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IN THE MATTER OF the Securities Act, (RSA 2000 c. S-4)
(The Act)

and

IN THE MATTER OF The Land Development Company Inc. and Phil Archer

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REASONS FOR DECISION OF THE ALBERTA SECURITIES COMMISSION

BEFORE:	Glenda A. Campbell, Q.C. Vice-Chair James E. Allard Member Thomas G. Cooke, Q.C. Member
APPEARANCES:	Lisa J. Skelton and Christopher Lee For the Staff of the Alberta Securities Commission Aleck Trawick, Q.C. For the Respondent
HEARD:	In Calgary, Alberta September 4 & 5, 2001 October 16 & 25, 2001 November 6, 2001

I. INTRODUCTION

[para 1]
These are our findings from a hearing involving allegations made by staff of the Commission against The Land Development Company Inc. ("LDC") and Phil Archer ("Archer"). The allegations are set out in a notice of hearing issued on May 3, 2001. The hearing was held under sections 198, 199 and 202 of the Act.

[para 2]
The first appearance in this matter was on May 15, 2001, on which date staff advised the panel that the parties had agreed to a hearing date of July 19, 2001, the hearing to proceed by way of an agreed statement of facts and written submissions based on those facts. The hearing of this matter was then set for July 19, 2001.

[para 3]
Prior to July 19, 2001, the parties advised the panel that they required more time and the hearing was adjourned to September 4, 2001.

[para 4]
On September 4 and 5, 2001, the panel received the Agreed Statement of Facts and heard testimony from six investors who purchased undivided interests in real estate projects sold by LDC and Archer, as president and guiding mind of LDC. The parties then filed written arguments and made further oral arguments on October 16, 2001, following which the parties filed supplemental written arguments. We adjourned the hearing pending these findings.

[para 5]
The Revised Statutes of Alberta 2000 (RSA 2000) were proclaimed into effect on January 1, 2002. As a result, the *Securities Act*, RSA 2000, c. S-4 replaced the *Securities Act*, S.A. 1981, c. S-6.1, as amended. Although the revision does not change the substance of the law, it introduced gender-neutral language in some provisions and re-numbered almost every provision of the Act. These proceedings were commenced and argued prior to the revision, referring to provisions of the Act as they were numbered at the time. This decision issued after the revision. This decision refers, wherever possible, to provisions of the Act as they are numbered after the revision.

II. ISSUE

[para 6]
The evidence and facts before us were uncontested. There is essentially only one issue to be decided in this case: were the undivided interests in undeveloped land sold to a number of Alberta investors by LDC and Archer "securities" within the meaning of subsection 1(ggg) of the Act?

[para 7]
Staff argued that the undivided interests in land, as sold by LDC and Archer, falls within the

"investment contract" branch of the definition of security, under section 1(ggg)(xiv) of the Act. Counsel for LDC and Archer argued to the contrary, that these were simply interests in real estate and not investment contracts.

[para 8]
Staff advised the panel that this matter brings before the Commission an important legal issue that has not been previously determined in Canada. While there is a plethora of American and Canadian case law on the subject of what constitutes an "investment contract", the case law is not easily reconciled and none cited to us involves facts exactly like those in this case.

[para 9]
If these interests are securities, then the Act applies and LDC and Archer traded in securities in Alberta without being registered or filing a prospectus with the Executive Director, contrary to sections 75(1) and 110(1) of the Act. If these interests are not securities, then LDC and Archer have not contravened the Act.

III. FACTS

[para 10]
LDC is an Alberta corporation of which Archer is the sole director and shareholder. LDC is in the business of purchasing, developing and reselling real estate and, since 1999, it has been involved in a number of real estate development projects.

[para 11]
In May and August 1999 LDC purchased two parcels of undeveloped land (the "Projects"): Bearspaw Ranche Estates (Bearspaw Ranche) containing approximately 148 acres and Bearspaw Ridge (Bearspaw Ridge) containing 160 acres.

[para 12]
Archer is also the sole director and shareholder of Celestine Mortgage Corporation ("Celestine Mortgage"), which financed a number of the investors' purchases of interests in the Projects.

[para 13]
LDC sold undivided beneficial interests in the Projects to investors. The price of a 1/148 undivided interest in Bearspaw Ranche or a 1/160 undivided interest in Bearspaw Ridge ranged from $9,000 to $13,000. Investors were not required nor called upon to contribute any additional funds to complete the development of the Projects.

[para 14]
LDC placed numerous advertisements for its Projects in The Calgary Herald. In one of the advertisements (Exhibit 13) Archer is quoted as saying:

> "We secured 148 acres of agriculturally zoned land at an exceptional value that we are sharing with our investors." Profits are realized once the community is developed and operational. "It's an excellent low risk investment for someone who is willing to wait the eighteen months to see the project come to life." The Land Development Company takes care of all the paperwork and legwork to get a project of this magnitude up and running.
>
> ...
>
> This win/win proposition leaves the investor fully secured while The Land Development Company develops and enhances the value of the property. This is a common process called "Change of Use Value Adding Real Estate Development".
>
> …
>
> We are not in this just to sell land, Phil states. "We find excellent future development property and bring the project into fruition. This is how we make our money".

