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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
BRADON TECHNOLOGIES LTD., JOSEPH COMPTA, ENSIGN CORPORATE COMMUNICATIONS INC. and TIMOTHY GERMAN

REASONS AND DECISION

Hearing:	December 1, 5, 8, 9, 10, 11 and 12, 2014 February 11 and 24, 2015	
Decision:	July 21, 2015	
Panel:	James E. A. Turner	- Vice-Chair of the Ontario Securities Commission
Appearances:	Brooke Shulman Catherine Weiler	- for the Ontario Securities Commission
	Pathik Baxi	- for Joseph Compta and Bradon Technologies Ltd.
	Timothy German	- for himself and Ensign Corporate Communications Inc.

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REASONS AND DECISION

A. OVERVIEW

1. Background

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether Bradon Technologies Ltd. ("**Bradon**"), Joseph Compta ("**Compta**"), Ensign Corporate Communications Inc. ("**Ensign**") and Timothy German ("**German**") (collectively, the "**Respondents**") breached the Act, committed fraud and/or acted contrary to the public interest.

[2] A Statement of Allegations was filed by Staff of the Commission ("**Staff**") on October 3, 2013 and a Notice of Hearing was issued by the Commission on the same day. Staff alleges that during the period from December 28, 2007 to April 20, 2011 (the "**Material Time**"), German and Ensign breached subsections 25(1)(a) of the Act (in force before September 28, 2009) and subsection 25(1) of the Act (in force on and after September 28, 2009) (trading without registration), subsection 38(1)(a) of the Act (prohibited representations), subsection 53(1) of the Act (illegal distribution of securities), and each of the Respondents' committed fraud and breached section 126.1(b) of the Act and acted contrary to the public interest. In addition, Staff alleges that as directors and officers of Bradon and Ensign, respectively, Compta and German are deemed also to have contravened Ontario securities law pursuant to section 129.2 of the Act.

[3] The hearing on the merits commenced on December 1, 2014 and was conducted over nine hearing days. Oral closing submissions were heard on February 24, 2015.

[4] Throughout the merits hearing, Compta and Bradon were represented by legal counsel. German represented himself and Ensign.

[5] These reasons constitute my decision and reasons on the merits.

2. The Respondents

(a) Bradon and Compta

[6] Bradon is an Ontario company with an office in Mississauga which was incorporated on March 18, 2004. Bradon is a software company whose business objective is to develop technology in the on-line meeting market as well as mobile Voice-over-IP (VoIP) products. Bradon developed SAViiDesk, which is described as an application that allows participants to talk, share data, and video stream from a webcam simultaneously over the internet from personal computers and mobile devices. SAViiDesk appears to be Bradon's only product.

[7] Bradon is a private company and was not a reporting issuer in Ontario during the Material Time. Bradon has distributed its shares to investors under the private issuer exemption in section 2.4 of National Instrument 45-106 – *Prospectus and Registration Requirements* ("**NI 45-106**"). Bradon also filed with the Commission one Form 45-106F1 – *Report of Exempt Distribution* dated October 25, 2010 under the accredited investor exemption in section 2.3 of NI 45-106.

[8] Compta is an Ontario resident and the founder of Bradon. He is a director, shareholder and President of Bradon and its directing mind.

[9] Neither Compta nor Bradon has ever been registered with the Commission in any capacity.

(b) Ensign and German

[10] Ensign is an Ontario private company which was incorporated on June 4, 2004. Ensign was not a reporting issuer in Ontario during the Material Time. Ensign operated out of a virtual office space in Toronto.

[11] German is an Ontario resident who is Ensign's sole director and shareholder. He is also the President and the directing mind of Ensign.

[12] No prospectus was filed and no receipt was issued by the Director under the Act to permit the purported sale during the Material Time by German of his Bradon shares.

[13] Neither German nor Ensign has ever been registered with the Commission in any capacity.

B. GERMAN'S NON-ATTENDANCE FOR CLOSING SUBMISSIONS AT THE MERITS HEARING

[14] German attended the merits hearing on December 1, 5, 8, 9, 10, 11 and 12, 2014. The evidence portion of the merits hearing concluded on December 12, 2014 and oral closing submissions were scheduled for February 11, 2015.

[15] German was present at the hearing when closing submissions were scheduled and the Commission issued an order setting the date for those submissions (*Re Bradon* (2014), 37 O.S.C.B. 11270). That order also required that the Respondents file any written materials in connection with closing submissions by February 4, 2015.

[16] German did not file any written materials in connection with closing submissions. He did not attend the hearing on February 11, 2015.

[17] On February 11, 2015, an adjournment of the hearing was requested by Compta's legal counsel for medical reasons and an adjournment was granted rescheduling closing submissions for February 24, 2015 (*Re Bradon* (2015), 38 O.S.C.B. 1569). Staff sent German a copy of that order to notify him of the revised date for closing submissions.

[18] German did not appear for oral closing submissions on February 24, 2015.

[19] 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 a hearing.

[20] The SPPA permits the Commission to proceed in the absence of any party that has been given reasonable notice of a 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.

[21] Similarly, the Commission's *Rules of Procedure* (2014), 37 O.S.C.B. 4168 (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.

[22] In the circumstances, I was satisfied that notice of the hearing date for closing submissions was given to German. He was sent the order that rescheduled the date for those submissions. Accordingly, I was entitled to proceed in his absence in accordance with subsection 7(1) of the SPPA and Rule 7.1 of the Commission's Rules, and I did so.

C. ISSUES TO BE ADDRESSED

[23] Staff's allegations raise the following issues:

(a) Did German and Ensign trade in securities without registration contrary to subsections 25(1)(a) of the Act, in force before September 28, 2009 and subsection 25(1) of the Act, in force on and after September 28, 2009?

(b) Did German and Ensign distribute securities without filing, and obtaining a receipt for, a prospectus in breach of subsection 53(1) of the Act?

(c) Did German and Ensign make prohibited representations to potential investors in breach of subsection 38(1)(a) of the Act?

(d) Did each of the Respondents commit fraud and breach section 126.1(b) of the Act?

(e) Did German authorize, permit or acquiesce in Ensign's breaches of the Act, such that he is deemed, pursuant to section 129.2 of the Act, to also have not complied with Ontario securities law?

(f) Did Compta authorize, permit or acquiesce in Bradon's breach of section 126.1(b) of the Act, such that he is deemed, pursuant to section 129.2 of the Act, to also have not complied with Ontario securities law?

(g) Was the foregoing conduct of the Respondents contrary to the public interest?

D. STANDARD OF PROOF

[24] The standard of proof in this matter is the civil standard of proof on a balance of probabilities. I will address the questions set out in paragraph [23] above, including the question whether a fraud was perpetrated, to determine whether on a balance of probabilities "…it is more likely than not that the event[s] occurred" (*F.H.* v. *McDougall*, [2008] 3 S.C.R. 41 at para. 44 ("***McDougall***")).

[25] I note that an allegation of fraud and breach of section 126.1(b) of the Act are very serious allegations. The Commission stated in *Re ATI Technologies Inc.* (2005), 28 O.S.C.B. 8558 that "as a matter of fundamental fairness … reliable and persuasive evidence is required to make adverse findings where those findings will have serious consequences for a respondent" (at para. 15). The seriousness of the allegations does not, however, change the standard of proof to be applied in this matter. As stated by the Supreme Court of Canada, in *McDougall* "…evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall*, *supra* at para. 46). Accordingly, Staff must prove its allegations on a balance of probabilities based on clear, convincing and cogent evidence.

E. EVIDENCE PRESENTED

1. Overview of the Alleged Misconduct

Purchase by Investors of Bradon Shares through German

[26] From December 28, 2007 to April 20, 2011, German purported to sell Bradon shares to at least 46 investors for an aggregate purchase price of $1,755,505.68. In almost all cases, the shares were sold by German to investors at a price of $5.00 per share (there was one transaction at $2.50 per share and one at $1.00 per share). Except as otherwise noted in paragraph [29] below, contemporaneously with such sales, German subscribed for Bradon shares at $1.00 per share.

[27] During the Material Time, German subscribed for 748,000 Bradon shares in 26 separate transactions. Those Bradon shares were issued and registered in German's name.

[28] While Ensign received an aggregate of $1,755,505.68 from investors as consideration for the purchase of German's Bradon shares, only $808,000 was used by German to subscribe for Bradon shares. As for the remaining $947,505.68, an aggregate of $125,000 was returned by Ensign and German to five investors (which included WC and JS's sister) and the balance of $822,505.68 is unaccounted for.

[29] Investors understood that they were buying Bradon shares from German and that the full purchase price was going to Bradon. It is clear on the evidence that, as investors purchased Bradon shares from German, German would aggregate or pool those investments and then apply a portion of the funds to acquire a similar number of Bradon shares, in his name, at a price of $1.00 per share (I note that German purchased Bradon shares at a price of $2.50 a share on his last four purchases). The Bradon shares owned by German were subject to resale restrictions under Ontario securities law and could not be transferred or resold without the approval of the Bradon board of directors. The latter restriction was contained in Bradon's charter and was

reflected on the share certificates for Bradon shares. None of the Bradon shares owned or acquired by German were actually transferred to or registered in the name of investors. Compta testified that Bradon was never requested by German to issue any Bradon shares to investors.

[30] German directed investors to pay the purchase price of the Bradon shares to Ensign for deposit in an Ensign bank account.

[31] German solicited investors to purchase Bradon shares from him. Those investors included German's friends, business acquaintances or contacts, and individuals referred to him by other investors in Bradon shares purchased from German. German told investors that Bradon was about to be acquired by a major technology company either imminently or within 60 to 90 days and that investors would profit immensely once a deal was completed (see, for instance, the investor testimony in paragraphs [55] and [66] of these reasons). Investors were led to believe that such a transaction was only a matter of time.

The Share Purchase Agreements

[32] In purchasing Bradon shares through German, investors would enter into a one-page "private share purchase agreement" on Ensign letterhead which defined "Ensign" as Ensign or German. The agreements stated that German "has agreed privately" to grant the investor an option to purchase the relevant Bradon shares and that upon execution of the agreement, "Mr. German will instruct BTI to register the shares pursuant to the direction of [blank]." As noted above, German was the registered shareholder of the Bradon shares purported to be sold to investors.

[33] The share purchase agreement also stated that:

> Bradon Technologies Inc. (BTI) is a private Ontario Registered software company that has developed proprietary software, algorithms, branded products and clients for interactive business and consumer communications. It has approximately 8,300,000 shares outstanding (fully diluted). BTI is currently involved in senior level negotiations and due-diligence reviews with several of its clients/strategic partners with an anticipated sale of all its assets (including: patents, copyrights, software, brands and intellectual properties) within the next 60 – 90 days.

Not all of the agreements contained the words "within the next 60-90 days". Nineteen of the 34 purchase agreements entered into by the investor witnesses included the "within the next 60-90 days" language. All of the investor witnesses testified that German represented to them that a sale of Bradon or its technology was imminent or anticipated within 60 to 90 days.

[34] Almost all of the share purchase agreements entered into by the investor witnesses included a buy-back option which stated that "[t]he purchaser [blank] has until [blank] to elect to provide thirty days' notice to Ensign to exercise a "buy back" option of the shares at the transaction price." Only six share purchase agreements entered into by the investor witnesses had the buy-back option completely filled out (that is, with the name of the investor and the date by which the buy-back option was to be exercised), and two of the share purchase agreements did not contain the buy-back option language.

[35] As noted above, investors thought they were buying Bradon shares under these agreements. The agreements were signed by German, with "Ensign Corporate Communications Inc." below his name. With the exception of two agreements, all of the agreements entered into by the investors who testified indicated that Compta was "cc'd" on them.

