IN THE MATTER OF

The *Securities Act*

S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF

STEVEN VINCENT WEERES and REBEKAH DONSZELMANN
(RESPONDENTS)

REASONS FOR THE DECISION ON THE MERITS

Date of Hearing by Conference Call:	8 September 2011
Date of Reasons for Decision:	29 November 2011

Panel:

Denise A. LeBlanc, Q.C., Panel Chair

Céline Trifts, Panel Member

Kenneth Savage, Panel Member

Appearances:

Marc Wagg	Counsel for the Staff of the New Brunswick Securities Commission
Steven Weeres & Rebekah Donszelmann, *per se*	

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REASONS FOR THE DECISION ON THE MERITS

1. BACKGROUND

[1] Staff commenced proceedings against each of Steven Vincent Weeres ("Weeres") and Rebekah Donszelmann ("Donszelmann") (collectively the "Respondents") pursuant to a Statement of Allegations filed on 16 November 2010, an Amended Statement of Allegations filed on 23 February 2011, and supporting affidavits of Commission Senior Investigator Gordon Fortner ("Fortner") and witnesses AA, BB, CC, DD and EE.

[2] Staff alleged that the Respondents failed to comply with New Brunswick securities law and acted contrary to the public interest by engaging in the following activities:

1) the Respondents traded in securities without having been registered, in any capacity, with the New Brunswick Securities Commission ("Commission") contrary to section 45 of the *Securities Act* ("*Act*");

2) the Respondents traded in securities without having filed a prospectus contrary to section 71 of the *Act*;

3) the Respondent Weeres made statements regarding the future value of the project, contrary to section 58(2) of the *Act*;

4) the Respondent Weeres defrauded CC of her property, contrary to section 69(b) of the *Act*; and

5) the Respondent Weeres made misleading and untrue representations contrary to section 181 of the *Act*.

[3] Staff sought orders against the Respondents pursuant to section 184(1) of the *Act*; namely that:

1) the Respondents cease trading in securities in New Brunswick;

2) any exemptions under New Brunswick securities law not apply to the Respondents;

3) the Respondents be prohibited from becoming or acting as directors or officers of any issuer; and

4) the Respondents disgorge to the Commission the sum of twenty-two thousand six hundred dollars ($22,600.00).

In addition, Staff requested administrative penalties and costs pursuant to the *Act*.

[4] The Office of the Secretary issued a Notice of Hearing for 9 March 2011. In response, the Respondents filed a letter with the Office of the Secretary on 10 January 2011 which indicated that while the Respondents intended to dispute Staff's

allegation, they were unable to attend the hearing because they were both under a court order by judge not to leave the province of Alberta.

[5] On 11 February, 2011, Staff and the Respondents signed the Consent to Proceedings in Writing in accordance with Part 15 of Local Rule 15-501 *Procedures for Hearing Before a Panel of the Commission.* A Panel of the Commission advised both parties to submit all evidence in writing, and indicated that a hearing via conference call would be held to provide the parties with an opportunity to make verbal representations based on the documents submitted. The Panel emphasized that no new evidence could be introduced at the hearing.

[6] On 24 February 2011, Staff filed an Affidavit of Service deposed by Marc Wagg, Legal Counsel for Staff of the Commission, detailing service upon the Respondents of the Amended Statement of Allegations, affidavits of Fortner, AA, BB, CC, DD and EE and Staff's prehearing submission. These documents were properly served on the Respondents via email on 23 and 24 February, 2011.

[7] In response, the Respondents filed affidavits of Donszelmann, Weeres and FF The affidavits and supporting exhibits were accepted for filing by the Office of the Secretary on 13 June 2011, subject to Exhibits B and C of the Affidavit of FF, which the Office of the Secretary was unable to open. The Respondents were given notice that the Panel would not consider Exhibits B and C to the Affidavit of FF.

[8] On 6 September 2011, Staff filed a supplemental affidavit of CC which responded to assertions made in the exhibits to the Donszelmann and Weeres affidavits.

[9] On 8 September 2011, a hearing by conference call was held before the Panel to provide the parties with the opportunity to make oral submissions based on the evidence previously submitted. During the hearing, the Panel advised the Respondents that they would be able to respond to Staff's supplemental affidavit of CC by written affidavit on or before 22 September 2011. The Panel also advised all parties that they could make

final written submissions related to the supplemental affidavit of CC on or before 17 October 2011.