[para 15]
In sales brochures (Exhibits 11and 19) Archer advised potential investors that:

> Your investment, $25,000 for a 2 acre undivided interest, is sure to be a financial success. You are, of course, in first position on title, while we do all the work to get the needed approvals.
>
> …
>
> It is a win/win proposition - you are fully secured as we develop and enhance the value of the property and we both make money on the final resale of the property. This is a process called "Change of Use Value Adding Real Estate Development".

[para 16]
Other descriptions used in the advertisements include: "Tremendous Profit Potential"; "Incredible investment opportunity!!!"; "RSP Eligible"; "Investment opportunity"; "Guaranteed Financing 8% - 3yrs -$281.49/m Share in the Tremendous Profits".

[para 17]
The undeveloped land was designated for agricultural use, and was primarily used as open pasture for grazing cattle. LDC salespeople told investors that they would profit through change of use or re-zoning of the lands from raw agricultural land into a country residential development consisting of two-acre serviced lots or a "plus 50" condominium development that would be offered for sale to the public. LDC would take the necessary steps to obtain municipal approvals to redesignate the land from agricultural to country residential, and subdivide the land into country residential lots with an internal roadway and open space system linked to a centrally located municipal reserve parcel. LDC would also be responsible for providing the lots with septic tank and field systems, and access to water, electricity and natural gas. Once a Project had been redesignated, subdivided and the individual lots serviced, LDC would be responsible for marketing and selling the individual lots to the public. Once a Project was sold, after payment of debts and expenses associated with the development of the Project, the remaining cash would be distributed to the investors in proportion to their respective interests in the Project.

[para 18]
LDC provided investors in either Project with promotional material (Exhibits 10, 19 and 20) that included projections of the development costs, net revenues and net anticipated profits.

[para 19]
The projections for Bearspaw Ranche included two scenarios: one assumed that, if 60 two-acre lots were sold after three years, after payment of hard and soft costs and development, management and marketing fees of $1.1 million, the net profit to be paid to investors would be $43,345 per undivided interest; the second assumed that if 300 condominium units were sold after three years, after payment of hard and soft costs and a development, management and marketing fees of $1.1 million, the net profit to be paid to investors would be $47,716 per undivided interest. The notes to the projections indicate that all co-owners/investors would be consulted prior to any monies being borrowed, and before any development plans are finalized.

[para 20]
Similar projections provided to investors of the Bearspaw Ridge Project indicated that the net profit to be paid to investors would be $40,814 per undivided interest after payment of hard and soft costs and a development, management and marketing fees of $1.2 million. A note to the projections indicated that all co-owners/investors would be consulted prior to any major decision and that no further capital contribution would be required from investors.

[para 21]
Each investor who purchased an undivided interest in either Project signed two documents, a "Land Reservation Agreement and Agreement to Purchase Land" ("Land Agreement") and a "Co-Ownership Agreement". Investors were advised that title to all of the lands in the Project would remain in the name of LDC and that LDC would deliver a Declaration of Trust in favour of the investors in respect of their interests in the land. Investors' beneficial interests were to be protected by way of caveat filed against the certificate of title for the Project lands.

[para 22]
The forms of Land Agreement and Co-Ownership Agreement were entered into evidence (Exhibits D and E to the Agreed Statement of Facts, Exhibit 2). The Co-Ownership Agreement is made between "The Land Development Company Inc. Operating the Project" and the investors in the relevant Project. It identifies the investors as "Co-owners", describes the relationship among the investors as a "joint venture" for the purpose of developing the "Property" into the Project, and sets out the respective responsibilities of LDC and the investors. Because of the importance of the Co-Ownership Agreement to our findings, we set out the salient terms of this agreement at some length:

> **Recitals**
>
> B. TLDCI remains the registered owner of the Property as trustee on behalf of the Co-Owners, and to the extent that TLDCI remains the beneficial owner of any interest in the Property, itself, as declared in the Declaration of Trust made by TLDCI to and in favour of the Co-Owners and dated February 15, 1999.

C. It has been agreed amongst the parties hereto, at a meeting held on February 15, 1999, to develop the Property and retain the services of TLDCI to promote and carry out the development of the Property in accordance with the general will of the Co-Owners as expressed at the said meeting.

1.1 Nature of Relationship Between Co-Owners

The Co-Owners and each of them hereby agree that they have joined together in a joint venture (the **"Joint Venture"**) for the purposes of developing the Property (or a portion there of) into the Project known as ***Bearspaw Ranche Estates***, a residential development consisting of 60 two acre lots or 300 +50 residential condominiums as TLDCI may get approval from the MD of Rockyview. The nature of the respective interests of the Co-Owners shall be undivided interests in the Property and Project.

It is understood and agreed that the Co-Owners, by entering into this Agreement, are not thereby intending to create nor creating a partnership (general or limited) and nothing herein contained shall be construed as constituting any of the Co-Owners in any way to pledge the credit of any other Co-Owners or as authorizing any Co-Owners in any way to pledge the credit or any other Co-Owner or to otherwise bind any other Co-Owners save as herein expressly provided.

…

3.1 Management of the Project

TLDCI shall be the initial manager of the Project and shall be ratified as manager or replaced as manager in a meeting of the Co-Owners to be convened as soon as practicable in accordance with the terms of this Agreement. Fees shall be payable to the manager at 12% of the Gross Proceeds from residential lots/condominiums. This fee will include all sales/marketing costs.