[36] German stated in an e-mail dated June 26, 2009 sent to an investor that:

> "You are invested in Bradon Technologies…I have notified Joe [Compta] that shares have been assigned to various parties…You own the stock because I have assigned the stock to you from my position…"

Purchases through German

[37] In these reasons, when I refer to the purchase by investors of Bradon shares from or through German, I am referring to the purported purchase of Bradon shares by investors under the share purchase agreements entered into between Ensign (defined as Ensign and German) and the investors. It is clear to me that these agreements purported to reflect a sale by German of Bradon shares to investors. Compta and Bradon took the position that investors did not, through these agreements, become shareholders of Bradon. That is undoubtedly true as a legal matter. Compta also submitted that the purchase agreements related to Ensign and not Bradon shares. I do not accept that submission (see the discussion commencing at paragraph [207] of these reasons). In any event, German would aggregate or pool the funds from investor purchases and directly subscribe for a similar number of Bradon shares contemporaneously with the purchases by investors. By contemporaneously, I mean within a relatively short time period after the purchases by investors. There is no allegation that such issuances of Bradon shares to German were contrary to Ontario securities law. The allegations relate to German's resale of his Bradon shares.

Alleged Misrepresentations by German

[38] German told investors that the full amount of the purchase price of the Bradon shares would go to Bradon and would be used by Bradon to cover Bradon's operating expenses, such as the salaries of software developers, and in connection with the sale of Bradon or its technology. German described himself as a friend of Compta's and represented to investors that he had been working as an advisor to Bradon. German discouraged investors from directly contacting Compta or Bradon.

[39] It is alleged by Staff that German knowingly made numerous misrepresentations to investors in order to induce them to purchase Bradon shares from him. Those misrepresentations included that Bradon was actively involved in the negotiation of the sale of Bradon or its technology and that a transaction was imminent or anticipated within 60 to 90 days (see the discussion commencing at paragraph [171] of these reasons). It is alleged that in his dealings with investors, German continued to make misrepresentations to, and to deceive, investors over the Material Time on conference calls and through other communications. Those representations induced investors to make repeated purchases of Bradon shares from German.

Compta's Involvement

[40] Compta had limited direct dealings or communications with investors through German and, except as otherwise described in these reasons, did not directly solicit any investments by them in Bradon shares. He did, however have communications directly with at least two of the investors who testified (i.e. PB and WC) and he signed and provided to German a Bradon letter that indicated, among other things, that German had agreed to provide Bradon with advice, including the provision of financial advice in support of the sale of Bradon's assets and the "securing of other potential investors" in Bradon (see paragraph [212] of these reasons).

Bradon is a Start-up Company

[41] Bradon is a start-up company that has never generated substantial revenues and has consistently suffered losses. Bradon's operations have been funded through shareholder loans and the issuances of Bradon shares.

[42] I was provided with the Bradon unaudited financial statements for the years ended June 30, 2011, 2010, 2009 and 2008. Although none of these financial statements were audited, it appears that the 2008 and 2009 financial statements were prepared by an external accountant and that the financial statements for 2010 and 2011 were prepared internally.

[43] Based on these financial statements, it appears that in 2008 Bradon used more cash for its operating activities than it generated, by approximately US $218,894. Staff's Senior Forensic Accountant, Michael Ho ("**Ho**"), testified that Bradon's income statement for that year reflected no sales, total revenue of US $20, and a net loss, after taxes.

[44] Similarly, in 2009, Bradon had negative cash flow of approximately US $246,512. The income statement for 2009 shows that Bradon had total sales of US $20,571.

[45] In 2010, Bradon's income statement for the year shows revenue generated in the amount of US $5,298.17 and an overall net loss of US $55,567.87 before taxes. In 2011, Bradon had no revenue and a net loss of US $258,416.03.

[46] Ho testified that because Bradon is a start-up company, its financial performance and financial statements are not unusual.

Losses by Investors

[47] Except as noted in paragraph [180] of these reasons, investors have not received back from German or Ensign any of the funds paid by them for Bradon shares. It appears that investors have all suffered a complete loss of their investment. Some of them have lost their life savings.

[48] In letters dated October 4, 2011 and December 15, 2011, Compta and Bradon advised investors that in the event that there are any Bradon shareholder distributions as a result of the sale of Bradon or its technology, Bradon would hold in trust for investors any amounts otherwise payable to German as a Bradon shareholder or interplead such amounts to the credit of investors pursuant to any outstanding litigation, until any claims by investors against German are resolved.

2. Staff's Witnesses

[49] Staff called the following seven witnesses:

(a) two members of Staff: Ho and Louisa Fiorini ("**Fiorini**"), Staff Investigator; and

(b) five individuals who were investors in Bradon through German: JS, WC, DY, PB, and RM.

[50] All the parties agreed that the transcripts of compelled interviews of the Respondents would be filed as exhibits and form part of the evidence in this matter. Staff also relied on the transcript of a voluntary interview of Compta given to a detective of the Kawartha Lakes Police.

[51] The testimony of the investor witnesses is summarized below.

[52] In order to protect the privacy of the investor witnesses, they are referred to in these reasons by their initials. Staff was also instructed to 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.*

JS's Testimony

[53] JS is an Ontario resident who met German at a health trade show. She is a relatively unsophisticated investor of limited means. In 2008, German solicited JS to buy shares in Bradon as a good opportunity to regain some of the money that JS had previously lost in other investments. German told JS that he was assisting Bradon in the sale of its technology to a major technology or telecommunication company.

[54] German told JS that Bradon had developed software that was highly sought after by IBM and other major companies and that JS would make a substantial return on her investment. German stated that Bradon shares were being sold for a purchase price of $5.00 per share but had the potential to reach $130 per share once Bradon completed a transaction. JS was told that Bradon shares could only be bought through German and in $25,000 blocks. German also told JS that he would guarantee the investment and would return the funds at the purchase price paid by JS at any time at her request. JS testified that the buy-back option applied until Bradon or its assets were sold.

[55] JS testified that German told her a sale of Bradon or its technology to IBM was imminent and that a transaction was going forward very quickly and that by investing, she would be able to get in just before the sale was going to happen. JS was also told during a conference call with other investors that IBM had signed a letter of intent to acquire Bradon (see paragraph [175](b) of these reasons). JS testified that, based on these representations made by German with respect to the sale of Bradon or its technology, JS felt very secure about her investment and would have invested more money if she had more funds available to do so. She was told by German to keep all of this information confidential including that she made any investment in Bradon shares.

[56] JS made her first purchase of Bradon shares from German on or about November 5, 2008 for $25,000. Over the period from December 12, 2008 to May 6, 2010, JS made five further

investments aggregating $70,000. Accordingly, JS paid a total of $95,000 to Ensign for the purchase of 19,000 Bradon shares at a price of $5.00 per share.

[57] JS introduced other family members to German for the purchase of Bradon shares. One of JS's sisters invested $225,000 consisting of all of her retirement savings, and another sister invested $100,000.

[58] JS testified that in conference calls with investors, German would provide updates as to Bradon's business and the progress on the sale of Bradon or its technology. On one of those calls, German stated that several major technology companies had signed up to deliver the SAViiDesk software to their customers and that potential subscribers could surpass 600 million. I note that there is no evidence supporting any of these statements made by German.

[59] JS testified that at one point she was asked by a personal friend of German's to forward an e-mail to investors regarding a meeting to be held at the Marriott Hotel on Wednesday, October 21, 2009 for the purpose of assisting investors to invest the windfall that would arise from their investment in Bradon shares. The e-mail stated that:

> Dear Bradon investors, we have been fortunate enough to be involved in this venture and to have the prospect of significant returns on our investment. I [German's personal friend] have been in the financial planning industry for 15 years and know from experience it is prudent to make plans in advance so that when you receive the windfall, as Tim [German] stated, you know what you are going to do. Without that planning, you will likely have a multitude of people contacting you from banks, et cetera, wanting to give you advice and pressuring you to do something immediately…The meeting will be held on Wednesday, October 21, 2009, at the Marriott Hotel".

[60] JS testified that she also received a letter on Bradon letterhead signed by Compta, dated December 16, 2009, about the relationship between German and Compta (see paragraph [212] of these reasons). JS said that letter made her feel secure about her investment. JS also testified that she was told by German not to contact Compta directly. The only time JS contacted Compta directly was in July 2011, when she could not find or reach German. She was worried, so she got in touch with Compta by phone, who informed her that he was not aware of German's activities in selling Bradon shares.

[61] JS testified that she and her family members have invested substantially all of their financial resources in Bradon shares. The funds came from their retirement savings, other savings, loans that were taken out, as well as money from other investments.

[62] JS testified that she is distraught from losing these funds and the circumstances have severely strained JS's relationship with the other members of her family. One of JS's sisters did receive $25,000 of her investment back from German. That sister had expressed concerns with the investment and German told JS that he did not like how her sister conducted herself during one of the investor conference calls. As a result, German gave her back $25,000 of her investment. According to JS's testimony, German had to take out a mortgage on his farm to pay her.

[63] JS is a plaintiff in a civil action commenced against Compta, Bradon, German and Ensign. JS has not to date recovered any money from that proceeding or otherwise in connection with her purchase of Bradon shares through German.

WC's Testimony

[64] WC is a resident of Toronto who is self-employed and is an unsophisticated investor. She first met German at a Christmas party in 2007. WC did some work for a company called Revolution Rotary Engines Inc. ("**Revolution Rotary**"), for which German was the President.

[65] In May 2008, WC made an investment of $300,000 in Revolution Rotary. That investment was very quickly lost.

[66] WC heard about Bradon through German. German explained that he was a consultant for Bradon and that Bradon's products would be a game-changer. German offered WC the opportunity to invest in Bradon to recover the money she lost from the investment in Revolution Rotary. WC was told by German that Bradon's share price would likely increase from $5.00 per share to $150 or $200 per share upon a sale of the company or its technology. WC was told by German that such a sale was "happening within probably likely [*sic*] 30 days, because it was at the very, very final stage" (Transcript, December 5, 2014 at page 93, lines 12-14).

[67] WC made her first purchase of Bradon shares on November 24, 2008 for $30,000. Over the period from December 1, 2008 to May 8, 2009, WC made four further investments aggregating $318,030. All of WC's purchases were made at $5 per share.

[68] WC also purchased 6,008 Bradon shares from German on behalf of her sister.

[69] WC asked German many times to meet Compta. German always discouraged such a meeting saying Compta was too busy. German indicated to WC and other investors, however, that German met regularly with Compta to discuss Bradon. WC eventually became concerned about her investment and wanted to confirm with Compta, among other things, what happened to her money and whether it had gone to Bradon.

[70] In November 2009, WC contacted Compta directly and requested a meeting (see the discussion commencing at paragraph [202] of these reasons). She did that without German's knowledge. WC testified that she met Compta at Bradon's offices on November 23, 2009 and they went to a coffee shop nearby. WC testified that she told Compta the amount of her investment in Bradon shares and that a goal of the meeting was to see for herself that he and Bradon existed. She also wanted to find out what had happened to the money she had invested. *WC testified that Compta told her that there was an arrangement whereby German found investors for Bradon who would then invest in Bradon shares through German.* This way, Compta only had to deal with German. One of the reasons for this arrangement was to avoid adding shareholders directly in Bradon who would then have to be included in the 50 investor limit imposed by the private issuer prospectus exemption under securities law. In this respect, WC testified that she was told by Compta that the strategy was to maintain Bradon as a private company "so they would not go over 50 investors. So it is a lot easier if [German] finds people, he gets money and people under [German] … and he [Compta] only has [German] as an investor" (Transcript, December 5, 2014 at page 128 lines 7-15). Compta told WC that Bradon

already had 47 registered shareholders. As a result, WC's investment was under or through German and she was not officially a Bradon shareholder. WC testified that Compta told her that she could not become a direct Bradon shareholder and that, since her money had come in through German, she would have to continue her investment in that manner. WC also testified that Compta confirmed that the price of the Bradon shares was $5.00 per share. According to WC, Compta responded "that's right" when WC stated the $5.00 share price.