[10] On 22 September 2011, the Office of the Secretary accepted for filing the supplemental affidavits of Donszelmann and Weeres with supporting exhibits.

[11] On 17 October 2011, the Office of the Secretary accepted for filing the final submissions of Staff and the Respondents.

[12] This decision on the merits is based on all the evidence submitted by the parties in writing and their oral representations on those written submissions made at the 8 September 2011 hearing by conference call.

2. FACTS

The Respondents

[13] The Respondent Weeres is an individual currently resident of Lot SW 36, Con # 47, Site # 25, Millet, Alberta; the Respondent Donszelmann is an individual currently resident of Lot SW 36, Con # 47, Site # 25, Millet, Alberta. Both Respondents were involved in the operations of Shaker Management Group Inc. ("SMGI"), a New Brunswick corporation incorporated in 2008.

[14] Neither of the Respondents has ever been registered with the Commission in any capacity.

The Project, Solicitations and Attempted Solicitations

[15] During the summer of 2008, AA, a resident of Fredericton, New Brunswick, learned through another party that the Respondents were offering a prototyping course, the purpose of which was to train individuals to identify franchising opportunities of existing businesses then sell the franchises at trade shows. AA attended an information session in Fredericton, New Brunswick in August or September of 2008 and it is at that time that she

met the Respondents. At the time, the Respondent Weeres was using the alias "Steve Webb" and the Respondent Donszelmann was using the alias "Becky Junior".

[16] In the fall of 2008, Weeres contacted AA with a business opportunity in which AA could participate. She was told that she would need to incorporate a company. AA provided Donszelmann with her Visa credit card number, and Donszelmann carried out all the necessary steps to incorporate a corporation under the name Shaker Management Group Inc. ("SMGI") in AA's name. AA was listed as the sole director and incorporator of SMGI.

[17] Weeres informed AA that his plan was to recruit a group of 20 people to work under SMGI to pursue training and potential franchising opportunities. The recruited individuals would need to pay $2,500.00 (plus HST) to be trained and join the group and in return would get 5% "ownership" in the "business". The plan, according to Weeres, was that once they found 20 people, they would incorporate another company, which would be the conduit for implementing the actual franchising opportunities. Everyone involved would be an equal shareholder.

[18] During late 2008, SMGI held its first information session seeking to promote this idea, at the Ramada Inn on Riverside Drive, Fredericton, New Brunswick. Only three or four people attended and no one signed up.

[19] In December of 2008, AA traveled to Halifax to meet with Weeres and Donszelmann, and together AA, Weeres and Donszelmann had further discussions of how SMGI was going to operate. It was agreed that all the paperwork was to be prepared by Donszelmann.

[20] SMGI's bank account was controlled by AA, Weeres and Donszelmann. While the account was initially opened by AA, AA subsequently provided full access to the account to Weeres and Donszelmann. AA also provided the Respondents with debit cards linked to the SMGI bank account, and with complete access to all of her personal credit cards. Weeres and Donszelmann used the SMGI bank account for various

purposes, including personal living expenses. Weeres told AA that he had funds in an off-shore account but could not access the funds because his debit card was not working.

[21] In early 2009, Weeres and Donszelmann approached AA with a new proposed project (the "Project") for SMGI, involving the potential purchase of real estate. The Project was intended to operate as follows:

- The Respondents would seek out investment hotel properties for purchase, with a view to generating income from the rental of rooms;
- The participants would be required to make a capital contribution to the Project and were promised a guaranteed monthly return based on the amount of their contribution;
- The participants would be required to sign an "agent agreement" with SMGI.

[22] Subsequently, Weeres and AA went to St. Andrews to view the Tara Manor Inn as a potential purchase for the Project. Weeres, Donszelmann and AA decided to then promote the Project as the "Tara Manor/Success Momentum Builder" project.

[23] Between January and June 2009, the Respondents held several training and information sessions in New Brunswick and Nova Scotia, during which they sought to promote the Project and attract participants. The evidence shows that Weeres and Donszelmann controlled all of these sessions. Weeres acted as the spokesperson and Donszelmann set up and operated audio and video equipment. While AA attended these sessions and meetings, she took no leadership role.

