be making a public offering of shares (Transcript, Jan. 24, 2013, testimony of C.H., p. 774, p. 16-24).

- J.M. testified that he was told that if he did not invest in a hurry then he "might not be able to get in on it" (Transcript, Jan. 24, 2013, testimony of J.M., p. 706, p. 19-25).

[118] None of the above representations was true. First, J.M. testified that he never saw any return on his investment (Transcript, Jan. 24, 2013, testimony of J.M., p. 731, lines 6-7). Second, C.H. testified that Moncasa never gave him the opportunity to sell his shares (Transcript, Jan. 24, 2013, testimony C.H., p. 776, lines 22-24). Third, M.C. testified that Collins told him that offering shares for reduced prices was "all about raising more money" (Transcript, Jan. 22,

2013, testimony of M.C., p. 442, lines 20-21). Fourth, there is no record of a public offering of Moncasa's shares. And fifth, J.M. testified that Moncasa urged him to make further investments (Transcript, Jan. 24, 2013, testimony of J.M., p. 711, lines 13-17).

Conclusion

[119] Investors relied on the false and fabricated information about Moncasa and its business activities when deciding whether to invest in the company. When Moncasa's activities are looked at as a whole, we find that the following facts are indicators that fraud was taking place: existence of false information in corporate documents, press releases and marketing and promotional materials; lack of financial documentation and failure to provide company and financial information to investors; the use of aliases; and the use of high pressure sales tactics to coerce investors to invest and to increase their investment. These fraudulent acts caused deprivation to investors. Through the investment scheme, Moncasa raised a total of approximately $1,200,000 from investors. I note that these investors lost their funds and were not paid back.

[120] For a corporate respondent, it is sufficient to show that its directing mind knew or reasonably ought to have known that the acts of the corporation perpetrated a fraud to prove a breach of section 126.1(b). As discussed below, Collins controlled Moncasa and was its directing mind. In addition, the evidence before me demonstrates that Collins interacted with investors and his actions perpetrated Moncasa's fraud.

[121] I conclude that Moncasa engaged in fraud and breached section 126.1(b) of the Act. I further find that such contraventions were contrary to the public interest.

Collins

[122] I find that Collins engaged in many acts of deceit, falsehoods and other fraudulent means that deprived investors of their funds.

Website biography of Collins

[123] Collins was ultimately responsible for what appeared on Moncasa's website. Unfortunately for investors, what appeared on the website was often riddled with misrepresentations. This includes Collins' biography, which was exaggerated, misleading and false. During his December 9, 2008 interview with Registration Staff, Collins admitted that:

- The website reference to Collins' "20 years" of experience in the real estate market refers to his personal real estate investments (Transcript, Dec. 9, 2008, voluntary interview of Collins before Commission Registration Staff, p. 18, line 6 to p. 19, line 7);

- The website refers to Collins receiving "several industry recognition awards for sales achievements", but, when questioned by Registration Staff about this statement, he could not recall a specific award or how many awards he received (Transcript, Dec. 9, 2008, voluntary interview of Collins before Commission Registration Staff, p. 19, lines 12-21);

- The website statement that "[Collins'] private equity background spans many industries" refers to family-related business dealings (Transcript, Dec. 9, 2008, voluntary interview of Collins before Commission Registration Staff, p. 26, line 9 to p. 27, line 5); and

- Collins' only example of being employed by a company engaged in private equity was "raising money for Limelight" (which was a boiler room operation sanctioned by the Commission) (Transcript, Dec. 9, 2008, voluntary interview of Collins before Commission Registration Staff, p. 27, line 17 to p. 29, line 1).

[124] As stated previously, investors relied on the website when deciding whether to purchase shares in Moncasa. One such investor, J.M., testified that the representations on the website made him "feel pretty secure" about investing (Transcript, Jan. 24, 2013, testimony of J.M., p. 701, line 12). I doubt that investors like J.M. would have expressed such sentiments had they been aware of the website's numerous falsehoods, including those contained in Collins' biography.