…

4.1 Development of the Project

Subject to the provisions of this Agreement, the Co-Owners agree to develop the Property according to the following terms:

(a) the manager shall be responsible for the provision of the development services with respect to the Project (the **"Development Services"**) including:
- (i) Management and co-ordination of all activities required to add any additional lands to the Project:
- (ii) Management and co-ordination of all activities required by the Municipal District of Rockyview, the Government of Alberta or any government authority or body with respect the lands;
- (iii) Preparation of financial analysis and budgets;
- (iv) Co-ordination of the conceptual design of the Project;
- (v) Arrangements for the preparation of working drawings and specifications;
- (vi) Supervision over and co-ordination of the activities of architects and consultants for the Project;
- (vii) The establishment and regular monitoring of an overall Project schedule;
- (viii) Negotiation of all contracts and purchases;
- (ix) Management and co-ordination of all activities relating to sale or leasing of the Project or parts thereof including co-ordination of the pre-construction advertising and promotion for the Project;
- (x) Instructing lawyers, accountants, surveyors, marketing consultants and any other consultants required;

(xi) Instruction and co-ordination of all activities relating to the environmental studies and clean-up on the Land;

(xii) Preparation of pro forma statements of assets and liabilities, income and expenses, projected cash flow statements, together with any other financial and other information required in order to obtain interim and final mortgage financing; and

(xiii) All other management and co-ordination services reasonably required with respect to the Property, the development of the Project and the marketing of the Project.

…

5.2 Contribution of Monies

It is the intention of the parties that TLDCI shall loan to the Project and Joint Venture, through the purchase and re-sale of the Property the initial and subsequent monies (except for borrowed funds secured on the Project as hereinafter provided) required, to the best of the ability of TLDCI, for the payment of liabilities and expenses relating to the Property or Project. The Co-Owners shall not be required nor called upon to contribute further monies. Further, it is the intention of TLDCI to obtain a performance bond as soon as same is available to assist in the completion of the Project.

5.3 Security for Borrowed Funds

The Co-Owners acknowledge and agree that TLDCI, or any subsequent manager of the Project, is authorized to pledge the Property, and all assets of the Project and Joint Venture to a lender in terms that TLDCI or the manager deem appropriate and the best available, to meet any cash contribution requirements for the Project not contributed by TLDCI. In such event TLDCI shall be and is hereby authorized to execute and deliver, at the direction of TLDCI, such security as may be required or prudent to give effect to the foregoing.

5.4 Appointment of Attorney

Effective upon execution of this Agreement, the Co-Owners hereby irrevocably make, constitute and appoint the President of TLDCI with full power of substitution, as their true and lawful attorney and agent, with full power and authority in their place and stead and for their use and benefit to make, execute and deliver such documents and assurances as may be necessary or desirable to give effect to the borrowing of monies and securing of same on the Property and other assets of the Joint Venture and to give effect to any subdividing, re-zoning or re-plotting of the Property necessary for the Project. This Agreement, and in particular this clause, shall be the only power of attorney document necessary and no separate document shall be required.

…

6.3 Sale or Transfer in the Lands

The Co-Owners may sell, transfer, assign, hypothecate, pledge or dispose of any undivided interest or portion thereof in the Property provided such disposition is made in accordance with and subject to the provisions of this Agreement.

6.4 Documentation of Transferee

Any transferee or assignee of any undivided interests in the Property shall be required to execute such documents, assurances, or the like as the solicitors for the time being of the Joint Venture may reasonably request or require in order to ensure that such transferee of assignee or assignee agrees to be bound by the provisions of this Agreement as if it were an original party thereto.

…

7.1 Calling of Meeting

Either the manager or [sic] Co-Owners representing 10% ownership in the Property and Project may convene a meeting of Co-Owners at any time and from time to time. In the event the Co-Owners wish to convene a meeting, they shall provide written notice of same to the manager who shall then send out the required notice of meeting to all Co-Owners. Such meeting shall be held at the City of Calgary. 51% of the Co-Owners may vote to replace the General Manager (TLDCI) for just cause.

…

7.3 Voting

Co-Owners representing ten percent (10%) ownership in the Property and Project present in person or by proxy constitute a quorum. All decisions required [sic] to be made by the Co-Owners shall be made by a majority of ownership interest in the Property and Project of the Co-Owners present or by proxy.

…

8.1 Frustration

If the development of the Property as contemplated under this Agreement or determined by the Joint Venture is impossible, or cannot be effected within ten (10) years following the date of this Agreement, then the Co-Owners shall use their best efforts to dispose of the Property at the highest price then available.

In the event of sale of the Property, the proceeds or any portion thereof of the proceeds of sale shall be distributed in accordance with the provisions of this Agreement.

…

10.1 First Right of Refusal

TLDCI acknowledge and agree that the Co-Owners shall each have a right of first refusal to purchase lots created in the subdivision and development of the Project. At a time when such developments lots have been finally subdivided, TLDCI, as the case may be, shall provide the Co-Owners with notice in the manner herein provided that such lots are available for purchase and will be listed for sale thirty (30) days from the date of notice. The notice to Co-Owners shall attach a copy of the plan of subdivision and list the price of each lot. From the date of deemed receipt of notice, the Co-Owners shall have thirty (30) days in which to enter an unconditional agreement to purchase a lot or lots for the list price specified less the listing commission. Particular lot priority and selection shall be determined in accordance with and in direct relationship to the date that the Co-Owner entered into an agreement to purchase an undivided interest in the Lands, with the earliest date having the date having the first selection.