[24] AA, Weeres and Donszelmann were eventually able to recruit 18 individuals from the sessions to join their group, which later became known as the Kailo Group of Companies (the "Kailo Group"). Most participants paid $2,500.00 (plus HST) to be trained and to become part of the Kailo Group. While individuals were told that another corporation would eventually be incorporated under the name "Kailo", there is no evidence that such a corporation was ever constituted. As such, the funds paid by the participants were deposited into SMGI's bank account.

[25] One of the individuals recruited for the group was BB, an individual resident in Moncton, New Brunswick. BB first attended an information session in Moncton in February 2009 where Weeres discussed the idea of forming a group of 20 individuals to franchise businesses and sell them. He also told the group that he had formed similar groups in the past and they had always been financially successful. BB paid the $2,500.00 (plus HST) to join the group and attended a further group session in Fredericton in March 2009.

[26] In April or May of 2009, BB attended a group session in Moncton where Weeres presented the Project to the group. At this time, Weeres told the group that there was a plan to purchase the Tara Manor Inn in Saint Andrews, New Brunswick. Weeres gave assurances that those involved in the Project would receive cash flow and safety of principal and equity. The "plan" was explained to the group in the following terms:

- rooms would be "pre-sold" at $20,000.00 each;
- for each room purchased, individuals would receive a monthly payment of $438.00 until such time as they had doubled their investment.

[27] Weeres also informed the group that he had access to a product called "Success Momentum Builder" (a computer based learning system aimed at helping users change their patterns of thought to match a successful person's thought patterns) and that $2.00 of every sale of the Success Momentum Builder would be used to reimburse the individuals who had purchased a room. If the sales from the Success Momentum Builder proved to be insufficient to cover the monthly minimum payment, revenues from the rental of rooms at the Tara Manor Inn would be used.

[28] Subsequent to the presentation, BB advised Weeres that he would not consider investing in the Project unless he was shown the proper legal documentation forming the basis of the Project. Weeres apparently became defensive at the use of the expression "investment" and BB became apprehensive thereafter. BB was never shown any legal documentation and he never gave a commitment to invest nor did he ever invest in the Project.

[29] Another individual approached for investment in the Project was CC, an individual resident in Halifax, Nova Scotia. CC first met the Respondents in January 2009 at a curriculum designer course in Nova Scotia where Weeres was the course's instructor. At one of the classes, Weeres discussed putting together a group of individuals to franchise businesses and sell them, and advised CC that she could join the group for free because she already paid $5,000.00 to attend the curriculum designer course. CC decided to join, and attended several sessions between January 2009 and the spring of 2009. In March 2009, Weeres approached CC with the possibility of investing in the Project. Weeres advised CC that BB, another group member, had invested in the Project and that there was no risk of losing money since CC would have two sources of income (i.e. a percentage of money from renting out the rooms at the Tara Manor Inn and a percentage of money from sales of the Success Momentum Builder product). CC signed an agent agreement with SMGI on 30 March 2009 and invested $22,600.00 in the Project by way of cheque payable to SMGI. An important factor in CC's decision to invest was the fact that she believed BB had also invested in the Project. Pursuant to the agent agreement, CC would receive monthly payments of $874.48. In addition, Weeres promised CC that she would receive a minimum of $874.48 per month until her money doubled. CC attended the information session in April or May 2009 in which Weeres presented the idea of the Project to other members of the group. CC never received any payments from SMGI or Weeres.

[30] Weeres also attempted to solicit DD, an individual resident in Dartmouth, Nova Scotia, to invest in the Project. DD first met Weeres at an information session held in Halifax in January 2009. DD attended further information sessions and joined the Kailo Group in January 2009. In April 2009, Weeres had a private meeting with DD for the purpose of soliciting her to invest in the Project. Weeres advised DD that if she invested in the Project she would be able to double her money within five years and that there was no risk because the rooms would always be booked solid. Weeres also advised DD that BB was going to take out a second mortgage on his home to purchase nine rooms at $20,000 each. DD did not invest in the Project as she had insufficient funds.

[31] In the summer of 2009, Weeres met with GG, an individual resident in Fredericton, New Brunswick, for the purpose of soliciting her to invest in the Project. GG had already invested $2,500.00 (plus HST) to become part of the Kailo Group. Weeres asked GG to invest in excess of $100,000.00, and advised her that she would get all her money back, plus more, within one month. GG did not invest in the Project, but she provided a $65,000.00 loan to SMGI because she was AA's close personal friend.