Press releases sent by Collins

[125] The press releases that Collins sent to investors contained untruths.

[126] J.M. testified that, after investing $50,000 in Moncasa, Collins sent him numerous press releases in an attempt to solicit further funds. For example, Collins mailed J.M. a press release in which he declared that Moncasa will have "properties across St. Lucia, Grand Cayman, and Turks and Caicos […] completed for occupancy through the early part of 2010". As stated previously, Collins and Moncasa never took concrete steps to secure properties in any of these destinations.

[127] Also, C.H. testified that Collins emailed him a press release, dated August 31, 2009, which contained the following words in bold: "Attention Shareholders: Moncasa Capital to Raise $6 million issuing 2 million shares at $3.00 per share". The reality was that Moncasa only raised $551,540 after August 31, 2009.

[128] Further, both J.M. and C.H. testified that they reviewed a press release, titled "Moncasa Private Club Residences now launched in Toronto", which contained numerous falsehoods. The press release was posted on Moncasa's website and identified Collins as Moncasa' president and contact person and, among its many untruths, stated that:

> Moncasa and their local knowledge of the Caribbean has been able to source exceptional real estate opportunities creating properties valued at under one million to $3 million.
>
> (Volume 6, Tab 10A, p. 84)

[129] As has been discussed above, these statements were false.

[130] This evidence demonstrates that Collins was willing to deceive investors in order to obtain their money.

Collins' personal use of investor funds

[131] Collins misappropriated investor funds.

[132] Staff's senior forensic accountant, Chak, testified that her analysis of Moncasa's banking records showed that Collins withdrew $340,116.88 worth of personal expenses from Moncasa's business account. Chak calculated the personal expenses of Collins as follows:

Granite Capital Investments – net	$43,042.14
Credit card – MBNA	$23,000.00
Credit card – Citibank	$96,389.00
Credit card – TD	$2,050.00
Drawings for John Collins	$178,269.04
Drawings for Diane Collins (Collins' wife)	$6,505.07
Apparent personal expenses	$25,798.90
	$375,054.15
Possible office expenses in Citibank credit card account	$34,937.27
Total Personal Expenses	$340,116.88

(Exhibit 67 – Volume 12, Tab 10)

[133] According to Collins' own admission to Enforcement Staff, the only source of income for the Moncasa business account was investor funds (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 170, lines 7-9). Collins also admitted that he had sole signing authority for the account and that he was responsible for all of the transactions in the account (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 169, lines 18-23).

[134] Some examples of expenses that Chak categorized as "apparent personal expenses" include payments made to: Golden Fitness, LCBO, BMW, Bruno's Meats, Metro, Canadian Tire, and Chapters.

[135] Even if I deduct the $12,343.36 of expenses (charged to Collins' Citibank credit card) relating to travel, meals, and lodging in the Caribbean (i.e. those expenses that might arguably relate to Moncasa's "business" of "acquiring luxury real estate homes"), I still arrive at a personal expense total for Collins of $327,773.52. This revised figure of $327,773.52 represents a misappropriation for personal use of 26.6% of the $1,231,800 raised from investors. With the exception of the USD $69,052.20 payment for the right to use a single property in the Dominican Republic for four one-week periods annually, the remaining investor funds were used to further the activities of the Moncasa boiler room operation. These disbursements included payments related to the rental of office space, office expenses, legal fees, and the commissions or salaries of Moncasa's salespeople.

Collins' dealings with investors

[136] Collins's dealings with investors were deceitful and fraudulent.

[137] In an attempt to further his investment scheme, Collins offered some Moncasa investors shares at lower prices. For example, L.M. testified that because he had "been investing so much [Collins] gave [him] some of [Collins'] own shares at a reduced price." (Transcript, Jan. 23, 2013, testimony of L.M., p. 615, lines 1-2). However, the reality was that L.M. did not receive anything that resembled a share price "discount" or "reduction". Rather, the price per share was whatever Collins wanted it to be.