[71] WC's notes, prepared later, of her interaction with Compta state the following:

> [Compta] said that it's also to the company's best interest to be remained [*sic*] under 50 investors due to tax issues. He explained that if the company had gone over 50 investors then it would have to go public. Once a company has gone public, things would be very complicated, including the way the tax was to be done.
>
> …
>
> He explained that due to this reasons [*sic*], [German] helped raise money by finding investors and but would only go under [German's] name, which, he said, had been working out very well.

[72] At the meeting, WC showed Compta a one-page share purchase agreement dated February 9, 2009 that she had entered into with Ensign in making one of her investments in Bradon shares. The day after the meeting, WC sent Compta an e-mail that said she had invested $348,040 in Bradon shares and that "it is peace of mind that my investment is left in good hand [*sic*]". Compta responded that he would keep WC in the loop and that their communication channel would be kept confidential.

[73] The testimony of WC and Compta conflicts in material respects with respect to what Compta said to WC at the meeting about her investment (see the discussion commencing at paragraph [202] of these reasons).

[74] WC made further purchases of Bradon shares following the November 23, 2009 meeting with Compta. On February 4, 2010, WC invested a further $15,000 in Bradon shares through German. She made a further investment on March 1, 2010 for $14,000. WC testified that those investments were made at a price of $5.00 per Bradon share. WC also testified that she wanted to exercise the buy-back option to the extent of $50,000; however, German talked her into only obtaining $25,000 of her investment back.

[75] WC testified that she has no money left and is in substantial debt having liquidated all of her retirement savings, life insurance and other savings and used a line of credit to invest in Bradon shares. She testified that this has had a very devastating effect on her and her family.

DY's Testimony

[76] DY is an Ontario resident who has been a financial advisor for approximately 14 years. DY heard of German through another financial advisor who had bought shares in Bradon. DY made his first investment through German shortly after attending a seminar held by German for

Bradon investors. DY testified that German offered him the opportunity to invest in Bradon because an existing shareholder wanted to sell their shares.

[77] DY made his first purchase of Bradon shares through German in October, 2009 for approximately $50,000. In December 2009, DY made two further purchases: one for himself in the amount of $25,000 and another on behalf of a family member for $25,000. In each case, the price paid was $5.00 per Bradon share. DY's third purchase was made in June, 2010 for approximately $25,000 at $2.50 per share and his final purchase was made in November, 2010 for $6,000 at $1.00 per share. DY made a total investment of $131,000 in 36,000 Bradon shares.

[78] DY testified that he requested Bradon share certificates in his name from German but he never received any such certificates.

[79] DY called Compta directly on January 28, 2011 after German had said that Bradon had won an IBM award for its technology, when in fact it appeared to DY that Bradon had not. He testified that he told Compta that he was a Bradon shareholder. Compta told DY that he was not a Bradon shareholder and that he was invested in Ensign. DY testified that Compta told him that only Compta was authorized to sell Bradon shares. Compta also told DY that Bradon did not win any IBM award and that Bradon was in talks to sell but he had no idea when a sale would occur. DY testified that, after this discussion with Compta, he met German on February 8, 2011 and German explained that investors invested through German because Bradon wanted to limit the number of its shareholders and couldn't have more than 50. As a result, German owned the Bradon shares but he could assign them to other investors. DY was upset because he thought he owned Bradon shares throughout. However, DY indicated that he was prepared to wait to get his money back and he did not want to exercise the buy-back option.

[80] DY testified that he has lost all of the money he invested in Bradon. He said that has caused him great distress.

PB's Testimony

[81] PB is an Ontario resident who is self-employed. PB heard of German through a friend and was told that German was offering an investment opportunity in Bradon shares. PB testified that he did some business due diligence with respect to Bradon and its software. As part of that due diligence, on October 26, 2009, PB sent Compta the e-mail discussed commencing at paragraph [196] of these reasons and received the response from Compta referred to in paragraph [198] of these reasons.

[82] As a result of the e-mail exchange with Compta, PB purchased Bradon shares through German on November 3, 2009 for $14,985 and made a second purchase on November 19, 2010 for $2,485. The purchase price of the shares was $5.00 per share for the first purchase and $1.00 per share for the second purchase. His total investment of $17,470 has not been returned to him.

RM's Testimony

[83] RM is an Ontario resident who is self-employed. He is not a sophisticated investor. RM was introduced to German through another investor. RM made approximately 19 purchases of Bradon shares through German over the period from December 2008 to November 2010. His

total investment is $76,000. The purchases were made at $5.00 per share, with the exception of one purchase made at $2.50 per share and one made at $1.00 per share.

[84] RM also facilitated investments in Bradon shares for approximately 12 people, in respect of whom German executed 26 purchase agreements between December 5, 2008 and December 9, 2009, for an aggregate of $41,750. RM testified that he has personally paid some money back to the friends he introduced into the investment, but that no money has been returned to him by German or Ensign. RM testified that these circumstances are a tragedy and that many of the investors' families have been severely and adversely affected by the investment in Bradon shares.

3. Respondents' Testimony

[85] German did not call any witnesses and chose not to testify.

[86] Compta did not call any witnesses, but he did testify.

[87] Compta testified how he got involved in the technology field. He said that he bought the intellectual property of Telum International and incorporated a new company, Bradon Technologies Ltd., to develop that technology. Compta owns 2.2 million Bradon shares representing approximately 23% of the outstanding shares. He says that he has invested his life savings in Bradon.

[88] Compta testified that third party investors made their first purchases of Bradon shares on March 18, 2004. He testified that, in the case of each investment, his lawyer would prepare the subscription agreement and issue the shares. He testified that these investors invested under the private issuer exemption of securities law, which permits a company to raise funds from up to 50 investors. He said that he wanted to keep Bradon a private company.

[89] Compta met German in late 2002 or early 2003 through a customer. Compta testified that he did not have a prior relationship with German and that he felt that German had knowledge of the technology sector. Compta and German became friends. Compta testified that he trusted German.

[90] Compta testified that German invested $20,000 in Bradon shares on December 31, 2007. Following this investment, German took an interest in Bradon and began to look closely at Bradon's expenses and how much Bradon would need to continue operations. Compta told German that he wanted to try to raise funds from two or three investors for half a million to a million dollars. German said that he would provide money to cover Bradon's monthly expenses, but in tranches rather than one large lump sum. Compta said that he told German that existing shareholders of Bradon could not trade or sell their Bradon shares. Compta testified that German never introduced a Bradon investor directly to him during the Material Time and that Bradon was never asked by German to issue any Bradon shares to investors.

[91] Compta testified that, by May 2010, he began to realize that German's investments in Bradon shares were actually being funded from a number of different investors that had purchased Bradon shares from German.

[92] Compta testified that he did not directly solicit any investors to invest in Bradon through German and that he had very limited contact or involvement with any of those investors. He testified that whatever arrangement those investors may have had was with German and Ensign and not Compta or Bradon.

[93] Compta testified that he received the e-mail from PB referred to in paragraph [196] of these reasons. He testified that he did not understand that PB's e-mail referred to new investments by investors in Bradon shares through German. He understood that either PB knew some of the approximately 47 existing shareholders of Bradon or that he knew people that German was intending to bring to Compta to invest in Bradon. He said that he understood that German was offering to introduce potential investors to Bradon to purchase shares from Bradon directly.

[94] Compta acknowledged that he met with WC on November 23, 2009 and that she showed him one of her share purchase agreements. Compta testified that he was confused by the agreement and that, based on his quick review of the agreement, it related to a sale of Ensign, and not Bradon shares to WC. Compta also testified that he made the statements to WC at that meeting set out in paragraph [203] of these reasons.

[95] Compta testified that he emphatically told German on more than one occasion that German couldn't sell his Bradon shares. Compta also stated that he did not know what representations were being made by German to investors. He testified that he would not have said that a transaction to sell Bradon or its technology was imminent or anticipated within 60 to 90 days. *In fact, he stated that there were no negotiations ever underway to sell Bradon or its technology to a major technology company and that no letter of intent to do so was ever entered into.* He testified that Bradon was talking to different major companies (such as IBM, Microsoft, etc.) to allow them to evaluate Bradon's technology and to assess whether it was a fit for them and their customers. For that purpose, Bradon had entered into a number of vendor partnership agreements with such organizations. Compta was not, however, negotiating a purchase of Bradon or its technology. Further, Compta testified that he would never predict the outcome of any such discussions and that he would never have given investors information about such discussions.

[96] Compta testified that during the Material Time, Bradon received an aggregate of $808,000 from German and, in return, Bradon issued 748,000 Bradon shares to German. Those shares were issued in at least 26 separate transactions over that period.

[97] Compta testified that he did not receive any salary or payments of his expenses from Bradon. The funds received from German were used by Bradon for its operating expenses. Compta stated at the conclusion of his testimony that Bradon was still in existence and that third party companies (unnamed) were continuing to look at acquiring Bradon's technology and that Bradon could have a deal done in the first part of 2015.

4. Credibility

[98] Some of Compta's testimony conflicts in material respects with the testimony of the investor witnesses or is inconsistent with documentary evidence. Compta's contradictory

evidence includes what he testified that he said to WC at the meeting on November 23, 2009 (see paragraph [203] of these reasons). I note that because German did not testify at the hearing, there is no corroboration by German of Compta's testimony related to the events at issue in this matter.

[99] In *McDougall*, the Supreme Court of Canada stated that in cases where there is conflicting or inconsistent testimony and where the trier of fact is deciding whether a fact occurred on a balance of probabilities:

> … provided the judge has not ignored the evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue[s] in the case.
>
> (*McDougall, supra* at para. 86)

[100] In *Springer* v *Aird & Berlis LLP* (2009), 96 OR (3d) 325 ("***Springer***"), the Court considered the credibility of a party witness and, citing the British Columbia Court of Appeal in *R* v *Pressley* (1948), 94 CCC 29 (BCCA), stated that:

> The most satisfactory test of judicial truth lies in its harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.
>
> (*Springer, supra* at para. 14)

[101] The Commission has applied this principle from *Springer* in *Re Doulis* (2014), 37 O.S.C.B. 8911 at paras. 266-272, *Re Suman* (2012), 35 O.S.C.B. 2809 at paras. 314-315 and most recently in *Re Phillips and Wilson* (2015), 36 O.S.C.B. 617 at para. 225. In *Doulis*, the respondent Doulis' testimony was internally inconsistent and it conflicted with the testimony of Staff's investor witnesses. The panel attached greater weight to the testimony of investor witnesses and to evidence that was corroborated by other evidence, including documentary evidence.

[102] In considering the credibility of Compta, I have applied the principles referred to in paragraphs [99] to [101] above. The evidence of each of the investor witnesses in this matter was consistent with the evidence given by the other investor witnesses and was corroborated by other evidence such as the terms of the share purchase agreements entered into by German and Ensign with investors, e-mails, and investors' notes of various statements made by German or Compta. I have generally accepted the evidence of the investor witnesses when it conflicted with Compta's testimony. Compta's testimony was at times at odds with the documentary evidence on key points and some of his testimony was inconsistent with his compelled testimony. I have indicated in these reasons where I take direct issue with or reject Compta's testimony.

5. Agreed Facts

[103] Compta and Bradon submitted an Agreed Statement of Facts and Respondents' Admissions (the "**Agreed Statement**") which admitted paragraphs 7 to 12 and 27 of Staff's Statement of Allegations. Among other matters, the Agreed Statement acknowledges that during the Material Time, German purchased 748,000 Bradon shares in his own name for $808,000 and that the funds German paid to Bradon were used to pay the company's operating expenses.

F. DID GERMAN AND ENSIGN TRADE IN SECURITIES WITHOUT REGISTRATION?

1. Applicable Law

September 2009 Amendments to Section 25 of the Act

[104] Staff alleges that during the Material Time, German and Ensign breached subsections 25(1)(a) of the Act as that section read prior to September 28, 2009, and subsection 25(1) of the Act as that section read thereafter.

[105] 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.

[106] Effective September 28, 2009, subsection 25(1) was amended to read 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.