…

11.2 Solicitors

The solicitors for the Joint Venture shall be appointed by TLDCI.

11.3 Accountants

The accountants for the Joint Venture shall be appointed by TLDCI.

[para 23]
On February 22, 2001 the certificate of title relating to Bearspaw Ranche disclosed:

- the lands were transferred into the name of LDC on May 20, 1999 for $500,000
- mortgages totalling $300,000
- caveats protecting named beneficial owners' undivided interests in the land, indicating that investors first began purchasing undivided interests in the land in or about June 1999
- caveats in the name of Celestine Mortgage indicating agreements charging land, apparently reflecting a number of mortgages securing financing provided by Celestine Mortgage to several of the investors.

[para 24]
On February 23, 2001 the certificate of title relating to Bearspaw Ridge disclosed:

- the lands were transferred into the name of LDC on August 5, 1999 for $335,000
- caveats protecting named beneficial owners' undivided interests in the land, indicating that investors first began purchasing undivided interests in the land in or about September 1999
- caveats in the name of Celestine Mortgage indicating agreements charging land, apparently reflecting a number of mortgages securing financing by Celestine Mortgage to several of the investors.

[para 25]
As of February 28, 2000 approximately 83 Alberta residents had purchased, solely or jointly, 101 undivided interests in Bearspaw Ranche and approximately 19 Alberta residents had purchased, solely or jointly, 11 undivided interests in Bearspaw Ridge.

[para 26]
While staff called only six of the investors to testify at the hearing, a number of common factors emerged when we heard the investors' stories. The following is a synopsis of their testimony.

1. The investors came from varied backgrounds: a flight attendant, a land surveyor, a retail salesperson, an industrial explosives advisor, a manager of a flight service centre and a professional engineer. All were unsophisticated investors with little, if any, prior experience with securities investments, real estate investments or the land development business.

2. Each investor learned of the opportunity to purchase the undivided interests in the Projects through advertisements in The Calgary Herald.

3. Each investor purchased one or two undivided interests in the Projects at a price

   ranging from $9,000 to $13,000 per undivided interest. They neither expected nor were asked to make any further cash outlays.

4. The investors understood that by purchasing an undivided interest they would only own 1/148th, or 1/160th, of the complete parcel and that the land could not be separated into identifiable individual one-acre interests.

5. The investors anticipated that if they invested their money in an undivided interest and waited until LDC re-zoned and developed the Project and the individual serviced lots or condominium units were sold, they would earn a substantial profit on their initial investment in a few years. Investors were told that their estimated total return on a five-year investment would be about "30 per cent"; the basis on which this estimated return was computed is unclear. Mr. Tobin, for example, said that he was told by an LDC salesperson that if his original investment was $13,000 and 1/148th of the developed Property sold for $80,000, after LDC had been repaid its expenses about $40,000 would be repaid to the investor for each undivided interest.

6. All of the investors understood that, once the Project was subdivided and developed, the Co-Ownership Agreement provided them with a right of first refusal to purchase lots created in the subdivision for the list price less commissions. Only one investor considered actually purchasing and occupying one of the developed lots. All of the other investors testified that they had no intention of acquiring or occupying a developed lot, as this was an investment only.

7. Each investor described this as a passive investment, made in the expectation that they would have no active participation in the development and eventual sale of the subdivided lots to the public, other than to follow the Project's progress and wait for their profit to be realized.

8. Each investor relied on LDC and Archer to perform all management and supervision relating to the development of the Project, including efforts to have the lands re-zoned, subdivided, developed, serviced, marketed and sold to realize a profit for them.

9. Each investor believed that it was LDC's and Archer's efforts in developing and selling the lands that would determine whether the Project was a success or a failure as an investment.

10. Each investor, by signing the Co-Ownership Agreement, irrevocably granted Archer a power of attorney to secure financing and make applications to subdivide, re-zone or re-plot the lands and authorized LDC to pledge the lands and all assets of the Project to finance development.

11. A number of the investors understood that they could replace LDC as manager of the development but believed they would have to replace LDC with another similar firm that had experience in the land development business. None of the investors expected to ever take over responsibility for managing the development of the Project.

12. Some of the investors were told that, if there were crucial decisions to be made, a meeting would be called and the investors would vote on the matter. However, none of the investors has been asked to make any decisions relating to the development of the Projects.

13. Investors received at least yearly invitations to meetings of investors at which they received updates from LDC and Archer as to their progress in developing the Projects. No vote was conducted at any of the meetings attended by the investors who testified nor were investors asked for their input on any aspect of the development of the Projects.

14. All of the investors who testified indicated that they were satisfied with their investment to date and with the progress being made by LDC and Archer in their efforts to develop their Project. None of these investors expressed any dissatisfaction about their Project or the service they received from either LDC or Archer.

[para 27]
LDC has never been registered under the Act to trade in securities. While Archer was registered under the Act as a mutual fund salesman from December 31, 1982 to May 9, 1988 and from May 10, 1988 to February 27, 1989 as a registered representative, he has not since that time been registered in any capacity.

[para 28]
LDC has neither filed with the Commission a preliminary prospectus or prospectus pursuant to section 110(1) of the Act relating to the undivided interests in land sold to investors, nor relied on any of the exemptions from the prospectus or trading registration requirements of the Act in selling those interests.