[138] M.C. testified that he inadvertently learned that shares were being sold at lower prices and that he did not understand how this could occur when there was a subscription agreement in place at a certain price. When M.C. confronted Collins about this, Collins explained that it was all about raising more money and told him that "everything is ok" (Transcript, Jan. 22, 2013, testimony of M.C., p. 442, lines 19-21). Collins did not show M.C. any paperwork to support these further offerings.

[139] Invariably, after realizing the fraudulent nature of Moncasa, many investors tried to redeem their shares. However, their attempts were stonewalled by Collins.

[140] C.H. testified that, despite repeatedly contacting Collins in order to try and sell his shares, he never was able to sell (Transcript, Jan. 24, 2013, testimony of C.H., p. 776, lines 9-24). J.M. testified that he never got a return on his $50,000 investment and that Collins ignored him when J.M. requested to redeem his shares (Transcript, Jan. 24, 2013, testimony of J.M. p. 728, line 16 to p. 729, line 3 and p. 731, lines 6-7). L.M. testified that he told Collins that he needed to redeem part of his investment to pay for his 40th wedding anniversary but noted that "we're almost two years over that and I haven't seen anything yet." (Transcript, Jan. 23, 2013, testimony of L.M., p. 620, line 22 to p. 621, line 1).

[141] In light of the foregoing, it is no surprise that the three investors who testified at the hearing on the merits described Collins in the following ways:

> Investor L.M.
>
> Well, I guess if I had to give [Collins] a nickname, it would be Pry Bar […] He can pry the money right out of you.
>
> (Transcript, Jan. 23, 2013, testimony of L.M., p. 630, lines 15-19)
>
> Investor J.M.
>
> He is one of the best snowmen I've ever met. He is pretty smooth.
>
> (Transcript, Jan. 24, 2013, testimony of J.M., p. 732, lines 12-13)

> Well, he is like a schemer. He knows how to put things together and, you know, take your money away.
>
> (Transcript, Jan. 24, 2013, testimony of J.M., p. 733, lines 6-8)
>
> Investor C.H.
>
> He will be judged later.
>
> (Transcript, Jan. 24, 2013, testimony of C.H., p. 777, lines 17-18)

Conclusion

[142] Collins' falsehoods helped Moncasa raise $1,231,800 from investors, none of which has been returned. At least $327,773.52 of the $1,231,800 was misappropriated by Collins for his personal expenses, while the remaining funds were used to pay salaries and commissions of Moncasa's salepersons and used to pay Moncasa's operating costs, apart from the use of 6% to buy the one four-week interest in one vacation property.

[143] I therefore conclude that Collins engaged in a fraud and breached section 126.1(b) of the Act. I further find that such contraventions were contrary to the public interest.

iii. Findings

[144] The investment scheme perpetrated by Moncasa and Collins was fraudulent.

[145] Moncasa misled investors by making false statements regarding its financial affairs and business activities. Investors were deprived of their funds as a result of false and misleading statements. Moncasa also deceived investors by allowing its salespeople to use aliases and to engage in high pressure sales tactics.

[146] Collins deceived investors by misrepresenting his qualifications, expertise, and experience and Moncasa's business activities and use of funds. Collins also misled investors by representing to them that Moncasa operated a successful and growing business. Investors were deprived of their funds as a result of false and misleading statements. Furthermore, Collins misappropriated investor funds by spending at least $327,773.52 of those funds on personal expenses, and with the exception of the USD $69,052.20 payment for the right to use a single property in the Dominican Republic for four one-week periods annually, the remaining investor funds were used to pay salespeople and to otherwise further the activities of the Moncasa boiler room operation.

[147] I conclude that the Respondents breached section 126.1(b) of the Act and, in so doing, their conduct was contrary to the public interest.

D. DID COLLINS MAKE FALSE AND/OR MISLEADING STATEMENTS TO THE COMMISSION IN BREACH OF SUBSECTION 122(1)(a) OF THE ACT AND CONTRARY TO THE PUBLIC INTEREST?

i. The Applicable Law

[148] Subsection 122(1)(a) prohibits individuals and companies from making misleading, misrepresentational or untrue statements in any material, evidence or information submitted to the Commission, Executive Director or agent of the Commission. Subsection 122(1)(a) states:

> 122(1) Offences, general – Every person or company that,
>
> > (a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make that statement not misleading is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or both.