[107] Both of these provisions at their core prohibit trading in securities by a person without registration under the Act. Accordingly, I must first determine whether German and Ensign traded in a security. The principal difference between these provisions is that current subsection

25(1) of the Act prohibits a person from engaging in or holding himself, herself or itself out as engaging in the *business of trading* in securities. Accordingly, in order to find a contravention of current subsection 25(1), I must also find that German and Ensign engaged in or held themselves out as engaging in the business of trading in securities.

Trading in Securities

[108] Both the predecessor provision and current subsection 25(1) of the Act refer to a trade or trading in a security. The terms "trade" or "trading" are defined in an inclusive manner by subsection 1(1) of the Act as follows:

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

Trading

[109] Decisions considering whether acts are in furtherance of trading reflect a contextual approach that examines the totality of the conduct and the setting in which it occurs. The primary focus 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***")).

[110] In previous decisions, the Commission has found that a variety of activities constitute acts in furtherance of trading, including:

(a) 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);

(b) accepting money from investors for the purchase of shares and depositing investor cheques in a bank account (*Limelight Entertainment Inc., (Re)* (2008), 31 O.S.C.B. 1727 at para. 133 ("***Limelight***"));

(c) providing potential investors with share purchase agreements to sign;

(d) issuing and signing share certificates; and

(e) meeting with individual investors.

(See *Momentas, supra* at para. 80)

[111] The Commission has held that its existing jurisprudence with respect to trading and acts in furtherance of a trade continues to apply in determining whether a person has engaged in the business of trading under current subsection 25(1) of the Act (*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).

The Business Trigger

[112] Section 1.3 of Companion Policy 31-103CP to OSC Rule 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant* Obligations provides the following guidance with respect to when a person is engaging in the business of trading in securities:

> **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.

[113] The policy goes on to identify the following factors as relevant in determining whether a person is trading in securities for a business purpose. A person is trading or advising for a business purpose where the person is:

(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.

[114] The policy notes that these factors are not exhaustive and that no one factor on its own may determine whether a person is in the business of trading or advising in securities.

2. Discussion

Registration

[115] Registration is an essential element of the securities regulatory regime under the Act for achieving the objective of protecting investors from unfair, improper or fraudulent practices (subsection 1.1(a) of the Act) (*Limelight, supra* at para. 135).

[116] Section 25 is a cornerstone of the Act because through the registration requirement, the Commission attempts to ensure that those who engage in trading securities meet necessary

proficiency requirements, are of good character and satisfy appropriate ethical standards (*First Global Ventures* (2007), 30 O.S.C.B. 10473 at para. 122 citing *Gregory & Co.* v. *Quebec (Commission des valeurs mobilieres),* [1961] S.C.R. 584 at p. 4).

[117] Subsection 2.1.2(iii) of the Act indicates that a primary means of achieving the purposes of the Act include "requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants." Further, one of the principal obligations of a dealer is to ensure that securities sold to investors are suitable for them.

[118] Staff tendered into evidence certificates pursuant to section 139 of the Act with respect to German, Ensign, Compta and Bradon. Those certificates show that none of the Respondents were registered with the Commission during the Material Time.

Trading and/or Acts in Furtherance of Trades by German and Ensign

[119] The evidence shows that German and Ensign engaged in the following acts in furtherance of trades in securities:

(a) German contacted and solicited investors to purchase Bradon shares from him; at least 46 investors made investments in Bradon shares through German;

(b) at least 79 share purchase agreements were entered into with investors; those agreements were on Ensign letterhead and were signed by German;

(c) German told investors that a sale of Bradon or its technology was imminent or anticipated within 60 to 90 days;

(d) German told investors that they could expect the Bradon shares to increase in value from $5.00 per share to $130 to $150 per share after a sale transaction;

(e) almost all of the share purchase agreements entered into by the investor witnesses gave investors the option on 30 days' notice to require Ensign to buy back the shares at the transaction price paid by the investor (referred to in these reasons as the "buy-back option") (see paragraph [34] of these reasons);

(f) investors paid Ensign the purchase price for the Bradon shares purchased through German;

(g) Ensign received at least $1,755,505 for the purchase by investors of Bradon shares; and

(h) German provided investors with regular updates about their investment through conference calls and in-person meetings. During these updates, German continued to represent to investors that the sale of Bradon or its technology to a major technology company was imminent or anticipated within 60 to 90 days.

[120] I heard testimony from investors that they paid Ensign the following aggregate amounts for the Bradon shares purchased by them through German:

(a) JS paid $95,000;
(b) WC paid $377,030;
(c) DY paid $131,000;
(d) PB paid $17,470; and
(e) RM paid $117,750.

These were very substantial amounts for the investors who testified and, in the case of WC and JS, the amounts represented substantially all of their financial resources.

Trading and/or Acts in Furtherance of Trades by German

[121] There is no doubt that German and Ensign purported to sell Bradon shares to investors for valuable consideration. It is irrelevant that the sale to investors of those shares was not completed by the issue of Bradon share certificates. German and Ensign purported pursuant to the relevant purchase agreements to sell Bradon shares to investors and the investors paid valuable consideration (cash) for those shares.

[122] During the Material Time, German was the principal actor in soliciting investors to purchase Bradon shares from him. That solicitation was for a business purpose: that is, to encourage investors to purchase Bradon shares from him. Most of the Bradon shares were sold by German to investors for $5.00 per share while at substantially the same time German was purchasing Bradon shares for $1.00 per share (see paragraph [26] of these reasons). Accordingly, German and Ensign made a $4.00 profit on most of the Bradon shares sold to investors. In doing so, German was carrying on all of the activities referred to in paragraph [113] of these reasons, other than acting as a market maker.

[123] Based on the foregoing, it is clear that German and Ensign engaged in trades and acts in furtherance of trades in Bradon shares for a business purpose.

Possible Exemptions

[124] Once Staff has shown that a respondent has traded in securities without registration, the onus shifts to the respondent to establish that one or more exemptions were available (*Limelight, supra* at para. 142 and *Re Ochnik* (2006), 29 O.S.C.B. 3929 at para. 67). German and Ensign have not made any submissions with respect to potential registration or prospectus exemptions that could have been available during the Material Time and I am not aware of any exemptions that were available in the circumstances. To the extent that the accredited investor exemption might have been available as a registration exemption prior to September 28, 2009, I address that exemption at paragraph [138] below.

3. Findings

[125] Accordingly, I find that during the Material Time German and Ensign traded in securities in Ontario for a business purpose within the meaning of the Act. Neither German nor Ensign was registered in any capacity with the Commission and there were no registration exemptions available in connection with such trades. German and Ensign thereby repeatedly breached

subsection 25(1)(a) of the Act as in force prior to September 28, 2009 and subsection 25(1) of the Act as in force on and after that date.

G. DID GERMAN AND ENSIGN ENGAGE IN ILLEGAL DISTRIBUTIONS OF SECURITIES?

1. Applicable Law

[126] Subsection 53(1) of the Act prohibits the distribution of securities unless a preliminary prospectus and prospectus with respect to those securities have been filed with the Commission and receipted by the Director under the Act. That section provides as follows:

> 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.

[127] The relevant portion of the definition of "distribution" in subsection 1(1) of the Act states that:

> "distribution", where used in relation to trading in securities, means,
> …
> (f) any trade that is a distribution under the regulations.

[128] Subsection 73.7(1) of the Act provides that:

> The regulations may provide that the first trade in a security previously distributed under an exemption from the prospectus requirement is deemed to be a distribution unless it is carried out in accordance with the regulations.

[129] I heard evidence from Compta that the Bradon shares owned by German were distributed to him under the private issuer exemption in section 2.4 of NI 45-106. There were resale restrictions pursuant to National Instrument 45-102 – *Resale of Securities* ("**NI 45-102**") on the first trade by German of the Bradon shares owned by him.

[130] Section 2.4 of NI 45-102 states that a first trade in a security is subject to section 2.6 of that instrument if the security was distributed under any of the exemptions listed in Appendix E to that instrument. The private issuer exemption is an exemption listed in Appendix E to NI 45-102.

[131] Subsection 2.6(1) of NI 45-102 provides that a first trade in a security "specified by section 2.4" of NI 45-102 is a distribution within the meaning of Ontario securities law unless certain conditions are satisfied. One of those conditions is that the issuer is and has been a reporting issuer for a specified period. Bradon has never been a reporting issuer. Accordingly, any sale by German of his Bradon shares was a distribution for purposes of the Act that required the filing of a prospectus.

[132] I should add that because Bradon was not a reporting issuer, any resale of German's Bradon shares was a distribution regardless of the exemption relied upon for the original issue of those shares to him.

2. Discussion

[133] Subsection 53(1) of the Act provides a fundamental protection to investors because the prospectus requirement ensures that investors have sufficient information to properly assess the risks of an investment in a security and to make informed investment decisions. The Commission stated in *Limelight* that:

> 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)

[134] Staff does not allege that the distribution of Bradon shares by Bradon to German was contrary to the Act. Rather, Staff alleges that German's purported resale of his Bradon shares to investors contravened the Act because those trades were distributions pursuant to subsection 2.6(1) of NI 45-102, which required the filing of a prospectus.

[135] German was issued 748,000 Bradon shares under the private issuer exemption pursuant to section 2.4 of NI 45-106. The first trade of those shares was subject to a resale restriction under subsection 2.6(1) of NI 45-102.

[136] No preliminary prospectus or prospectus was ever filed in respect of the Bradon shares purported to be resold by German during the Material Time. Therefore German's purported sales of his Bradon shares to investors were illegal distributions that contravened subsection 53(1) of the Act, unless an exemption was available.

[137] There is no evidence that German relied upon any exemption from the prospectus requirement for the resale of his Bradon shares. The onus is on a respondent to establish that an exemption was available in connection with a distribution of securities. German has failed to do so.

[138] I note that section 2.4 of NI 45-106 establishes a private issuer exemption which allows an issuer that is not a reporting issuer to distribute securities to not more than 50 persons (excluding current and former employees of the issuer or affiliates) who fall within certain categories. It was not contended that the sale by German of his Bradon shares to investors qualified under that exemption. I also note that section 2.3 of NI 45-106 provides a prospectus exemption if the purchaser is an "accredited investor" and is purchasing the security as principal.

Based on their testimony, none of JS, WC, DY, PB or RM met the financial criteria for being an accredited investor. Accordingly, I am not aware of any prospectus exemption that would have been available to German in connection with the resale of his Bradon shares to investors.

3. Findings

[139] As discussed above, German and Ensign engaged in trades and acts in furtherance of trades in Bradon shares as defined in the Act. Further, the first trade by German of his Bradon shares to investors constituted a distribution of Bradon shares within the meaning of subsection 53(1) of the Act. No preliminary prospectus or prospectus was filed in connection with those distributions to investors and no prospectus exemptions were available. Accordingly, the purported sale by German of his Bradon shares to investors during the Material Time repeatedly breached subsection 53(1) of the Act.

H. DID GERMAN AND ENSIGN MAKE PROHIBITED REPRESENTATIONS TO POTENTIAL INVESTORS?

1. Applicable Law

[140] Subsection 38(1) of the Act states:

> 38(1) **Representations prohibited -** No person or company, with the intention of effecting a trade in a security, other than a security that carries an obligation of the issuer to redeem or purchase, or a right of the owner to require redemption or purchase, shall make any representation, written or oral, that he, she or it or any person or company,
>
> (a) will resell or repurchase; or
> (b) will refund all or any of the purchase price of,
>
> such security.