IV. ANALYSIS AND FINDINGS

A. Conclusion

[para 29]
For the reasons set out below, we find that the undivided interests in land sold by LDC and Archer are investment contracts, and therefore that they are securities within the meaning of section 1(ggg)(xiv) of the Act.

[para 30]
By selling these interests to members of the public, LDC, and Archer as president and guiding mind of LDC, traded in securities in Alberta without being registered or filing a prospectus, contrary to sections 75(1) and 110(1) of the Act.

B. Investment Contract a Security

[para 31]
The Act defines "security" broadly. Section 1(ggg) lists 16 types of security, one of which is an investment contract.

[para 32]
It is well established that a simple sale of real estate, whether for investment or personal occupation, is not a "security" under the Act. However, if the sale of real estate includes collateral arrangements through which the purchaser may earn a return on income through the managerial efforts of a promoter or manager in their operation of the enterprise associated with the real estate (such as rental pool agreements, cash flow deficiency guarantees or rental management services), such transactions are generally characterized as investment contracts. See *Beer et al. v. Townsgate I Limited et al*, [1995], O.J. No. 3009 (Ont. Ct. (Gen. Div.))(*Beer*); *Sunfour Estates N.V.* (1992), 15 O.S.C.B. 269 (O.S.C.)(*Sunfour*).

C. The Tests

[para 33]
There is a considerable body of case law on the question of what constitutes an investment contract. Canadian courts and securities commissions have regularly looked to jurisprudence in the United States when addressing this question.

[para 34]
Staff referred us to the Commission's decision in *In the Matter of Paul Dennis Charbonneau et al.* (1997), 6 A.S.C.S. 3076 (A.S.C.)(*Charbonneau*) for its review of the two tests established in the American jurisprudence as accepted by the Supreme Court of Canada in the seminal Canadian case on investment contracts, *Pacific Coast Coin Exchange of Canada v. Ontario (Securities Commission)* (1977), 80 D.L.R. (3d) 529 (S.C.C.) (*Pacific Coast Coin*). The Commission stated [at p. 3080]:

> The definition of "investment contract" was addressed by this Commission in the *Go Vacations Inc.* decision delivered in 1990. That decision reviewed the applicable case law: *S.E.C. v. W.J. Howey Co.* (*Howey*)(1946), 328 U.S. 293 (U.S.S.C.); *State of Hawaii v. Hawaii Market Center, Inc.* (*Hawaii*) (1971), 485 P. 2d. 105 (S.C.Haw.); and *Pacific Coast Coin Exchange of Canada v. Ontario Securities Commission* (1977), 80 D.L.R. (3d) 529 (S.C.C.)

The basic test was stated in *Howey*, which described an investment contract as:

> "…a contract, transaction or scheme whereby a person invests his money in a common enterprise and is lead to expect profits solely from the efforts of the promoter or a third party …"

This test has since been refined in several ways. The word “solely” has been watered down, so that the test is “whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise”. The expression “common enterprise” has been defined as “one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties”. These refinements were taken from *S.E.C. v. Glen W. Turner Enterprises Inc.* (1973), 474 F.2d. 476 and accepted by the Supreme Court of Canada in *Pacific Coast Coin.*

As noted by this Commission in *Go Vacations Inc*. (A.S.C.W.S. August 31,1990, p.1), the *Pacific Coast Coin* decision also makes it clear that vertical commonality is sufficient to establish a “common enterprise” in Canada. Vertical commonality is a common enterprise between the investor and the promoter or issuer. It contrasts with horizontal commonality, which requires a common enterprise between the investors such as a pooling of revenue or property.

The other test is that in the *Hawaii* case, where the Supreme court of Hawaii defined an investment contract as “the placing of capital or laying out of money in a way intended to secure income or profit from its employment”. The court also said, “This subjection of the investor’s money to the risks of an enterprise over which he exercises no managerial control is the basic economic reality of a security transaction”. The *Hawaii* test has become known as the “risk capital approach”. It, too, was used by the Supreme Court of Canada in *Pacific Coast Coin,* and considered by this Commission in *Go Vacations Inc.*

When we apply these tests to consider whether the [agreements] are securities, we must bear in mind the overriding rule for construing remedial legislation like the *Securities Act*. The legislation must be construed broadly, and as stated by the Supreme Court of Canada in *Pacific Coast Coin* (quoting from *Tcherepnin v. Knight* (1967), 389 U.S. 332 at 336):

> “… in searching for the meaning and scope of the word “security” in the Act, form should be disregarded for substance and the emphasis should be on economic reality.”

[para 35]
We agree with the Commission’s analysis in Charbonneau and apply this approach to the case before us.

D. Purposive Approach to Interpretation

[para 36]
In determining whether the sale of the undivided interests to investors are “investment contracts” we follow the purposive approach to statutory interpretation described by the Supreme Court of Canada in *Pacific Coast Coin* and more recently by the Commission in *In the Matter of World Stock Exchange, Thomas Kim Seto and Orest Rusnak* (2000), 9 A.S.C.S. 658 (A.S.C.) [at pp. 675-679].