[149] The importance of providing full and accurate information to the Commission was emphasized by the Ontario Court of Appeal in *Wilder et al v. Ontario Securities Commission*, (2001) 53 O.R. (3d) 519 (C.A.) at paragraph 22:

> The [Commission] is charged with the statutory obligation to do its best to ensure that those involved in the securities industry provide fair and accurate information so that public confidence in the integrity of the capital markets is maintained. It is difficult to imagine anything that could be more important to protecting the integrity than ensuring that those involved in those markets, whether as direct participants or as advisers, provide full and accurate information to the [Commission].

ii. Discussion

Misleading statements regarding ongoing sales of Moncasa's shares

[150] During his voluntary interview with Commission Registration Staff on December 9, 2008, relating to his application to be registered through Tri Palms Equity, Collins advised Staff that he was not "currently selling anything" and that no sales of Moncasa securities had been made between the end of September 2008 and the date of the interview (Transcript, Dec. 9, 2008, voluntary interview of Collins before Commission Registration Staff, p. 51, lines 20-21; p. 66, line 13 to p. 67, line 6). However, according to Staff's analysis, further investor funds were

deposited into Moncasa's bank account between October 8, 2008 and November 25, 2008 from five new investors, totalling approximately $76,000.

Misleading statements regarding the role of Moncasa's salespeople

[151] Collins misled both Commission Registration Staff and Enforcement Staff as to the true nature of the role of Moncasa's salespeople. He claimed that the salespeople were tasked with developing relationships with tourism and government officials in countries in the Caribbean and he minimized the extent to which they interacted with investors (Transcript, Dec. 9, 2008, voluntary interview of Collins before Commission Registration Staff, p. 34, line 20 to p. 35, line 10; p. 36, lines 13-23; p. 55, line 22 to p. 56, line 8 and Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 47, lines 4-10; p. 57, lines 7-15).

[152] These assertions, however, were contradicted by the following admissions made by Collins to Commission Enforcement Staff:

- Salespersons J.B. and P.P. "spoke to investors and introduced investors into the company" (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 44, lines 17-25);

- Salespersons J.B., P.P., and Da Silva and Collins participated in the sale of shares of Moncasa (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 72, lines 5-9); and

- Salespersons Da Silva, J.B. and P.P each brought in approximately 10 to 12 investors (Transcript, May 25, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 223, lines 14-17).

[153] In addition, during a voluntary interview with Enforcement Staff on March 22, 2011, J.B. described how he would send information packages to people who had expressed an interest in investing in Moncasa and that he would "follow up with [potential investors] quite a bit to see what their interest [level] was […]" (Transcript, March 22, 2011, voluntary interview of J.B. with Commission Enforcement Staff, p. 61, line 18 to p. 62, line 11).

[154] The evidence before me demonstrates that Collins and Moncasa salespeople interacted with investors, contrary to Collins' statements to Registration and Enforcement Staff.

Misleading statements regarding commissions paid to Moncasa's salespeople

[155] Collins misled Enforcement Staff regarding whether Moncasa paid commissions to its salespeople. During Collins' compelled interview on May 5, 2011, Staff asked Collins several times about how the salespeople were compensated and each time Collins consistently and categorically denied paying the salespeople commissions or any similar payment tied to the selling of securities. Specifically, Collins responded to one sequence of Staff's questions in the following way:

Q. Okay. And what was [P.P.'s] compensation arrangement?

A. He got paid on a biweekly basis depending on the number of days or hours that he could afford to work.

Q. Okay. And was he a salary employee then?

A. Yes. Yes.

Q. Okay. Did he make – you indicated that he did some sales. Was he – did he receive commissions?

A. No.

(Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 45, lines 11-20)

Q. So, skipping back to [J.B.] then, what was his compensation arrangement?

A. Same as [P.P].

Q. $500 a week?

A. If we had it.

Q. What if you didn't have it?

A. They didn't get paid.

Q. Was he ever paid commissions for sales?

A. No.

(Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 48, lines 2-10)