[141] The purpose behind prohibiting a representation as to the resale or repurchase of securities is to prevent an investor from being misled as to the risks associated with a purchase of a security. In *Hampton Court Resources Inc. (Re)*, 2006 ABASC 1345 at para. 169 ("***Hampton***"), the Alberta Securities Commission (the "**ASC**") states in relation to the equivalent subsection of the Alberta *Securities Act* that:

> The purpose of the provision, we believe, is twofold: to protect the particular investor to whom a representation might otherwise be directed; and to prevent conduct that could impair the fair and efficient operation of the capital market generally. The prohibition addresses representations that go to the risk associated with an investment. We discern from the prohibition a legislative intention that investors not be lured into making investment decisions on the basis of distorted appreciations of investment risk.
>
> (*Hampton*, *supra* at para. 169)

[142] The ASC also stated that Staff need not "prove actual harm, either to an identifiable investor or to the capital markets generally, whether as a result of distorted market information, a failure to follow through on the assurances represented, or otherwise" (*Hampton, supra* at para. 172).

[143] In Ontario, the Commission considered subsection 38(1) of the Act in *Global Partners Capital*, (2010), 33 O.S.C.B. 7783 ("***Global***") where there was evidence that the respondents repeatedly told investors that their shares would be repurchased if the share price did not reach a specified level at the time of the company's initial public offer (*Global, supra* at paras. 195-196 and 204-207). The Commission stated that:

> For a breach of subsection 38(1), the Panel must be satisfied on the evidence that [the respondents] represented to investors that the shares sold to them would be repurchased or refunded for the purpose of effecting a trade in a security.
>
> (*Global, supra* at para. 194)

[144] In *Global*, the Commission found that the representations made were solely for the purpose of enticing investment in securities and that the respondents breached subsection 38(1) of the Act.

2. Discussion

[145] The evidence is clear that German made repeated representations to investors with the intention of selling his Bradon shares that he or Ensign would, at the election of the investor, repurchase the Bradon shares sold to the investor at the price paid for them. That obligation was an express provision of almost all of the share purchase agreements entered into between Ensign and the investors who testified (see paragraph [34] of these reasons). I note that there were two share purchase agreements in evidence that did not contain the buy-back option.

[146] During his compelled interview, German admitted that he had offered the buy-back option to investors.

[147] JS and DY testified that this representation by German that he would buy back the Bradon shares at the full price paid for them had a "huge" impact on convincing them to invest. It is clear that the investors who testified were materially misled and lured into purchasing the Bradon shares on the basis of this representation. That buy-back option has not been honoured by German or Ensign. These circumstances are precisely why subsection 38(1) of the Act prohibits the making of such representations.

3. Finding

[148] Based on the foregoing, I find that German and Ensign repeatedly breached subsection 38(1)(a) of the Act by making a prohibited representation to investors with the intention of effecting sales by German of his Bradon shares to those investors.

I. THE LAW RELATED TO FRAUD

[149] Staff alleges that each of the Respondents committed fraud and engaged or participated in an act, practice or course of conduct relating to securities that the Respondents knew or reasonably ought to have known perpetrated a fraud on investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

[150] 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.

[151] The Commission has recognized that fraud in relation to securities is "one of the most egregious securities regulatory violations" (*Re Al-tar* (2010), 33 O.S.C.B. 5535 ("***Al-tar***")).

[152] There is generally no requirement under Ontario securities law to prove that a respondent intentionally or knowingly contravened those laws. However, in order to establish a breach of section 126.1(b) of the Act, Staff must establish, on the balance of probabilities, that a fraud occurred and that the respondent knew or ought to have known of the perpetration of that fraud.

[153] Because "fraud" is not defined in the Act, the Commission has adopted the test for fraud established by the Supreme Court of Canada in *R.* v. *Théroux*, [1993] 2 S.C.R. 5 ("***Théroux***").

[154] In this respect, the Commission stated in *Al-tar*:

> 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.
>
> (*Al-Tar, supra* at p. 214 to 221)

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

[156] The *actus reus* of fraud requires proof of a dishonest act involving "deceit, falsehood or other fraudulent means" which causes detriment or deprivation to a victim. A "deprivation" includes both an actual deprivation and the risk of prejudice to the victim's pecuniary or economic interests (*Théroux, supra* at para. 13).

[157] To prove the first two categories of dishonest acts, "deceit" or "falsehood," the Supreme Court stated, "all that need be determined is whether the accused, as a matter of fact, represented that a situation was of a certain character, when, in reality, it was not" (*Théroux, supra* at para. 15). For example, in *Théroux*, the Supreme Court upheld a fraud conviction and accepted the following conduct as dishonest acts involving deceit and falsehood:

> The trial judge found that the appellant deliberately lied to his customers, by means of verbal misrepresentations, a certificate of participation in the insurance scheme, and brochures advising that the scheme protected all deposits. The lies were told in order to induce potential customers to enter into contracts for the homes the appellant was selling and to induce them to give him their money as deposits on the purchase of these homes.
>
> (*Théroux, supra* at para. 38)

[158] For the third category of dishonest act, "other fraudulent means," the Supreme Court has held that the issue is to be "determined objectively, by reference to what a reasonable person would consider to be a dishonest act" (*Théroux, supra* at para. 14). The term is intended to encompass all means, other than deceit or falsehood, which can be properly characterized as dishonest.

[159] Omission or non-disclosure of important facts can fall under the category of "other fraudulent means." For example, in *Émond*, the Quebec Court of Appeal characterized the failure to disclose material facts as "a situation where, through his silence, an individual hides from the other person a fundamental and essential element…such as would mislead a 'reasonable person'" (*R* v. *Émond* (1997), 117 CCC (3d) 275 (Que CA) at 284 ("***Émond***")). Another case that has

dealt with "other fraudulent means" is *R v. Zlatic*, [1993] 2 S.C.R. 29 at para. 18, where the Supreme Court of Canada stated that:

> …the third category of "other fraudulent means" has been used to support convictions in a number of situations where deceit or falsehood cannot be shown. These situations include, to date, the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property…

[160] In "***Brost ASC*"** (cited as *Re Capital Alternatives Inc.* 2007 LNABASC 47), the ASC found fraud based on the non-disclosure of important information to investors. In that case, the ASC held that the omission of material information in an offering memorandum (including what investors would be investing in, how their funds would be spent, and the risks of the investment) "conveyed a thoroughly misleading picture of what investors were buying into and what was happening with their money" which was "misleading, deceitful and fraudulent" (*Brost ASC, supra* at paras. 205-206, 209-215, 243-245, 258 and 264-265, aff'd, *Alberta Securities Commission v. Brost*, [2008] A.J. No. 1071 (C.A.) ("***Brost CA***") at paras. 12 and 42).

[161] In addition to the non-disclosure of important facts, "other fraudulent means" has also been held to include the unauthorized diversion of funds (*Théroux, supra* at para. 15, *Hibbert, supra* at paras. 90 and 91) and the unauthorized taking of funds or property (*Lehman, supra* at para. 90).

[162] The Supreme Court of Canada has stated that dishonesty connotes "an underhanded design which has the effect, or which engenders the risk, of depriving others of what is theirs" (*R.* v. *Zlatic, supra* at para. 32). The dishonesty lies in the "wrongful use of something in which another person has an interest, in such a manner that this other's interest is extinguished or put at risk." Use is wrongful in this context if it "constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous" (ibid).

[163] The *mens rea* component of fraud is established by proof of (a) subjective knowledge of the prohibited act, and (b) subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist of knowledge that the victim's pecuniary or economic interests are put at risk) (*Théroux, supra* at para. 24).

[164] In *Théroux*, the requirement for subjective knowledge was described as follows:

> The test is not whether a reasonable person would have foreseen the consequences of the prohibited act, but whether the accused subjectively appreciated those consequences *at least as a possibility*. In applying the subjective test, the court looks to the accused's intention and the facts as the accused believed them to be…
>
> (*Théroux, supra* at para. 18) [emphasis added]

[165] The Supreme Court of Canada observed that subjective intent may be inferred from the acts themselves and that it is not necessary to show precisely what was in the mind of the accused at the time of the fraudulent acts:

> …The accused must have subjective awareness, at the very least, that his or her conduct will put the property or economic expectations of others at risk. As noted above**,** this does not mean that the Crown must provide the trier of fact with a mental snapshot proving exactly what was in the accused's mind at the moment the dishonest act was committed. In certain cases, the inference of subjective knowledge of the risk may be drawn from the facts as the accused believed them to be….*where the accused tells a lie knowing others will act on it and thereby puts their property at risk, the inference of subjective knowledge that the property of another would be put at risk is clear.*
>
> (*Théroux, supra* at para. 26) [emphasis added]

[166] Consistent with this principle, the Commission has held that "subjective awareness can be inferred from the totality of the evidence; direct evidence as to the accused's specific beliefs at the time of the fraudulent acts is not required" *(Re Nest Acquisitions and Mergers* (2013), 36 O.S.C.B. *4628* at para. 62; *Brost CA, supra* at para. 43).

[167] The inference of subjective knowledge is clear where an accused tells a lie knowing others will act on it and thereby puts their property at risk (*Théroux, supra* at para. 26). Subjective knowledge may also be established by showing that the respondent was "reckless" as to the conduct and the truth or falsity of any statements made (*Théroux, supra* at 23).

[168] A sincere belief or hope that no deprivation would ultimately occur does not vitiate fraud. The Supreme Court of Canada stated in *Théroux*:

> A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or her personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons. If the offence of fraud is to catch those who actually practise fraud, its *mens rea* cannot be cast so narrowly as this.
>
> (*Théroux, supra* at para. 33)

[169] In order to establish a breach by a corporation of section 126.1(b) of the Act, it is sufficient to show that its directing mind knew or reasonably ought to have known that the corporation perpetrated a fraud (*Al-tar, supra* at para. 221).

J. DID GERMAN AND ENSIGN COMMIT FRAUD?

1. Discussion

[170] There was compelling evidence that established that German and Ensign engaged in fraud through an intentional, ongoing and extended course of conduct of deceit and falsehoods that caused substantial harm and deprivation to investors.

[171] During the Material Time, German made a series of misrepresentations to investors for the purpose of inducing them to purchase Bradon shares from him. The most material misrepresentations included that (i) the sale of Bradon or its technology was imminent or anticipated within 60 to 90 days, when no such transaction was actively being negotiated; (ii) all of the funds from the sale of German's Bradon shares to investors were going to Bradon, when they were not; (iii) the price of the Bradon shares was $5.00 per share when German was making substantially contemporaneous purchases of Bradon shares from Bradon at $1.00 per share; and (iv) German was permitted to sell his Bradon shares when he was not legally entitled to do so.

[172] Based on Compta's testimony referred to in paragraph [95] above, it is clear that a transaction to sell Bradon or its technology was never imminent or anticipated within 60 to 90 days. That was one of the key representations made by German upon which investors relied in purchasing Bradon shares from him.

[173] German also told investors that all of the funds they paid to Ensign were going to Bradon to fund its operating expenses and the ongoing development and marketing of its technology. In fact, German applied only $808,000 to purchase Bradon shares. Apart from $125,000 returned to investors (see paragraph [28] of these reasons), the remaining $822,505.68 that Ensign received from investors is unaccounted for. In almost all cases, German sold his Bradon shares to investors at a price of $5.00 per share (there was one transaction at $2.50 per share and one at $1.00 per share) when he was contemporaneously buying Bradon shares at $1.00 per share (however, German purchased Bradon shares for $2.50 per share on his last four purchases). German did not inform investors of these facts.

[174] German and Ensign clearly purported to sell Bradon shares to investors. Those shares were registered in German's name and were subject to resale restrictions under Ontario securities law and could be resold only if a prospectus was filed or a prospectus exemption was available. Neither of these requirements was met in connection with German's sales of his Bradon shares to investors. Further, the certificates for the Bradon shares also noted that "[t]here are restrictions on the right to transfer the shares represented by this Certificate". Bradon's Articles of Amendment dated August 27, 2004 stated that "[t]he right to transfer shares of the Corporation shall be restricted so that no shares shall be transferred without the previous consent of a majority of the directors of the Corporation expressed by a resolution passed at the meeting of the directors or by an instrument or instruments in writing signed by all of the directors". No such consent of directors was obtained for the sale by German of his Bradon shares to investors.