[para 37]
The fundamental purposes of securities legislation are to protect the investing public while fostering efficient capital markets and public confidence in those markets. See: *Barry v. Alberta (Securities Commission)*, (sub nom. *Brousseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301(S.C.C.); *Pezim v. British Columbia (Superintendent of Brokers)*, [1984] 2 S.C.R. 557 (S.C.C.); *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2000 S.C.J. No. 38 (S.C.C.). In furtherance of these purposes, the Act seeks to protect prospective investors in public offerings by providing them with access to the kind of information that can help them to appreciate the risks involved in making the investment.

[para 38]
Counsel for LDC and Archer pointed out that no investors have complained to the Commission about their investment or about the information they received from LDC and Archer regarding their investment. He argued that it is not in the public interest to find that the undivided interests sold under the Co-Ownership Agreement are "investment contracts" and hence "securities" under the Act. Counsel submitted that the application of securities legislation would have a detrimental financial effect on the business of LDC and other land developers that sell similar investments. He argued that to find that the undivided interests as sold by LDC and Archer are "investment contracts" would cast the net too broadly, encompassing transactions that do not warrant the protections afforded by securities legislation. Counsel referred us to Laskin C.J.C.'s caution concerning the scope of the term "investment contract" in his dissent *Pacific Coast Coin* [at p.531]:

> The term, it is conceded, cannot be given a literal meaning because to do so would bring within the scope of [securities legislation] innumerable transactions which have no public aspect.
>
> …
>
> It is easy, in a case like the present one, when faced with a widely-approved regulatory statute embodying a policy of protection of the investing public against fraudulent or beguilingly misleading investment schemes, attractively packaged, to give broad undefined terms a broad meaning so as to bring doubtful schemes within the regulatory authority. Yet, if the Legislature, in an area as managed and controlled as security trading has deliberately chosen not to define a term which, admittedly, embraces different kinds of transactions, of which some are innocent, and prefers to rest on generality, I see no reason of policy why Courts should be oversolicitous in resolving doubt in enlargement of the scope of statutory control.

We bear in mind the cautionary words of Laskin C.J.C in *Pacific Coast Coin*, but we must apply the principles described by de Grandpré J., speaking for the majority in that case [at pp.538 – 539]:

> Such remedial legislation must be considered broadly, and it must be read in the context of the economic realities to which it is addressed. Substance, not form is the governing factor. …
>
> In the search for the true meaning of the expression "investment contract", another guideline must also be present in the forefront of our thinking. In the words of the Supreme Court of the United States in *Securities Exchange Com'n v. W.J. Howey Co. et al* (1946), 328 U.S. 293 at p. 299, any definition must permit
>
> > … the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of "the many types of instruments that in our commercial world fall within the ordinary concept of a security"…It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of money of others on the promise of profits.
>
> Which does not mean that the legislation is aimed solely at schemes that are actually fraudulent; rather it relates to arrangements that do not permit the customers to know exactly the value of the investment they are making.

And further [at p. 542] he stated:

> At the invitation of the parties, I have examined the facts in the sole light of the *Howey* and *Hawaii* tests. Like the Divisional Court, however, I would be inclined to take a broader approach. It is clearly legislative policy to replace the harshness of *caveat emptor* in security related transactions and Courts should seek to attain that goal even if tests carefully formulated in prior cases prove ineffective and must continually be broadened in scope. It is the policy and not the subsequently formulated judicial test that is decisive.

[para 39]
To understand the substance and economic reality of the investments offered by LDC and Archer, we considered several key elements of the arrangements between LDC and Archer and the investors in determining whether these investments meet the requirements of the *Howey* test and the *Hawaii* "risk capital" test.

E. The *Howey* Test

1. *Howey* Test: Element 1 - Investment of Money and Intention to Earn a Profit

[para 40]
It is not disputed that investors invested money in the Projects, and did so, with the expectation of profit. The projections relating to the Projects posited an eventual realization after three to five years of over three times an investor's initial cash investment.

2. *Howey* Test: Element 2 - Common Enterprise

[para 41]
It is not disputed that the development and sale of each Project is a common enterprise between the investors, LDC and Archer as the president of LDC.

[para 42]
There is horizontal commonality among the investors in each Project. They have effectively pooled their undivided interests in the land. Their individual profit is dependent on the success of the Project as a whole. They have no claim to profits or exposure to losses attributable to only their particular undivided interest but, rather, their entitlement is to a pro-rata share of the profits of the Project.

[para 43]
There is also vertical commonality between the investors, on one hand, and LDC and Archer on the other. The investors have supplied capital on the understanding that LDC, and Archer as the president of LDC, have a common interest in making each Project a success. LDC and Archer would participate in that success through the management fee of 12% of the gross proceeds of ultimate sale of residential lots or condominium units.

3. *Howey* Test: Element 3 - Expectation of Profits Produced by the Efforts of Others

[para 44]
The first two elements of the *Howey* test are clearly met in this case. The third element of the *Howey* test is critical to determining the issue before us. This depends on whether the investors were led to expect profits solely from the efforts of others, which means that those efforts are "the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise". See: *SEC v. Glenn Turner Enterprises Inc. et al*. 474 F. 2d. 476 (9th Cir. 1973); *Pacific Coast Coin*.

[para 45]
Counsel for LDC and Archer submitted that the legal relationship between the investors and LDC is a joint venture by virtue of article 1.1 of the Co-Ownership Agreement. The crux of LDC and Archer's argument on this point is that, because the Co-Ownership Agreement is a joint venture, investors retain substantial control over their undivided interests in the land, making the managerial efforts of LDC and Archer non-essential to the failure or success of the Project. If those managerial efforts are not essential to the failure or success of the Project, then the third prong of the *Howey* test is not met.

