



THE MANITOBA
SECURITIES
COMMISSION

July 4, 2014

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: BRIAN MIGIE

**REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION**

Panel:

Panel Chair:	Mr. D.G. Murray
Member:	Mr. G.J. Lillies
Member:	Mr. B.P. Cyncora

Appearances:

Mr. S. Gingera)	Counsel for the Commission
)	No appearance on behalf of the Respondent

This matter was heard Wednesday, January 29, 2014. The Respondent, Brian Migie, who did not appear, had been served by order of substitutional service. Staff counsel advised that he had not been contacted by Migie or anyone on his behalf. The panel was satisfied that service had been properly completed as required by The Securities Act and directed staff counsel to proceed to call evidence.

Exhibit 7 was filed being a certified Statement of Director indicating that Migie has never been registered in any capacity, has not at any time filed a preliminary prospectus or a prospectus with the Commission, has not applied for or been granted an exemption order from the Commission nor has he filed any reports of an exempt distribution.

Steven Stewart was sworn and provided testimony. Mr. Stewart is 39 years old. He is married with three children. He has a high school education and received a carpentry certificate from Red River College. He has lived in Kelowna, B.C. since July 2007 but prior thereto resided in Winnipeg. He is a carpenter by trade.

Mr. Stewart testified that he met the Respondent Migie during the summer of 2006 at which time he was dating the Respondent's daughter, Ianna.

Mr. Andrews only connection to Migie was due to his relationship with his daughter. He was never a friend and the two shared no common social connections. He would generally see Migie when he attended at his home to visit his daughter.

Mr. Stewart's girlfriend advised him that her father was an investor and that he worked "in stocks". Stewart testified that while visiting at Migie's house he had seen him monitor stocks over the internet. Migie told Mr. Stewart that he worked with a partner, however, Mr. Stewart never met him nor does he know the partner's name.

Migie advised that he had been dealing in stocks for over 10 years and had developed a software program for trading. At Migie's suggestion, Mr. Stewart gave him \$25,000.00 to invest on his behalf. Migie advised him that there would be a 10% return on the principal. The Respondent Migie advised Mr. Stewart that the \$25,000.00 was a good basic start for an investment portfolio.

Mr. Stewart depended on Migie to pick the investments and had no input in this at all. At that time Mr. Stewart had very little investment experience having invested once in the 1990's in mutual funds through the spouse of a co-worker. Mr. Stewart gave Migie a cheque for the sum of \$25,000.00 dated December 4, 2006 (Exhibit 8) and received in return a document titled "Promissory Note" in that amount dated December 10, 2006. The Promissory Note was entered as Exhibit 9. The Promissory Note shows a rate of interest of "at least" 10% per annum "or higher". The document clearly referred to the transaction as a loan and indicated that it was callable at any time.

Despite the fact that the document indicates that the transaction was a loan Mr. Stewart testified that he considered his \$25,000.00 advance to be an investment that Migie would make on his behalf in the stock market by virtue of his software program. Mr. Stewart did testify that it was important to him that the investment could be recalled at any time as he was thinking of buying a house sometime in the not too distant future and would need a down payment.

Migie provided Mr. Stewart no documentation other than the Promissory Note. Again, Stewart testified that his understanding was that he was making an investment, along with others and receiving an interest in a bundle of stocks being picked by Migie.

Seven months later Mr. Stewart moved to Kelowna, British Columbia. In January 2008 he received from Migie a cheque dated January 16th in the amount of \$2,520.00 which is characterized as "interest on loan". A copy of this cheque was entered as Exhibit 10.

Prior to receiving this payment Mr. Stewart had contacted Migie asking for the return of the \$25,000.00 as he needed it for a deposit on a house he wished to buy in British Columbia.

Exhibits 11 through 15 are a series of emails going back and forth between Mr. Stewart and Migie during the months of March, April and May, 2008. In an email of March 13th Mr. Stewart advised that he needed the money "asap". He also advised Migie that he had lost the "stock certificate" he had received. A March 14th email reply from Migie provides confirmation of a loan from Stewart to Migie in the amount of \$25,000.00 and refers to a rate of interest of 1% per month. Throughout this matter Mr. Stewart always referred to his \$25,000.00 advance as an investment and Migie always referred to it as a loan. In the email of March 14th Migie indicated that the interest for the first quarter of 2008 was coming shortly in the amount of \$756.00. This never arrived.