[175] The following are examples, based on investor testimony, of some of the other outright lies German told investors:

(a) German told investors that 14 companies were looking to buy Bradon's technology including IBM, Cisco, Oracle, RIM, HP, Dell, Microsoft, Google and Wells Fargo. This was untrue. Compta testified that this statement was not true and that, while some of these companies may have been evaluating Bradon's technology, there were never any negotiations related to the sale of Bradon or its technology;

(b) on April 27, 2009, German told investors on a conference call that IBM had entered into a letter of intent to acquire Bradon and that there were 72 hours for the deal to

be finalized. This was false. Bradon was never in negotiations with IBM with respect to the sale of Bradon or its technology and no such letter of intent was entered into;

(c) on the same call, German represented to investors that a senior vice president of Bell Canada had agreed to be the President of Bradon because he was so excited about Bradon's technology and what it could do. This was false. According to Compta, no one from Bell had ever agreed to become Bradon's President;

(d) on the same call, German said that the "top six companies have meetings this week and have set aside $2 Billion." There were no companies in negotiations to acquire Bradon or its technology and there is no evidence that any company had set aside any funds to do so;

(e) German told investors that RIM had offered $20 per share for Bradon shares, and that another company had offered $25 per share, but that the offers were not accepted by Bradon because the price offered was too low. There is no evidence that any such offers were made;

(f) in May and June 2009, German told investors that Allen & Company was being retained by Bradon to assist in negotiating a transaction. This was false. In his compelled examination by Staff, German acknowledged that Allen & Company was never retained; and

(g) German told investors that only he could sell Bradon shares and that they could not buy shares directly from Bradon because he had an exclusive agreement with Bradon to finance the company. This was false. German was not entitled to sell his Bradon shares and there was no such exclusive agreement between German and Bradon (see paragraph [212] of these reasons for the terms of the advisory arrangement between Bradon and German).

[176] Throughout, German attempted to ensure that investors had no direct contact or communication with Compta. He told investors that Compta was too busy to meet with them but that German met regularly with Compta and passed relevant information to them.

[177] The misrepresentations and lies referred to above were communicated by German to investors to induce them to purchase Bradon shares from him. German continued to deceive investors over the course of nearly two and a half years on conference calls and in other communications with them. German also attempted to calm the increasing concerns of investors by reiterating his promise to buy back their Bradon shares for the price they paid for them. German and Ensign have failed to honour that commitment.

[178] The investor witnesses testified that they were materially misled and abused by German's conduct.

[179] Accordingly, German committed acts of deceit and falsehood in connection with the sale of his Bradon shares to investors.

Deprivation

[180] There is also clear evidence of the deprivation of investors. The investors to whom German purported to sell his Bradon shares have not become Bradon shareholders. With the exception of WC and JS's sister, none of the investor witnesses have received any of their money back or realized any value from their purchase of Bradon shares through German. Five investors (including WC and JS's sister) each received $25,000 back from Ensign and German. In any event, all of the investors who purchased Bradon shares through German were put at high risk of financial loss.

[181] Any continuing possibility of a sale of Bradon or its technology seems at best wishful thinking. There is no evidence before me related to that possibility other than the statement made by Compta at the end of his testimony that a sale could yet occur within the first quarter of 2015 (presumably that has not occurred).

[182] A number of the investors who testified borrowed money on credit cards and lines of credit and took money out of their registered retirement and education savings plans in order to invest in Bradon shares. Some of those investors have lost their life savings.

[183] While it is not necessary in order to establish fraud that a respondent ultimately profited or benefited from their conduct, German and Ensign did benefit. They obtained the full purchase price of $1,755,505.68 from the purported sale of German's Bradon shares to investors during the Material Time. German purchased $808,000 of Bradon shares. The balance of $822,505.68 (which takes into account that $125,000 was returned by Ensign and German to five investors) was retained by Ensign and is unaccounted for.

[184] German committed the acts of deceit and falsehood referred to in paragraphs [171] to [177] above and caused the deprivation or risk of deprivation referred to in paragraphs [180] to [183] above. Accordingly, the *actus reus* of fraud has been proven against him. German had actual knowledge of his deceit and falsehood and that such conduct would cause deprivation or the risk of deprivation to investors. Accordingly, I find that Staff has also established the *mens rea*, or subjective knowledge by German, of the fraud perpetrated by him.

2. Finding

[185] Based on the foregoing, I find that German perpetrated fraud in the purported sale by him of Bradon shares to investors and knowingly engaged in multiple acts, practices or courses of conduct that perpetrated that fraud. German thereby repeatedly breached section 126.1(b) of the Act during the Material Time.

3. German's Relationship with Ensign

[186] German was the directing mind and sole director and officer of Ensign. While German was the principal actor in the conduct described in these reasons, Ensign entered into the share purchase agreements with investors together with German (see the discussion commencing at paragraph [32] of these reasons) and the funds paid by investors for the purchase of Bradon shares were paid to Ensign. I note in this respect that all of the Bradon shares purported to be sold to investors were owned by German (as shown on the Bradon shareholder list) and not by

Ensign. In the circumstances, it is clear that German was the directing mind of Ensign and that Ensign directly participated in the fraud perpetrated by German. Further, German's knowledge of the circumstances is attributed as a legal matter to Ensign as a result of German's status as the directing mind of Ensign. Accordingly, based on my finding against German set out in paragraph [185] above, I find that Ensign also committed fraud and breached section 126.1(b) of the Act.

K. DID COMPTA AND BRADON COMMIT FRAUD?

1. Compta's Involvement with Investors

[187] Compta had limited direct contact with the investors who purchased Bradon shares through German. He does not appear to have directly solicited their investments (except as otherwise noted in these reasons) and he testified that he did not know that (i) German was selling his Bradon shares to investors (at least until May 2010), or (ii) what representations were being made by German to investors to induce them to purchase German's Bradon shares. Compta's direct involvement with investors is described below.

Subscriptions by German

[188] Compta knew of, approved and facilitated German's subscriptions over the Material Time for shares of Bradon. There were approximately 31 separate subscriptions by German for Bradon shares over that period and there were five instances in which German's subscription cheques bounced. Compta testified that in or around May 2010, when a number of investors started to approach him and have more direct discussions with him (because German was increasingly unavailable), Compta began to realize that German's subscriptions for Bradon shares were actually funded by investors who had understood that they were purchasing Bradon shares through German. Staff does not allege that the share issuances by Bradon to German were per se improper or illegal. I do not, however, accept Compta's testimony as it relates to when he realized that investors were funding German's subscriptions (see paragraphs [193], [201] and [211] of these reasons).

The Investment Summary

[189] There was an e-mail communication from German to Compta on September 3, 2008 in which German sent Compta a document entitled the "Ensign Investment Summary" which purports to show funds invested in Bradon to that date. Attached to the e-mail is an equity position summary showing investors and their Bradon share holdings. That summary identifies at least two investors who were not registered Bradon shareholders and who were in addition to the 47 registered shareholders on the Bradon shareholder list (although neither of those investors testified).

[190] This was the only e-mail between German and Compta directly introduced in evidence. Compta did not address that e-mail in any of his testimony. In his compelled examination, Compta stated that the handwriting on the document was his and the information was accurate. Compta said that he used these notes to prepare a chart of German's purchases of Bradon shares that was provided to Staff.

[191] In closing submissions, counsel for Compta submitted that Compta did not pay close attention to the e-mail but believed that the equity positions shown in the e-mail attachment referred to shares of Ensign, not Bradon. It was submitted that Compta did not recall the e-mail until he discovered it when complying with undertakings sought by Staff. There is no evidence before me that supports any of these submissions.

[192] I do not accept Compta's submission that the e-mail attachment refers to shares of Ensign and not Bradon. Apart from anything else, there is no reason why German would provide information with respect to Ensign share issuances to Compta. Further, I am skeptical of Compta's submission that he did not pay close attention to the e-mail. It was important to Compta who the shareholders of Bradon were and whether the private issuer exemption continued to be available.

[193] The equity position summary shows that there was one investor listed under German's name, and at least two investors on the summary who were not investors listed on Bradon's shareholder list and who were not related to someone on that list. Accordingly, Compta should have known by September 3, 2008 that there were at least two investors who had purchased Bradon shares through German who were not on the Bradon shareholder list.

The Advisor Letter

[194] In September 2009, German gave Compta a draft letter that he proposed be signed by Bradon and used by German for the purpose of attracting other potential investors in Bradon. The initial draft of this letter contained the statement "Mr. German is authorized to dispose of his equity in BTI [Bradon] to other interested parties". Compta testified that he was alarmed by this statement and consulted his lawyer. The statement that German could dispose of his Bradon shares was deleted from the signed version of the letter. Compta testified that he told German emphatically that German could not sell his Bradon shares. The letter actually signed by Compta is described in paragraph [212] of these reasons. As a result of these circumstances, Compta knew at least that German had been intending to sell his Bradon shares to other investors who were not then shareholders of Bradon. That means that Compta should have been very alive to that issue going forward.

Direct Contact with Investors

[195] There were two instances in which Compta had direct contact or communication with investors. The first was receipt from PB of the e-mail referred to in paragraph [196] below and the second was the meeting with WC discussed commencing at paragraph [202] below.

[196] On October 26, 2009, Compta received an e-mail from PB that said that a number of PB's friends had invested in Bradon through German and that PB had also been invited to invest in Bradon shares through German.

[197] The e-mail stated in part that:

(a) "I have a number of friends who have invested in Bradon Technologies through Tim German";

(b) "My friends have been told that despite the delays in working out a deal regarding the asset that Bradon owns, a deal is imminent – probably by the end of the year and that the expected returns are significant"; and

(c) "My questions are these: Is the offer from Tim [German] a legitimate offer? (he is offering shares in Bradon) Is the explanation that a deal to sell SAViiDesk to major players according [*sic*] accurate? Is the explanation that a deal is imminent accurate?"

[198] PB testified that Compta responded by e-mail that "on the investment side Tim [German] has been working with us to establish the offerings for stock purchases. I have cc'd him on this e-mail so that you may contact him with your questions. Tim [German] is very legitimate". PB testified that this response meant to him that German could be trusted, that Compta was aware of what German was doing (in offering shares of Bradon to investors), and that German was working with him. PB decided immediately to purchase Bradon shares through German as this was the link between German and Bradon that he was looking for.

[199] Compta testified with respect to this e-mail that he thought the reference to "…friends who have invested in Bradon Technologies through Tim German" referred to existing shareholders of Bradon who had invested under the private issuer exemption, or to investors that German would introduce in the future. It is clear to me from the e-mail that PB was referring to current investors in Bradon and that those investors had purchased Bradon shares through German. Further, the e-mail stated that "Is the offer from Tim [German] a legitimate offer? (he is offering shares in Bradon)". Clearly, German was offering Bradon shares to PB and was representing to PB and other investors that the sale of Bradon's technology (SAViiDesk) was imminent. That e-mail should have been a bombshell to Compta if he was unaware of German's actions in this respect. In response, Compta confirmed PB's perception that German was authorized to sell Bradon shares by sending PB an e-mail response stating "on the investment side, [German] has been working with us to establish the offerings for stock purchases" and Compta indirectly endorsed the legitimacy of an investment through German and the representations he was making by stating "[German] is very legitimate". Compta also directed PB to contact German with his questions.

[200] Compta submits that his response to PB was truthful and that there was nothing improper about it. He testified that he did consider German to be legitimate.

[201] I do not accept Compta's submission that he had no idea that German was attempting to sell Bradon shares to PB. The October 26, 2009 e-mail from PB is clear that German had offered investments in Bradon to other investors (who were not then shareholders of Bradon) and was offering his Bradon shares to PB. German had no authority on behalf of Bradon to offer its shares and Compta's response to PB is inconsistent with his characterization that German was simply referring potential investors to Compta. PB's e-mail also indicates that investors had been told by German that a sale of Bradon's technology was imminent. That e-mail completely undermines Compta's claim that he did not know that German was selling his Bradon shares to investors and that he did not know that German was representing to investors that a sale of Bradon's technology was imminent.