[32] In June 2009, Weeres and Donszelmann met with EE, an individual resident in Fredericton, New Brunswick, for the purpose of soliciting her to invest in the Project. EE had already invested $2,500.00 (plus HST) to become part of the Kailo Group. Weeres and Donszelmenn asked EE to invest $150,000.00 into the Project. EE did not invest in the Project, but she provided a $55,000.00 loan to SMGI because she was AA's close personal friend.

[33] The purchase of the Tara Manor Inn was never completed.

Commission Investigation

[34] On 27 July 2009, Staff of the Enforcement Division of the Commission received a complaint from CC alleging that the Respondents and SMGI solicited an investment from her without complying with New Brunswick securities law. Staff began an active investigation into the Respondents, SMGI and AA.

[35] Staff discovered that the Respondent Weeres has been subject to previous regulatory activity in both Alberta and Saskatchewan. During 1999 and 2000, Weeres was the subject of Settlement Agreements and Orders with the Alberta Securities Commission and the Saskatchewan Financial Securities Commission for illegally distributing securities in those provinces.

[36] On 15 November 2010, SMGI and AA entered into a settlement agreement with Staff where SMGI and AA agreed to a proposed settlement of violations of New

Brunswick securities laws. This settlement agreement was approved by an order of the Commission issued on 13 December 2010.

[37] SMGI discontinued operations in the fall of 2009 and is currently insolvent.

[38] Although AA was the sole director and incorporator of SMGI, she alleged that Weeres and Donszelmann had full control over the finances and operations of SMGI. Specifically, AA indicated that the Respondents had control over SMGI's bank account and the flow of money in and out of SMGI. They planned and controlled all the training sessions and meetings related to SMGI. They also developed the plan to purchase the Tara Manor Inn and solicited individuals to participate in the Project. In addition, the Affidavits of BB, CC, EE and GG indicated that they perceived Weeres as the leader of SMGI and the person who made all decisions in regards to the operations of SMGI.

3. ANALYSIS AND DECISION

Evidence Presented

[39] Staff presented a large number of exhibits in these proceedings, including affidavits of service; affidavit of Commission Investigator Fortner; and affidavits from various witnesses, including AA, BB, DD, EE and CC. Staff also submitted a supplemental affidavit from CC in response to evidence presented in the Respondents' affidavits. All affidavits contained supporting exhibits.

[40] The Panel finds that Staff's evidence is reliable and credible in this proceeding, and weights it accordingly.

[41] The Respondents filed three preliminary affidavits with supporting exhibits from Weeres, Donszelmann and FF In addition, the Respondents filed supplemental affidavits with supporting exhibits from Weeres and Donszelmann in response to Staff's supplemental affidavit of CC.

[42] The majority of the evidence contained in the affidavits and supporting exhibits of the Respondents, in contrast to the evidence presented by Staff, was either not relevant to Staff's allegations against the Respondents or contained broad statements which were not supported by documentary evidence and/or were not corroborated by third party witnesses.

[43] The affidavits of Weeres and Donszelmann did not address, specifically or otherwise, the allegations made against them. Generally the Affidavits of Weeres and Donszelmann responded mainly to the statement of facts contained in the settlement agreement entered into between Staff, SMGI and AA on 15 November 2010. This settlement agreement related to Staff's proceedings against SMGI and AA, and did not address the current allegations against Weeres and Donszelmann. The affidavits also contained various broad statements to discredit AA, but did not provide relevant or sufficient evidence to corroborate the statements. The Weeres affidavit responded to various statements contained in Staff's Pre-hearing Submission dated 23 February 2011, but again did not provide relevant or sufficient evidence to counter Staff's assertions and did not address the allegations contained in Staff's Statement of Allegations.