[156] In addition, later in that same interview, Collins repeatedly took the position that commissions were not paid to employees:

Q. Okay. And did [Da Silva] receive any compensation for the sale of shares to any –

A. No.

Q. – of these people?

A. No.

Q. No finder's fees?

A. No.

Q. Was any finder's fees or any compensation over and above their weekly -- I know you're shaking you're head, let me finish just so I'm sure –

A. Yes.

Q. – [J.B.], [P.P], [Da Silva], none of them received any compensation for performance. I found a new investor. Do I get a 10 percent, a 5 percent, any percent as a bonus, as a finder's fee, as a compensation or commission?

A. No. (emphasis added)

(Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 61, line 14 to p. 62, line 5)

[157] However, the evidence presented by Staff refutes Collins' denials. For example, J.B. told Enforcement Staff that he was paid a percentage commission on each Moncasa investment that he sold. J.B. stated that the commission payment "started at around ten percent but … as things developed it went actually down to five percent." (Transcript, March 22, 2011, voluntary interview of J.B. before Commission Enforcement Staff, p. 27, lines 18-20). In addition, M.C. testified that both P.P. and Da Silva told him that they were compensated with commission (Transcript, January 22, 2013, testimony of M.C., p. 422, lines 8-15).

Misleading statements regarding Collins' relationship with Abel Da Silva

[158] Collins misled Enforcement Staff regarding his pre-existing relationship with one of Moncasa's salespeople, Da Silva. Da Silva is a well-known recidivist boiler room salesperson who was the subject of three separate Cease Trade Orders issued by the Commission and in force at the time he was employed by Moncasa (*R v. Da Silva, supra* at para. 5).

[159] During his compelled interviews with Enforcement Staff, Collins identified a photograph of Da Silva as "Jim Wilson" (which was the alias that Da Silva used while employed by Moncasa) (Transcript, May 25, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 219, lines 7-13) and told Enforcement Staff that:

- he had never met "Wilson" before "Wilson" arrived at the Moncasa office looking for work (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 55, lines 1-17 and Transcript, May 25, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 219, lines 14-19).

- he did not know where "Wilson" worked before (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 58, lines 12-15);

- he never met "Wilson" outside of work (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 67, lines 3-4);

- he did not know where "Wilson" lived and he was never given an address (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 67, lines 17-20); and

- "Wilson's" nickname was "Abel" or "Abe" (Transcript, May 25, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 217, line 21 to p. 218, line 6).

[160] Contrary to what Collins told Enforcement Staff, both S.I. and M.C. testified that Collins and Da Silva had a pre-existing relationship.

> Q. Okay. Did [Abel] have a previous relationship with John?
>
> A. That I believe so.
>
> Q. Why is that?
>
> A. **Because John knew him. He said, I know this guy.** He is going to be coming in and helping us.
>
> (Transcript, Jan. 22, 2013, testimony of S.I., p. 382, lines 14-24) (emphasis added)
>
> Q. Okay. Can you tell me, did anyone in the office – did John know him as Abel, John Collins?
>
> A. Yes.
>
> Q. Okay. Did he at a certain point ask not to be called Abel?
>
> A. Yeah.
>
> (Transcript, Jan. 22, 2013, testimony of S.I., p. 383, lines 12-18)
>
> Q. And why was it your belief that Mr. Collins knew him as Abel?
>
> A. Sorry, say that again.
>
> Q. Well, I think before I asked you did Mr. Collins know him as Abel.
>
> A. Yes.
>
> Q. And I guess my question is why you had that impression.
>
> A. **Because they were friends from what I knew …**
>
> (Transcript, Jan. 22, 2013, testimony of S.I., p. 384, lines 2-11) (emphasis added)

Q. And before you mentioned a Jim Wilson. To your knowledge, how did he come to begin working at Moncasa?

A. John hired him through past – I was under the impression they had worked together before.

(Transcript, Jan. 22, 2013, testimony of M.C., p. 423, lines 8-13)