[para 46]
In support of his argument, counsel for LDC and Archer referred the panel to the decision of the Fifth Circuit Court of the United States in *Williamson v. Tucker*, 645 F. 2d. 404 (5th Cir.1981) (*Williamson*). That court has set out yet another three-pronged test to determine, in cases in which an investor's interest is in either a joint venture or general partnership, whether the third element of the *Howey* test has been met. Counsel argued that because the Co-Ownership

Agreement established a joint venture relationship between the parties, then it is the *Williamson* test that determines whether what was sold is an investment contract.

(a) The *Williamson* test

[para 47]
In *Williamson* purchasers of joint venture interests in a parcel of undeveloped land sought to apply securities laws to rescind the joint venture agreements, cancel notes signed in connection with the agreements and recover money already paid on the notes, on the grounds that the interests were "investment contracts", and therefore "securities", by virtue of the significance of the developer's managerial efforts. In response, the developer/defendant argued that the joint venturers had sufficient powers under the joint venture agreements to preclude a finding that the joint venture interests were securities.

[para 48]
The Court agreed that investments in general partnerships or joint ventures are not generally found to be investment contracts under securities legislation because the investors retain control over their investment and have the ability to gain access to important information and to protect themselves from the managing partner or hired manager pursuant to the terms of the partnership or joint venture agreement. However, the Court noted that if investors can establish that they were so dependent on the promoter or manager that they were in fact unable to exercise their partnership or venture powers, this could lead to a finding that the investment was a security. The Court described the relevant circumstances as follows [at p.424]:

> A general partnership or joint venture interest can be designated a security if the investor can establish, for example, that (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

[para 49]
If any of these three circumstances set out in *Williamson* are present, then the investor is not exercising meaningful or real control over the investment. Apart from any issue as to whether the Projects are or are not joint ventures, the tests described in *Williamson* and discussed in other American cases referred to us are therefore relevant in determining whether the efforts of LDC and Archer are the "undeniably significant ones", as contemplated in the third element of the *Howey* test.

(b) The three prongs of the *Williamson* test

(i) *Legal powers of the investor*

[para 50]
The first part of the Williamson test turns on whether investors have so little power under an agreement that the arrangement in fact distributes power away from the investors, as would a limited partnership. We examined the legal powers given to the investors by the Co-Ownership Agreement and the investors' expectations at the time of the investment. In our view, the Co-Ownership Agreement did not give the investors significant legal powers.

[para 51]
The Co-Ownership Agreement provides in Article 7.3 that all decisions required to be made by the investors require a majority vote and investors representing 10% ownership in the Project constituted a quorum, but it is silent on what decisions or activities would require a vote or majority consent of the investors. The only investor decision identified in the Co-Ownership Agreement is that LDC could be removed as the manager of the Project if 51% of the investors agree, and only then if they have "just cause" for their decision. The investors' right to remove LDC is very limited. This situation is unlike many of the cases to which we were referred where the partnership or joint venture agreement specified a substantial number of partnership actions that could only be taken after a majority vote of the partners: See *Holden v. Hagopian*, 978 F. 2d. 1115 (9th Cir. 1992)(*Holden*); *Koch v. Hankins*, 928 F. 2d 1471(9th Cir. 1991)(*Koch*). This restriction on the investors' power to remove LDC as manager of the Projects distinguishes this case from many of the American authorities: See *Fargo Partners v. Dain Corp.,* 540 F. 2d 912 (8th Cir. 1976) (*Fargo*); *Schultz v. Dain Corp.,* 568 F.2d 612 (8th Cir. 1978)(*Schultz*); *Holden; Koch.*

[para 52]
It also significant that the Co-Ownership Agreement states in the *Recitals* that the parties agreed to develop the Property and retain the services of LDC to promote and carry out the development of the Property at a meeting held on February 15, 1999. Article 3.1 provides that LDC was to be ratified or replaced as manager in a meeting of Co-Owners to be convened as soon as possible. The lands comprising the Projects were not purchased until May and June 1999 and the first investors purchased their interest in the Projects commencing in June 1999. Obviously, no investors were in a position to have attended the meeting at which LDC was appointed manager of the Projects. LDC has held informational meetings for the investors, but there is no evidence that LDC has been ratified as manager.

[para 53]
Some of the investors we heard from were told by LDC salespersons that they would have the ability to vote at meetings on various decisions made regarding the development undertaken by LDC, while others believed they would have no input in the manner in which the Project was developed and managed. The Co-Ownership Agreement does not stipulate what types of decisions require investor consensus. It appears that LDC and Archer have complete discretion to determine what, if any, decisions would be referred to investors for decision. None of the investors who testified have been consulted or asked to vote on any matters. The investors who

attended the meetings described the meetings as updates and sales pitches at which no voting occurred and their input was not sought on any aspect of the development of their Project.