[44] While Staff provided various witness affidavits which attested to the allegations against the Respondents, the Respondents only provided one witness affidavit from FF with supporting exhibits. The FF affidavit contained a lot of information which was not relevant to Staff's allegations against the Respondents, and contained two exhibits, namely Exhibits B and C, which could not be opened by the Office of the Secretary and therefore could not be viewed by the Panel. As such, the Panel gives no weight to these two exhibits. The only relevant statements in the FF affidavit related to claims that AA controlled the financial decisions of SMGI and that Donszelmann had no control over SMGI's finances. This evidence was directly contradicted in the witness affidavit of AA, which indicated that the Respondents had control over the finances of SMGI, and the witness affidavits of AA, BB, CC, EE and GG, which indicated that Weeres was the leader and had control over the operations of SMGI.

[45] The Respondents claimed in their affidavits and verbal submissions that Staff prepared their evidence without all the facts and failed to take into account the testimony of key individuals. However, the Respondents did not provide affidavits from any key individuals except FF and presented no witnesses to corroborate their evidence or contradict statements made by Staff's witnesses in the affidavits of Fortner, AA, BB, CC, DD and EE.

[46] Finally, in terms of the final submissions, the Panel advised all parties that they could make final written submissions related to the supplemental affidavit of CC on or before 17 October 2011. Although the Respondents submitted final submissions, the submissions did not adhere to the Panel's instructions as they related to issues outside of those addressed in the supplemental affidavit of CC.

[47] Because of the foregoing, the Panel finds that the Respondents' evidence lacks relevance, reliability and credibility in this proceeding, and weights it accordingly.

Legal Analysis

a) s. 45 – Registration Requirement

[48] Staff allege that the Respondents traded in securities for and on behalf of New Brunswick investors without being registered to do so, contrary to section 45 of the *Act*. Section 45(a), at all times material to this matter, provided as follows:

> Unless exempted under this Act or the regulations, no person shall
> (a) trade in a security or act as an underwriter unless the person is registered as a dealer, or is registered as a salesperson, as a partner or as an officer of a registered dealer and is acting on behalf of the dealer, or
> ...

[49] The registration requirement is an integral part of securities laws in the province. It attempts to ensure that market participants have a minimum level of proficiency, are of good character and satisfy the appropriate ethical standards.

[50] Under section 45(a), the registration requirement is imposed if two conditions are satisfied; namely that: 1) there is a trade in a security; and 2) that there are no exemptions from registration available.

[51] Staff submitted that the Respondents traded in securities by trading "investment contracts" in New Brunswick, and were therefore subject to the registration requirements. Under section 1(1) of the *Act*, the definition of security includes an investment contract. Staff cited numerous authorities from both Canada and the United States outlining what has been held to constitute an investment contract. This Commission, in its Reasons for Decision issued on 21 July 2008 in *Wealth Pools International et al.*, also discussed the interpretation of investment contract at paragraph 35:

> An investment contract has been held to mean a scheme whereby a person invests money in a common enterprise with the promoted expectation of profits to be made from the efforts of a promoter or third party. The potential investor's expectations are key to the definition of investment contract. Also key to the definition is the fact that the investor operates no practical or actual control over the managerial decisions of the company.

[52] After reviewing the authorities, and having regard to the facts in this matter, the Panel is satisfied that the Project promoted by the Respondents is an investment contract, and therefore a security as defined in the *Act*. The Respondents solicited investors, such as CC, to invest money in a common enterprise, being the Project, with the promoted expectation of profits. Specifically, CC invested in the Project because Weeres represented that she would receive minimum monthly payments until her money doubled. In addition, the investors, such as CC, did not exercise any practical or actual control over the management decisions of the Project or SMGI.

[53] The Panel is also satisfied that the Respondents traded in securities. Trade is defined broadly in section 1 of the *Act* as follows:

> "trade" includes
>
> (a) a sale or disposition of a security for valuable consideration or an attempt to sell or dispose of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase

> of a security or, except as provided in paragraph (*d*), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,
> ...
> (*e*) an act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (*a*) to (*d*).

[54] The definition specifically refers to actual sales or dispositions, attempts to sell or dispose of a security as well as acts and solicitations in furtherance of a trade. The Respondents' solicitation of CC and attempted solicitation of DD, BB, GG and EE clearly fall within the definition of a trade. In addition, the Respondents both acted in furtherance of a trade by creating the investment opportunity in the Project, organizing and running information and training sessions intended to promote the Project and recruiting individuals to join their group and invest in the Project.