Under date March 31st Mr. Stewart emailed Migie and advised him again that he needed the money and indicated in fact that he had purchased a house in Kelowna. In a return email Migie advised that he was waiting for "settlement funds" from Geneva. On April 28th Migie again emailed Stewart and advised that he was looking to obtain money from other investors in order to return the funds. He made reference to one prospective investor who "is in for 20K". Mr. Stewart testified that it seemed strange to him that he would be obtaining the return of his investment based on a payment by a subsequent investor.

Impatient to receive his money Mr. Stewart asked his brother-in-law, a lawyer, to send a demand letter to Migie. This resulted in an email of May 29th, 2008 from Migie indicating that he was now considering his options. Mr. Stewart never heard again from Migie and never received any additional funds.

Len Terlinski, an investigator with The Manitoba Securities Commission, was sworn and gave testimony. He was involved in the investigation into the complaint against Migie. He identified a series of documents which were filed as Exhibit 16. Exhibit 16 was broken down into 16.1 through 16.32. These documents and the testimony provided by Mr. Terlinski are informative as to the actual use made of Mr. Stewart's \$25,000.00.

The trail of the funds is as follows:

- a) Mr. Stewart wrote a cheque to Migie on December 4, 2006 drawn on the Vantis Credit Union in the sum of \$25,000.00 (16.1);

- b) On December 5, 2006 this sum was deposited by Migie with the RBC Financial Group where \$17,350.00 was credited to a credit card balance in the amount of \$17,564.64 in the names of Migie and his daughter.
- c) The remainder of the \$25,000.00, being \$7,650.00 was issued to Migie in the form of a bank draft also dated December 5, 2006 (16.2, 16.3 and 16.4). The \$7,650.00 draft was deposited to the credit of Migie at the Vantis Credit Union, also on December 5, 2006. Of this sum \$5,400.00 stayed on deposit and the balance of \$2,250.00 was taken out in cash by Migie (16.5 and 16.6).
- d) On December 6, 2006 Migie wrote a cheque drawn on the Royal Bank joint Visa account for \$17,300.00 to himself. Obviously he was able to do this as a result of depositing \$17,350.00 of Mr. Stewart's funds into that account the day before (16.7 and 16.8).
- e) Also on December 6, 2006 Migie deposited the sum of \$18,300.00 into his Vantis Credit Union account. This included the \$17,300.00 Royal Bank cheque along with an additional \$1,000.00 (16.9 and 16.10).
- f) At this point, of Mr. Stewart's \$25,000.00, a total of \$22,800.00 had been deposited on December 5th and 6th into Migie's Vantis Credit Union account with the remaining \$2,200.00 being withdrawn by him in cash. After these deposits the balance in the account was \$26,921.20.
- g) On December 12, 2006 Migie wrote a cheque on the Vantis account for \$15,000.00 which was deposited in a cash account in Migie's name at Interactive Brokers of Canada, a securities dealer and a member of IIROC (16.11, 16.12, 16.13, 16.14 and 16.15).
- h) These funds, which were Mr. Stewart's money, continued to sit in Migie's cash account with Interactive for a couple of months until he directed disbursements of \$1,000.00 on February 12, 2007 and \$2,500.00 on February 23, 2007, which sums were deposited back into Migie's Vantis Credit Union account on February 13th and February 26th, 2007 (16.16 – 16.20).
- i) It is clear by this time that Migie was using Mr. Stewart's money to cover his day to day expenses. When \$1,000.00 was deposited the account balance had gone down to \$21.26. The balance of Mr. Stewart's money was clearly gone. By the time the \$2,500.00 was deposited about two weeks later, the account balance had been reduced to about \$250.00. On the same day he deposited the \$2,500.00 Migie withdrew \$2,000.00 in cash.
- j) This scenario repeated itself in March, 2007 when Migie directed disbursements from the Interactive cash account of \$1,500.00 on March 2, 2007 and \$1,800.00 on March 28, 2007 which amounts made their way into Migie's Vantis account on March 5th and March 30th respectively (16.21 – 16.24).

Prior to the March 5th deposit the account balance had been \$171.20. At the time of the March 30th deposit the balance had sunk to \$4.69.