The Meeting with WC

[202] WC testified that she became increasingly concerned as to German's relationship with Compta and Bradon. As a result, she contacted Compta directly to request a meeting, met him at the Bradon offices on November 23, 2009 and went for coffee with him. At that meeting, WC showed Compta a copy of her one page share purchase agreement with Ensign dated February 9, 2009 and indicated that she was an investor in Bradon shares. WC's testimony as to what was said at that meeting is described in paragraph [70] of these reasons.

[203] Compta's version of what he told WC at the November 23, 2009 meeting was that:

(a) WC had made an agreement with Ensign, not Bradon, the share purchase agreement *had* nothing to do with Bradon, and Compta had never received a copy of the agreement even though the agreement showed a "cc" to Compta;

(b) only Compta could sell Bradon shares;

(c) German could not sell his Bradon shares to WC;

(d) the price of Bradon shares was $1.00 per share, not $5.00 per share;

(e) Bradon is the type of technology company that is very difficult to get started and to develop into a commercial company;

(f) Bradon was negotiating at a high level with some companies and that at some point Bradon would be acquired; and

(g) her investment was in Ensign shares and not Bradon shares, and Ensign was a company that was doing a number of different things (meaning it had business interests in addition to its interest in Bradon, although Compta had no knowledge of those interests).

[204] On the day after the meeting, WC sent the e-mail to Compta referred to in paragraph [72] of these reasons thanking him for the meeting and reiterating that she had invested $348,040[1] in Bradon shares and that she appreciated Compta's "vision and administration towards the sale of the company/technology". That amount represented the full amount that WC had paid to Ensign for the purchase of Bradon shares to that date. She wrote that "[i]t is peace of mind that my investment is left in good hand [*sic*]." Compta responded with a complimentary e-mail to WC and agreed to keep their communication channel confidential. He also provided some general information describing Bradon's technology. After the meeting, WC made two further investments aggregating $29,000 in Bradon shares through German at a price of $5.00 per share (see paragraph [74] of these reasons).

[205] In considering the conflicting testimony of Compta and WC with respect to the November 23, 2009 meeting, I am strongly influenced by the following. First, WC requested the meeting with Compta because of her concerns with respect to her investment and the fact that

[1] In her testimony, WC always otherwise referred to an investment of $348,030.

she had been dealing only with German. She stated to Compta that she was an investor in Bradon. I accept Compta's testimony that he told WC that she was not a direct shareholder in Bradon and that her agreement was with German. However, if Compta had advised WC of the other matters referred to in paragraph [203] (c), (d), (f) and (g) above, that would have validated WC's worst fears that she had not, in fact, purchased Bradon shares from German, that her investment of $348,040 was not paid to Bradon and that the representations being made by German with respect to these matters, including the advanced state of the negotiations by Bradon to sell its technology, were untrue. If those statements were made by Compta to her, she would never have expressed her "peace of mind". Further, she clearly stated in her follow-up e-mail to Compta that she had made a $348,040 investment in Bradon shares. Compta was silent with respect to that statement in his e-mail response to WC. In my view, that silence undermines his testimony as to what he told WC at the meeting.

[206] I also note WC's testimony that Compta explained to her the arrangement under which German was selling his Bradon shares to investors to avoid going over the 50 shareholder limit in the private issuer exemption (see paragraphs [70] and [71] of these reasons). WC would not have known anything about this aspect of securities law. *More important, WC's testimony means that Compta knew that German was selling his Bradon shares to investors in order to avoid increasing the number of shareholders on Bradon's shareholder register.*

[207] As noted in paragraph [203](g) above, Compta testified that the share purchase agreement that WC showed him at the November 23, 2009 meeting related to Ensign shares and not Bradon shares. That agreement does not expressly identify the shares being purchased as Bradon shares. However, while the agreement is on Ensign letterhead (which it properly would be for a sale by Ensign of its Bradon shares), it described Bradon (referred to as BTI), indicated the number of Bradon shares outstanding and disclosed that Bradon was "currently involved in senior level negotiations and due diligence reviews … with an anticipated sale of all its assets … within the next 60-90 days." It stated that "Mr. German is an investor in and consultant to BTI." It also contained the statement that "[u]pon execution of this agreement, Mr. German will instruct BTI to register the shares pursuant to the direction of _____ [blank]."

[208] Even apart from the other provisions of the agreement, the statement referred to in the last sentence of paragraph [207] above makes clear that BTI is to register the shares being purchased. BTI has authority to issue and register Bradon shares and no authority with respect to Ensign shares. More important, WC testified that she expressly told Compta that the agreement provided for a purchase by her from German of his Bradon shares. Further, in my view, even a cursory review of the agreement shows that it related to a sale by German and Ensign of Bradon shares.

[209] Further, if Compta had told WC that the price of the Bradon shares was only $1.00 per share and not $5.00, WC would have been shocked by that statement knowing that she had paid $5.00 for all of her Bradon shares. She would never have made subsequent investments at $5.00 per Bradon share, or at all.

[210] I accept WC's version of the conversation she had with Compta, including WC's testimony that Compta confirmed that the price of the Bradon shares was $5.00 per share. Compta's testimony is inconsistent in very important respects with (i) WC's testimony, (ii) WC's

follow-up e-mail to Compta, (iii) the terms of the share purchase agreement that WC showed Compta, and (iv) WC's subsequent investments in Bradon shares through German.

[211] Accordingly, I find that, as a result of Compta's meeting with WC on September 23, 2009, Compta knew on that basis alone that German was purporting to sell his Bradon shares to investors and was representing to them that a sale by Bradon of its technology was anticipated within 60 to 90 days. That finding is consistent with my conclusions in paragraph [201] of these reasons.

The December 2009 Letter

[212] In December 2009, Compta provided a letter requested by German, on Bradon letterhead and addressed to Whom it May Concern, describing German's relationship with Bradon and the services he was providing to Bradon. Compta testified that the letter was intended to show potential investors that German was permitted to locate potential investors and to refer them to Bradon. The letter stated that:

> Bradon Technologies Ltd. (BTL) is a private Ontario registered software company that has developed proprietary software, algorithms, branded products and clients for interactive business and consumer communications.
>
> Mr. German is an investor and advisor to BTL and holds in excess of 500,000 shares.
>
> Mr. German has agreed privately to provide to Bradon Technologies Ltd. advice including but not limited to:
>
> - Providing of financial investment,
> - Provision of financial advice in support of the asset sale and/or development of the corporation,
> - Securing of other potential investors,
> - Introduction to potential strategic partners, resellers, ISPs, and or other customers,
> - Introduction to other consultants if required.

[213] I note that this letter was provided by Compta for use by German subsequent to and notwithstanding PB's e-mail to Compta on October 26, 2009 and the meeting with WC on November 23, 2009.

[214] In his submissions, Compta submitted that he clearly and unequivocally told German that he was prohibited from selling his Bradon shares to other investors and that German confirmed that he understood that. Further, Compta submits that, after the e-mail communication with PB and the meeting with WC, that Compta had a discussion with his lawyer and with German and that he was satisfied that German was selling shares of Ensign that "did not have [anything] to do with [Bradon]".

[215] I reject these submissions. In my view, the share purchase agreements clearly relate to the sale of Bradon shares and it was equally clear that both PB and WC were addressing Bradon shares in their communications with Compta. Except for Compta's uncorroborated statement that he consulted his lawyer, there is no evidence before me that Compta received any legal advice in this respect. Because Compta's lawyer did not testify, I am unable to determine whether any legal advice was given to Compta and whether any such advice was reasonable.

2. Conclusions as to Compta's Knowledge and Actions

[216] Based on the foregoing discussion, I find that Compta:

(a) knew of, approved and facilitated German's 31 subscriptions for Bradon shares over the Material Time;

(b) should have known from the September 3, 2008 e-mail (referred to in paragraph [189] of these reasons) that there were at least two investors in Bradon shares through German who were not reflected on the Bradon shareholder list;

(c) knew from the September 2009 draft letter (referred to in paragraph [194] of these reasons) that German had originally intended to sell his Bradon shares to investors who were not then shareholders of Bradon;

(d) knew from the October 26, 2009 e-mail exchange with PB, that German had purported to sell Bradon shares to other investors (who were not then shareholders of Bradon), was offering his Bradon shares to PB and had represented to investors that a sale of Bradon's technology was imminent (see the discussion commencing at paragraph [196] above);

(e) with knowledge of the matters referred to in (d) above, had responded to PB endorsing German as "working with us to establish the offerings for stock purchases" and as "very legitimate";

(f) knew, as a result of the meeting with WC on November 23, 2009, that German was purporting to sell Bradon shares to investors, representing that a sale by Bradon of its technology was anticipated within 60 to 90 days and that WC understood that she had invested $348,040 in Bradon shares at $5.00 per share through German (see the discussion commencing at paragraph [202] above);

(g) knew further that German was selling his Bradon shares to investors in a scheme to avoid increasing the number of Bradon shareholders for purposes of the shareholder limits imposed by the private issuer exemption (see paragraph [70] of these reasons);

(h) with knowledge of the matters referred to above, provided German with the December 2009 letter on Bradon letterhead stating, among other matters, that German was providing advice to Bradon in support of an asset sale and securing other potential investors (see paragraph [212] above);

(i) represented to DY in January 2011 that Bradon was in talks to sell its technology (when Bradon was not in such talks) (see paragraph [79] of these reasons); and

(j) notwithstanding the knowledge referred to above, continued to facilitate subscriptions by German for 243,000 Bradon shares in 10 separate issuances over the period from November 30, 2009 to May 2, 2010.

[217] The evidence supporting these conclusions is clear, convincing, cogent and overwhelming.

[218] I would add that it is undoubtedly true that there was nothing per se improper for Bradon to have issued Bradon shares to German over the Material Time. The key question, however, is whether Compta knew or ought to have known that such actions were facilitating illegal sales by German of his Bradon shares as part of a fraud being perpetrated by German.

3. Did Compta and Bradon Commit Fraud?

[219] I must decide whether the actions and statements of Compta and Bradon referred to in paragraphs [187] to [216] of these reasons amounted to the perpetration of a fraud by them contrary to section 126.1(b) of the Act.

The Actus Reus of Fraud

[220] With respect to whether Compta committed the *actus reus* of fraud in his dealings with PB and/or WC, I will address whether Compta committed dishonest acts by "other fraudulent means". That question is to be determined objectively by reference to what a reasonable person would consider to be a dishonest act (see paragraphs [158] and [159] above). In *Émond*, the Quebec Court of Appeal characterized as fraudulent the failure by silence to disclose material facts that would mislead a reasonable person. The ASC concluded in *Brost ASC* that the omission of material information from an offering memorandum was "misleading, deceitful and fraudulent" (see paragraph [160] of these reasons).

[221] I have concluded, on balance, that Compta committed a dishonest act by "other fraudulent means" by failing to disclose to:

(a) PB that German was not legally entitled to sell his Bradon shares to PB (under Ontario securities law or Bradon's corporate charter) and that no negotiations were underway for the sale of Bradon or its technology and, accordingly, such a sale was not imminent (see the discussion commencing at paragraph [196] of these reasons). In my view, Compta's silence on those two matters, together with his response that "Tim is very legitimate" and his referral of PB to German for the answers to PB's questions, would be considered dishonest by a reasonable person;

(b) WC at the meeting on November 23, 2009, (i) the matters referred to in paragraph [203] (c) and (d) above, (ii) that Bradon had not received the full $348,040 purchase price paid by WC for German's Bradon shares, and (iii) that no negotiations were underway for the sale of Bradon or its technology. I have concluded in these reasons, based in part on WC's testimony, that Compta did not in fact tell WC these things at

their meeting or afterwards. In my view, Compta's failure to disclose these facts to WC, together with his reassurance of her, would be considered dishonest by a reasonable person.