[55] The Panel therefore finds that the Respondents traded in securities in New Brunswick without being registered to do so and that they were not exempted from the registration requirements. As such, the Panel finds that the Respondents contravened section 45 of the *Act*.

b) s. 71 – Prospectus Requirement

[56] Staff allege that the Respondents traded in securities without having filed a prospectus, contrary to section 71 of the *Act.* Section 71 provides:

> 71(1) Unless exempted under this Act or the regulations, no person shall trade in a security on the person's own account or on behalf of any other person where the trade would be a distribution of the security unless
> (*a*) a preliminary prospectus and a prospectus that are in the form prescribed by regulation have been filed with the Executive Director in relation to the security, and
> (*b*) the Executive Director has issued receipts for the preliminary prospectus and prospectus.

[57] The prospectus requirement is another integral part of securities laws in the province. Prospectus requirements aim to assist investors in becoming fully apprised of the risks before undertaking an investment.

[58] The Respondents did not file a prospectus with the Commission in relation to the distribution of their securities, nor were they exempted from doing so. As such, the Panel finds that the Respondents contravened section 71 of the *Act*.

c) s. 58(2) – Prohibited Representations

[59] Staff allege that the Respondent Weeres made prohibited representations regarding the future value of the Project, contrary to section 58(2) of the *Act*. Section 58(2) at all times material to this matter provided as follows:

> 58(2) No person, with the intention of effecting a trade in a security, shall make any representation, orally or in writing, relating to the future value or price of the security that is not in accordance with the regulations.

[60] The evidence demonstrates that Weeres made several representations relating to the future value of the Project in an effort to effect a trade. Specifically, Weeres represented to CC that she would receive minimum monthly income by investing in the Project until her money doubled. He advised DD that she would double her money within five years and that the Project involved no risk since rooms would be booked solid. In addition, Weeres guaranteed BB monthly payments and advised GG that she would get all her money back plus more within one month of investing. As such, the Panel finds that Weeres contravened section 58(2) of the *Act*.

d) s. 69(b) – Fraud

[61] Staff allege that the Respondent Weeres defrauded CC of her property, in contravention of section 69(b) of the *Act*. Section 69(b) at all times material to this matter provided as follows:

> No person shall, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person knows or reasonably ought to know
> …
> (*b*) perpetrates a fraud on any person.

[62] The term "fraud" is not defined in the *Act*, and therefore the Panel must draw out guidance and principles from jurisprudence and decisions from other securities commissions.

[63] The British Columbia Court of Appeal, in *Anderson v. British Columbia (Securities Commission)* 2004 BCCA 7, assessed the fraud provision in the British Columbia *Securities Act*, which is substantially similar to s. 69(b) of the New Brunswick *Act*. The Court of Appeal adopted the test for fraud as outlined by the Supreme Court of Canada in *R. v. Théroux*, [1993] 2 S.C.R. 5, and summarized the elements of fraud 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).

[64] This test was also adopted by the Ontario Securities Commission in *Re Al-Tar Energy Corp.* 2010 CarswellOnt 3966, 33 O.S.C.B. 5535 to interpret the fraud provision in the Ontario *Securities Act*. The Panel is of the view that this test should also be used to interpret section 69(b) of the New Brunswick *Act*.

[65] The Panel finds that the *actua reus* of the offence was present in this case. Weeres knowingly deceived CC by advising her that BB invested in the Project, in an effort to entice her to also invest in the Project. Weeres' statement was a falsehood as he knew that BB had not invested in, nor committed to investing in the Project. In addition, Weeres' deceit directly caused CC's deprivation. CC invested $22,600.00 into the Project because she thought that BB also invested in the project. CC lost all her investment and never received any payments from SMGI or from Weeres.

[66] The Panel also finds that the *mens rea* of the offence was present in the case. Weeres knew that he was deceiving CC by telling her that BB invested in the project. Weeres knew that BB had not invested in the Project and that he had never committed to investing in the Project. In addition, it is not a defence for Weeres to claim that he honestly believed the BB would invest in the project at a later date. The Supreme Court of Canada in *R. v. Théroux* stated that an accused's belief that his actions would subsequently be ratified affords no defence to fraud. Specifically, in the *Théroux* decision, the Supreme Court of Canada referred to its own decision in *R. v. Lemire*, [1965] S.C.R. 174, at paragraph 28 where Justice McLachlin writes:

> In *R. v. Lemire*, [1965] S.C.R. 174, this Court held that the accused's belief that his actions would subsequently be ratified afforded no defence. The accused, the Chief of the Quebec Liquor Police, had been told by the Premier of Quebec to submit fictitious expense accounts in order to receive a salary increase which had been agreed to but which could not be officially paid until a government-wide salary review, then under way, had been completed. In submitting the expense accounts Lemire no doubt felt that his actions, if unorthodox, were not dishonest. Nevertheless, Lemire was convicted. Reversing the decision in the Court of Appeal, Martland J. (for the majority) held, at p. 193:
>
> > In other words, [the court below held that] there is no intent to defraud within the requirement of s. 323(1) [now s. 380(1)] if the accused person, while deliberately committing an act which is clearly fraudulent, expects that that which he is doing may, at a later date, be validated. To me the very statement of this proposition establishes its error in law.

[67] In addition, Justice McLachlin, while discussing the pragmatic considerations of the *mens rea* requirement, wrote the following at paragraph 33 of the *Théroux* decision:

> 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.

[68] Weeres also knew that his deceit could deprive CC of her money and put her investment at risk. He knew that no one else had invested in the Project, and that CC's

funds were not being used for the Project, but instead being used as working capital for SMGI and for personal living expenses for himself and Donszelmann. Weeres clearly had subjective knowledge of CC's risk of deprivation.

[69] The Panel finds that Weere's actions meet both the *actus reus* and the *mens rea* of the offence. Therefore, the Panel finds that Weeres defrauded CC of her property and breached section 69(b) of the *Act*.

e) s. 181 – Misleading or Untrue Statements

[70] Staff allege that the Respondent Weeres made misleading and untrue representations to investors and putative investors, with the intention of trading in the Project, contrary to section 181 of the *Act*. Section 181 at all times material to this matter provided as follows:

> No person shall make a statement that the person knows or reasonably ought to know
> (*a*) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading, and
> (*b*) significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of a security.

[71] Weeres made material misleading and untrue statements to CC and DD. He falsely advised both individuals that BB had invested in the Project in order to entice them to invest as well. BB never invested in the project, nor did he make any commitment to do so.

[72] In addition, Weeres knew, or reasonably ought to have known that his statements about BB's investment would significantly affect or would reasonably be expected to have a significant effect on the value of the Project. If BB had actually invested a significant amount into the Project, as Weeres represented, SMGI may have had the

financial means to purchase the Tara Manor Inn and there would have been a greater likelihood of success in the Project.

[73] Taking into account all of the foregoing, the Panel finds that Weeres made misleading and untrue statements in a material respect, and therefore contravened section 181 of the *Act*.

Sanctions and Costs

[74] As noted above in paragraph [3], Staff sought orders in the public interest against the Respondents pursuant to section 184(1) of the *Act*; namely that: the Respondents cease trading in securities in New Brunswick; any exemptions under New Brunswick securities law not apply to the Respondents; the Respondents be prohibited from becoming or acting as directors or officers of any issuer; and the Respondents disgorge to the Commission the sum of twenty-two thousand six hundred dollars ($22,600.00). Staff also requested administrative penalties and costs pursuant to the *Act*.

[75] The Panel has not yet received written submissions as to the imposition of sanctions or costs from either Staff or the Respondents. As such, the Panel will provide both parties with an opportunity to make written submission addressing the issue of the imposition of sanctions and costs after the issuance of these Reasons. All written submissions must be filed with the Office of the Secretary no later than 30 days from the date of these Reasons. After such time, the Panel will consider the parties' written submissions and render a decision on sanctions and costs.

4. CONCLUSION

[76] The above constitutes the Commission's Reasons for the Decision on the Merits, in which the Commission found that both Respondents breached sections 45(a) and 71(1) of the *Act*, and that the Respondent Weeres breached sections 58(2), 69(b) and 181 of the *Act*. As indicated above in paragraph [75], the parties have an opportunity to

provide written submissions on sanctions related to the breaches within 30 calendar days from the issuance of this decision.

Dated this _29th_ day of November 2011.

"original signed by"
Denise A. LeBlanc, Q.C., Panel Chair

"original signed by"
Céline Trifts, Panel Member

"original signed by"
Kenneth Savage, Panel Member

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