Q. Did Abel or, sorry, did Jim Wilson go through an interview process that you are aware of or how was he hired?

A. He just showed up one day and John said – he introduced us to him and that was it, you know.

(Transcript, Jan. 22, 2013, testimony of M.C., p. 423, lines 20-25)

Misleading statements regarding Moncasa's previous relationship to its investors

[161] Collins misled both Commission Registration Staff and Enforcement Staff by stating during interviews that the investors in Moncasa were himself, family, friends, and past business associates (Transcript, Dec. 9, 2008, voluntary interview of Collins before Commission Registration Staff, p. 42, lines 19-22; p. 53, lines 8-12; p. 54, lines 12-20; Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 43, lines 9-13; and Transcript, May 25, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 205, line 25 to p. 206, lines 1-3).

[162] With respect to one particular investor, Collins testified that "C.H. has dealt with [Collins] in the past", through a referral, possibly from J.B. (Transcript, May 5, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 94, lines 5-14). However, C.H. testified that he was cold-called and had no previous relationship with anyone at Moncasa (Transcript, Jan. 24, 2013, testimony of C.H., p. 745, lines 1-17).

iii. Findings

[163] Based on the conduct described above, I find that Collins breached subsection 122(1)(a) of the Act and acted contrary to the public interest by:

(i) making false and misleading statements to the Commission in a voluntary interview held before Commission Registration Staff on December 9, 2008; and

(ii) making false and misleading statements to the Commission in compelled interviews held before Commission Enforcement Staff on May 5, 2011 and May 25, 2011.

E. DID COLLINS AUTHORIZE, PERMIT OR ACQUIESCE IN BREACHES OF SECTIONS 25(1)(a) (DURING THE TIME PERIOD FROM APRIL 1, 2008 TO SEPTEMBER 27, 2009), 25(1) (DURING THE TIME PERIOD FROM SEPTEMBER 28, 2009 TO MAY 16, 2011), 53(1) AND 126.1(b) OF THE ACT BY MONCASA, SUCH THAT HE IS DEEMED TO ALSO HAVE NOT COMPLIED WITH ONTARIO SECURITIES LAW, PURSUANT TO SECTION 129.2 OF THE ACT?

i. The Applicable Law

[164] Pursuant to section 129.2 of the Act, a director or officer of a company is deemed to be liable for a breach of securities law by the company where the director or officer authorized, permitted or acquiesced in the company's non-compliance with the Act. Specifically, section 129.2 states:

> 129.2 For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

[165] For an individual respondent to be held liable under section 129.2, Staff must establish (i) that the individual respondent was a "director or officer" of a company, (ii) that the company has not complied with Ontario securities law, and (iii) that the individual respondent "authorized, permitted or acquiesced in" the non-compliance.

[166] In subsection 1(1) of the Act, a "director" is defined as "a director of a company or an individual performing a similar function or occupying a similar position for any person" and an "officer" is defined as:

> (a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,
>
> (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and
>
> (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b).

[167] The leading decision on the meaning of "authorized, permitted or acquiesced in" is *Momentas*:

> 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 [in] 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, give permission, particularly in writing. "Authorize" means to give official approval or permission, to give power or authority or to give justification.
>
> (*Momentas*, *supra* at para. 118)

ii. Discussion

Collins was the president and sole director of Moncasa

[168] Collins admitted to Commission Registration Staff that he was Moncasa's president (Transcript, Dec. 9, 2008, voluntary interview of Collins before Commission Registration Staff, p. 13, lines 17-20; p. 34, lines 3-6). Collins also represented himself as Moncasa's president in numerous emails to investors. As well, Gallacher testified that, according to a Corporation Profile Report from November 23, 2010, Collins was the sole director of Moncasa (Transcript, Jan. 21, 2013, testimony of Gallacher, p. 77, line 14 to p. 78, line 4).