- k) Although there appeared to be some trading going in the Interactive account there was no evidence led as to the current status of the account since March, 2007. It is clear that Migie was using Mr. Stewart's funds as his own private "piggy bank". There was no apparent attempt to involve Mr. Stewart's money in any type of commercial use intended to result in a return. The only amount actually sent to Mr. Stewart was the cheque for \$2,520.00 in January, 2008. Whether it is characterized as an investment or a loan Mr. Stewart's \$25,000.00 is gone.

Counsel for the Commission argued that Migie traded in securities without registration or a prospectus and seeks a denial of exemptions, assessment of an administrative penalty and an order of financial compensation as well as an order of costs.

The only real question that must be answered is whether Migie was trading in securities. It was argued by counsel for the Commission that whether the transaction is characterized as an investment contract or the issuance of a Promissory Note it represents trading in securities. The panel agrees.

A Promissory Note is a security and issuing a Promissory Note for cash or a cheque is a trade (re: Terry James Minnie, 204 BCSC com 677, par .38).

Mr. Stewart believed that the transaction represented an investment. Counsel for the Commission characterizes it as an investment contract based on the testimony received. He referred to re: Kustom Design Financial Services Inc., a decision of the Alberta Securities Commission reported at 210 AB ASC 179. In that case it was noted that jurisprudence defines an investment contract "as an investment of money in a common enterprise with expected profits arising significantly from the efforts of others". While the term investment contract is not defined in the Alberta Act it is defined in the Manitoba Securities Act as "a contract, agreement, certificate, instrument or writing, containing an undertaking by a security issuer to pay the holder thereof, or his assignee or personal representative or other person, a stated or determinable amount in cash or its equivalent on a fixed or determinable date, and containing optional settlement, cash surrender or loan values prior to or after maturity".

Counsel for the Commission argued that as \$25,000.00 was advanced by Mr. Stewart on expectation of a return, that Migie had full control of the transaction and the disposition of the funds, there were set returns and specified payment dates and Mr. Stewart believed he was investing in stocks, the transaction represents an investment contract and a trade in securities. In the view of the panel this transaction could fall under the definition of investment contract in the Manitoba Securities Act. Under the Act an investment contract is considered a security.

While the panel finds the argument that the transaction represented an investment contract to be persuasive it does not feel the need to make that finding. Whether the document issued is a Promissory Note or the transaction can be characterized as an investment contract, Migie was trading in securities without registration or a

prospectus. No evidence was led to suggest that Migie was relying on an exemption under the Securities Act and in fact, no reports were filed to evidence an exempt distribution. In addition, it is clear, however the transaction may be characterized, Mr. Migie misappropriated Mr. Stewart's funds.

Decision

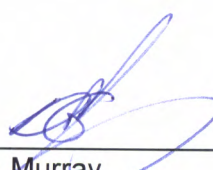
The panel finds it to be in the public interest and so orders as follows:

1. There will be a permanent denial of access to the exemptions by Migie under Section 19(5) of The Securities Act;
2. There will be an order that Migie will pay an administrative penalty in the amount of \$25,000.00;
3. There will be an order of financial compensation pursuant to section 148.2 in favour of Mr. Stewart in the amount of \$25,000.00, being the sum misappropriated.

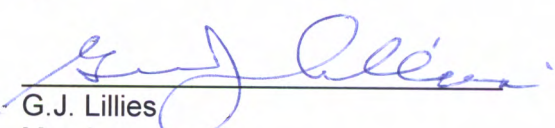
The amount paid to Mr. Stewart by the cheque of January 16, 2008 in the amount of \$2,520.00 was indicated to be a return on an investment and not capital and Migie is not entitled to any credit against the amount owing for this payment.

In addition, counsel provided a schedule of costs pursuant to the Regulations totaling \$5,386.62 and this amount is also assessed against Migie.

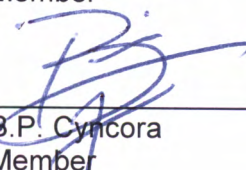
A copy of this Decision and subsequent Order can be served on Migie in keeping with the terms of the original Order of Substitutional Service.



D.G. Murray
Chair



G.J. Lillies
Member



B.P. Cyncora
Member