[222] I note that counsel for Compta and Bradon distinguishes the case law involving an omission to disclose (see paragraphs [159] and [160] of these reasons) on the basis that those decisions involved a direct solicitation of investors by the respondents. It is not necessary for me to address whether that is a valid distinction. While Compta may not have directly and expressly solicited investors to purchase Bradon shares through German, he did have direct contact and communication with investors, as described in these reasons.

[223] It is important, in this respect, that Compta was not simply silent in his interactions with PB and WC. Compta took positive steps to (i) endorse German and encourage PB to rely on him knowing full well that German was being dishonest with him, and (ii) reassure WC with respect to her investment in Bradon shares at the meeting on November 23, 2009 and by the e-mail referred to in paragraph [204] of these reasons knowing full well that WC was being misled by German. Subsequent to those interactions, Compta armed German with the letter referred to in paragraph [212] of these reasons. It is no valid answer to say that Compta didn't respond specifically to PB's questions or that he was silent because he wanted to preserve the confidentiality of corporate information with respect to the sale of Bradon or its technology. As noted above, I have concluded that a reasonable person would consider his responses in the circumstances to be dishonest.

Deprivation

[224] With respect to whether there was deprivation as a result of Compta's prohibited acts, Compta knew that his silence put PB and WC at risk of loss if they made investments in Bradon shares through German without knowledge of the facts referred to in paragraphs [221] (a) and (b) above, respectively. In the case of PB, Compta knew that PB's questions were expressly being asked to determine whether he should invest in Bradon shares through German. In the case of WC, she thought she was already an owner of Bradon shares purchased through German, but Compta knew or should have known that his failure to disclose to WC could lead to (i) WC maintaining her existing investment in Bradon shares, or (ii) a further investment by WC in Bradon shares through German. Both results gave rise to a risk of loss by WC. It is no answer to say that the deprivation of PB and WC was directly caused by German and not Compta. Compta's actions and communications also gave rise to deprivation of PB and WC.

4. Findings

[225] I find that Staff has established that Compta committed prohibited acts by other fraudulent means that caused deprivation or risk of deprivation to PB and WC. Accordingly, I find that Compta committed the *actus reus* of fraud in his dealings with PB and WC described in these reasons.

[226] I also find that Staff has established Compta's subjective knowledge of the prohibited acts referred to in paragraph [221](a) and (b) of these reasons and subjective knowledge that those acts could have as a consequence the deprivation or risk of deprivation of PB and WC and

their financial interests, respectively. Compta must have foreseen those circumstances at least as a possibility. I infer that subjective awareness from the totality of the evidence before me. I rely on *Théroux* and *Brost CA* as the legal basis for these conclusions (see paragraphs [164] to [166] of these reasons).

[227] I also find that Compta was reckless in endorsing German to PB (see paragraph [198] of these reasons) and in referring any questions he had to German. He was also reckless as to the consequences to PB and WC of his failure to disclose to them, respectively, the facts referred to in paragraph [221] of these reasons. When one considers the e-mail from PB to Compta referred to in paragraph [196] of these reasons and the information communicated by WC to Compta at the meeting on November 23, 2009, Compta must have known that German was purporting to sell his Bradon shares to investors and, in doing so, was making misrepresentations to them including misrepresentations with respect to the status of the sale of Bradon or its technology. If Compta was confused as to the meaning of the e-mail from PB, it would have been easy for him to clear up that confusion by communicating with PB. It was not sufficient for Compta to simply say that, after receiving that e-mail, he contacted German and (i) reiterated that German could not sell his Bradon shares, and (ii) was satisfied with German's responses. In this respect, I reject Compta's submission that in response to these circumstances, he made reasonable inquiries to confirm that German was acting properly. It was not sufficient to simply speak to German and rely on his reassurances.

[228] Accordingly, I find that Staff has established Compta's *mens rea*, or subjective knowledge, of fraud on the two separate grounds set out in paragraphs [226] and [227] above.

[229] While it is not necessary for my findings, it is clear that Compta and Bradon benefited substantially from their own and German's fraudulent conduct through the receipt of $808,000 paid by German in connection with his subscriptions for Bradon shares during the Material Time. The source of those funds was investors in Bradon shares purchased through German.

[230] I therefore conclude that, by reason of his direct dealings with PB and WC described above and my findings in paragraphs [225], [226] and [227] above, Compta engaged in an act, practice or course of conduct relating to securities that perpetrated a fraud and thereby breached section 126.1(b) of the Act.

5. Participation by Compta in German's Fraudulent Acts

[231] Even though I have concluded that Compta committed two acts of fraud in his direct dealings with PB and WC, I must also address whether he contravened section 126.1(b) of the Act by participating in German's fraud.

[232] The British Columbia Court of Appeal held in *Anderson* that the British Columbia counterpart to section 126.1(b) of the Act is contravened by participants in a course of conduct who "reasonably ought to know" that a fraud is being perpetrated by others. I agree with *Anderson* in this respect. Section 126.1(b) of the Act extends to participants in a course of conduct involving fraud by others where the participant "knew or ought to have known" that such a fraud was being perpetrated. Staff need not prove that such participants themselves committed fraud.

[233] Compta and Bradon certainly participated in an act, practice or course of conduct relating to securities in connection with German's activities. That participation is described in paragraph [216] of these reasons. The question then is whether Compta knew or ought to have known that German was committing fraud.

[234] I have concluded that Compta knew that German was purporting to sell his Bradon shares to investors. That was clear from PB's October 26, 2009 e-mail (see the discussion commencing at paragraph [197] of these reasons) and from his meeting with WC on November 23, 2009 (see the discussion commencing at paragraph [202] of these reasons). Compta knew those shares were subject to resale restrictions under securities law and required Bradon's board approval pursuant to Bradon's charter. Compta also knew as a result of PB's e-mail to him and the subscription agreement WC showed him, that German was representing to investors that a transaction to sell Bradon or its technology was imminent or anticipated within 60 to 90 days. That was untrue (see paragraph [95] of these reasons). Further, Compta knew from his meeting with WC that German was selling those shares to investors at a price of $5.00 per share while at substantially the same time Bradon was issuing shares to German at $1.00 per share.

[235] Notwithstanding this knowledge of the misrepresentations being made by German, Compta and Bradon:

(a) continued subsequent to November 23, 2009, to accept subscriptions by German for Bradon shares at a price of $1.00 per share (see paragraph [29] of these reasons); and

(b) in December 2009, issued the Bradon letter to German referred to in paragraph [212] of these reasons indicating, among other things, that German was an investor in and an advisor to Bradon and that German had agreed to provide advice to Bradon, including "securing of other potential investors" for Bradon.

These continuing actions are particularly damning in the circumstances.

6. Findings

[236] I find that the actions referred to in paragraphs [233] to [235] above constituted an act, practice or course of conduct relating to securities within the meaning of section 126.1(b) of the Act. I also find that Compta knew or ought to have known by no later than November 23, 2009 that German was committing fraud in connection with his sale of Bradon shares to investors. Accordingly, I find that Compta thereby breached section 126.1(b) of the Act.

[237] Compta was the directing mind of Bradon and an officer and director of Bradon. Compta was directly involved as a participant in the conduct as described in these reasons. It was Bradon, however, that issued shares to German throughout the Material Time and it was Bradon that issued the letter referred to in paragraph [212] of these reasons. Accordingly, Bradon directly participated in the illegal conduct of Compta described in these reasons. Compta's knowledge is attributed as a legal matter to Bradon as a result of his status as the directing mind of Bradon. Accordingly, based on my findings against Compta set out in paragraphs [230] and [236] of these reasons. I find that Bradon also committed fraud and breached section 126.1(b) of the Act.

[238] I would add that it was German and Ensign who directly, intentionally and repeatedly defrauded the investors in Bradon shares referred to in these reasons. Accordingly, their conduct in the circumstances was the most egregious and directly caused the substantial harm suffered by investors.

[239] Except as otherwise described in these reasons, Staff has not established that Compta knew all of what German was doing and representing to investors in purporting to sell his Bradon shares to them. I have concluded that Compta committed two acts of fraud in his direct dealings with PB and WC by his failure to disclose the facts referred to in paragraph [221] of these reasons and that, by no later than November 23, 2009, he knew or ought to have known that German was committing fraud. In each case, Compta thereby contravened section 126.1(b) of the Act. While Compta's actions may have been less egregious than German's, I note that no fraud could have been committed by German but for Compta's actions or inactions described in these reasons.

L. DID GERMAN AND COMPTA AUTHORIZE, PERMIT OR ACQUIESCE IN BREACHES OF THE ACT BY ENSIGN AND BRADON, RESPECTIVELY?

1. Applicable Law

[240] Pursuant to section 129.2 of the Act, if a company has not complied with Ontario securities law, a director or officer of the company is deemed also to have not complied with such law, where the director or officer authorized, permitted or acquiesced in the company's non-compliance. Section 129.2 of the Act 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.

[241] Accordingly, for section 129.2 of the Act to apply, Staff must establish that (i) the individual respondent was a "director or officer" of the company, (ii) the company has not complied with Ontario securities law, and (iii) the individual respondent "authorized, permitted or acquiesced in" the non-compliance.

[242] *Momentas* is the leading Commission decision interpreting the words "authorized, permitted or acquiesced in". It was stated in *Momentas* that:

> 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, or 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)

2. Conclusions

[243] I have concluded that German and Compta directly contravened Ontario securities law as described in these reasons. I have also concluded that, where German or Compta breached Ontario securities law, Ensign and Bradon also did so, respectively. The actions of each individual with their respective private company were so intertwined as to make it impossible to treat those actions as separate or distinct or as made only in a representative capacity. Accordingly, in the circumstances, nothing turns on whether section 129.2 of the Act applies to German and Compta in their roles as directors or officers of Ensign and Bradon, respectively. Nonetheless, I would have concluded that German and Compta authorized, permitted and acquiesced in all of the actions of Ensign and Bradon, respectively, described in these reasons.

M. CONDUCT CONTRARY TO THE PUBLIC INTEREST

[244] Staff alleges that the Respondents' conduct in this matter was contrary to the public interest within the meaning of section 127 of the Act. I have found that each of the Respondents breached Ontario securities law (see paragraph [245] below). In my opinion, that conduct was contrary to the public interest given the very serious breaches of Ontario securities law and the substantial harm caused to investors. Further, in these circumstances, it is appropriate for the Commission to have the discretion to impose the types of orders available under section 127 of the Act. Accordingly, by reason of my findings in paragraphs [245] (a) to (e) below, I find that each of the Respondents acted contrary to the public interest within the meaning of that section.

N. FINDINGS

[245] For the reasons discussed above, I have found that during the Material Time:

(a) each of German and Ensign repeatedly breached subsection 25(1)(a) of the Act as in force prior to September 28, 2009 and subsection 25(1) of the Act as in force on and after that date (see paragraph [125] of these reasons);

(b) each of German and Ensign repeatedly breached subsection 53(1) of the Act in purporting to sell Bradon shares to investors (see paragraph [139] of these reasons);

(c) each of German and Ensign repeatedly breached subsection 38(1)(a) of the Act by making a prohibited representation to investors (see paragraph [148] of these reasons);

(d) each of German and Ensign committed fraud and thereby repeatedly breached section 126.1(b) of the Act (see paragraphs [185] and [186] of these reasons);

(e) each of Compta and Bradon:

(i) committed fraud and thereby breached section 126.1(b) of the Act in their direct dealings with PB and WC described in these reasons (see paragraphs [230] and [237] of these reasons); and

(ii) knew or ought to have known by no later than November 23, 2009, that German was committing fraud and thereby also breached section 126.1(b) of the Act (see paragraph [236] of these reasons); and

(f) by reason of the foregoing findings, each of the Respondents also acted contrary to the public interest within the meaning of section 127 of the Act (see paragraph [244] above.

[246] Staff and the Respondents shall, within 30 days following the date of this decision, contact the Office of the Secretary to schedule a hearing on sanctions and costs.

Dated at Toronto this 21st day of July, 2015.

"James E. A. Turner"

_____

James E. A. Turner