Collins was the majority shareholder in Moncasa

[169] Collins was also a controlling shareholder of Moncasa. According to the List of Security Holders provided by Equity Transfer, Collins owned the majority of Moncasa's shares. As at April 7, 2011, the shareholdings of Moncasa were as follows:

Shareholder	Number of Shares	% of outstanding shares
John Collins	10,000,000	62.366%
M.C.	5,000,000	31.183%
57 Other Shareholders	1,034,250	6.451%
TOTAL	16,034,250	100%

(Transcript, May 25, 2011, compelled interview of Collins before Commission Enforcement Staff, p. 286, line 22 to p. 287, line 6; p. 288, line 5 to p. 289, line 9; Transcript, Jan. 21, 2013, testimony of Gallacher, p. 222, line 1 to p. 223, line 17; and Volume 4, Tab 10, pp. 321-326).

Collins' conduct

[170] As set out above in paragraphs 61 to 64 of these Reasons, Collins was the mind and management behind Moncasa's actions. By creating the Moncasa websites, soliciting investors on behalf of Moncasa, by hiring and supervising Moncasa's salespersons and by signing documents on behalf of Moncasa, he permitted and authorized Moncasa's conduct and made Moncasa's actions possible.

iii. Findings

[171] Collins' actions as president, sole director, and controlling shareholder demonstrate that he was the mind and management behind Moncasa's misconduct. He admitted he was Moncasa's president, signed documents on behalf of Moncasa as its president, corresponded with investors using the title "President" of Moncasa to solicit investor funds, and was the owner of Moncasa's websites, which were used as a marketing tool to attract investors. In addition, the conduct and evidence establishing that Collins acted as Moncasa's mind and management is set out at paragraphs 61 to 64 of these Reasons. Collins was responsible for all decisions made at Moncasa.

[172] As Moncasa's president and sole director, Collins is ultimately responsible for the conduct of Moncasa, its representatives, agents, and employees. There is ample evidence for me to find not only that Collins participated directly, but that Collins authorized, permitted or acquiesced in Moncasa's non-compliance with subsections 25(1)(a), during the time period from April 1, 2008 to September 27, 2009, 25(1), during the time period from September 28, 2009 to May 16, 2011, 53(1), and 126.1(b) of the Act.

[173] As a result, I find that Collins is deemed to also have not complied with Ontario securities law, pursuant to section 129.2 of the Act.

6. CONCLUSION

[174] For the reasons stated above I find that:

(a) Moncasa and Collins breached subsection 25(1)(a) of the Act during the time period from April 1, 2008 to September 27, 2009 and subsection 25(1) of the Act during the time period from September 28, 2009 to May 16, 2011;

(b) Moncasa and Collins breached subsection 53(1) of the Act;

(c) there were no exemptions available to either Moncasa or Collins;

(e) Moncasa and Collins breached section 126.1(b) of the Act;

(f) Collins breached subsection 122(1)(a) of the Act;

(g) pursuant to section 129.2 of the Act, Collins is deemed to have not complied with Ontario securities law, having authorized or permitted Moncasa's breaches of subsections 25(1)(a) during the time period from April 1, 2008 to September 27, 2009 and 25(1) during the time period from September 28, 2009 to May 16, 2011, 53(1) and 126.1(b) of the Act; and

(h) Moncasa and Collins acted contrary to the public interest.

[175] An order will be issued as follows:

1. Staff shall serve and file written submissions on sanctions and costs by 4:00 p.m. on June 7, 2013;

2. The Respondents shall serve and file responding written submissions on sanctions and costs by 4:00 p.m. on June 21, 2013;

3. Staff shall serve and file reply written submissions on sanctions and costs (if any) by 4:00 p.m. on June 28, 2013;

4. the hearing to determine sanctions and costs will be held at the offices of the Commission at 20 Queen Street West, 17th floor, Toronto, ON, on July 11, 2013, at 10:00 a.m., or such further or other dates as agreed by the parties and set by the Office of the Secretary; and

5. upon failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party, and such party is not entitled to any further notice of the proceeding.

Dated at Toronto this 17th day of May, 2013.

"Edward P. Kerwin"

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Edward P. Kerwin