[para 54]
We find that the role of the investors in the Projects was intended to be, and was in fact, passive. All of the investors who testified described themselves as passive investors, expecting to play no part in the development and management of the Project other than following its progress, hoping to collect some profit when the development was eventually sold. Their expectation was that LDC and Archer would take responsibility for all steps necessary to develop and enhance the value of the Project. As one of the advertisements said [Exhibit 6]:

> Profits are realized once the community is developed and operational. "It's an excellent low risk investment for someone who is willing to wait the eighteen months to see the project come to life." The Land Development Company takes care of all the paperwork and legwork to get a project of this magnitude up and running.

[para 55]
The only management decision given to the investors under the Co-Ownership Agreement is the right to vote for the replacement of LDC as manager of the Project. We find this provision, which as noted above, requires just cause, severely restrictive of the powers of the investors.

[para 56]
Essentially investors were asked to, and did, accept a package deal in which LDC as manager was part of the package that went with their purchase of their undivided interest in the Project. The investors were not, and did not expect to be, free to dispense with LDC's management services.

[para 57]
It appears that the Projects could involve as many as 148 or 160 investors. As the court noted in *Williamson* [at p.423]:

> Thus, a general partnership in which some agreement among the partners places the controlling power in the hands of certain managing partners may be an investment contract with respect to the other partners. *Pawgun v. Silverstein*, 265 F. Supp 898 (S.D.N.Y. 1967). In such a case the agreement allocates partnership power as in a limited partnership, which has long been held to be an investment contract. … Similarly, one would not expect partnership interests sold to large numbers of the general public to provide any real partnership control; at some point there would be so many partners that a partnership vote would be more like a corporate vote, each partner's role having been diluted to the level of a single shareholder in a corporation. Such an arrangement might well constitute an investment contract.

[para 58]
We find that the investors' powers under the Co-Ownership Agreement are so limited that the arrangement in fact distributes powers, as would a limited partnership. These investments therefore fall within the first prong of the *Williamson* test.

(ii) Capabilities of the investors

[para 59]
Under the second prong of the *Williamson* test, we need to examine the capabilities of the investors to "intelligently exercise" their venture powers. The court in *Holden* described the test as follows [at p. 1121]:

> The proper inquiry is whether the partners are inexperienced or unknowledgeable "in business affairs" generally, not whether they are experienced and sophisticated in the particular industry or area in which the partnership engages and they have invested.

[para 60]
All of the investors we heard from learned of the opportunity to invest in the Projects through advertisements in The Calgary Herald. It is not disputed that LDC advertises regularly in the local media for investors for its Projects. The targeted investors included any member of the public who was willing to invest in the Project. No special skills or knowledge were required of investors. It is not, therefore, surprising that the investors came from all walks of life and that they varied in their investment experience, knowledge and skill.

[para 61]
We find that all the investors who testified were unsophisticated investors with little, if any, prior experience with securities investments, real estate investments or the land development business. Of the six investors we heard from only two had some experience in, or knowledge about, real estate transactions.

[para 62]
These are not the powerful investors, capable of exercising real control over their investment, that were involved in some of the American cases referred to: See *Williamson*; Koch. Rather, this is a case, to use the words of the United States Eight Circuit Court in Schultz, "where a small investor is helplessly reliant on the promoter's efforts because of lack of business knowledge, finances, or control over the operation." We agree with the view expressed in *Williamson* [at p. 423] that:

> A scheme which sells investments to inexperienced and unknowledgeable members of the general public cannot escape the reach of the securities laws merely by labelling itself a general partnership or joint venture. Such investors may be led to expect profits to be derived from the efforts of others in spite of partnership powers nominally retained by them.

[para 63]
We find that the limited knowledge and expertise of these investors would reasonably impair their ability to exercise meaningful control over their investment in the Project. Therefore, the second prong of the *Williamson* test applies.

(iii) Unique management abilities

[para 64]
Under the third prong of the *Williamson* test, we considered whether the investors are so dependent on the "unique entrepreneurial or management ability" of LDC and Archer that the latter cannot be replaced or that the investors cannot exercise meaningful powers. The question is whether LDC and Archer were so uniquely capable of managing or developing the Project, or the investors' dependence on the expertise of LDC and Archer was so great, that the investors were incapable, practically, of finding a replacement.

[para 65]
The American case law on this point indicates that, on facts analogous to this case, if the investor cannot, looking at the practical realities, remove the manager, then the third prong of *Williamson* test is met: See *Hocking v. Dubois,* 885 F.7d. 1449 (9th Cir. 1989); *Koch; Holden*

[para 66]
LDC and Archer represented themselves as a "Proven Calgary Developer" whose development team included "Planning Protocol Inc. a leading Calgary firm that has developed numerous successful projects in southern Alberta for over eighteen years". These representations suggest that LDC and Archer have expertise, reputation and a role in the land development business that is not easily matched.

[para 67]
More importantly, the manner in which the Projects are structured makes it very doubtful that another land developer would be willing to take over the Project or, could be imposed by the investors as a replacement for LDC. For example, title to the lands remained in the name of LDC. Archer had an irrevocable power of attorney. A number of the investors financed their purchase by borrowing from Archer's company, Celestine Mortgage. By structuring the Project in this way, LDC and Archer had, in effect, given themselves "non replaceable" ability to manage the Projects, notwithstanding that other land developers in the area might have comparable expertise.

[para 68]
The mechanism available to the investors under the Co-Ownership Agreement to replace LDC as manager of the Project is of little practical value. As we have discussed, the investors are only entitled to replace LDC as manager of the Project for cause. To replace LDC as manager of the Project, an investor would first have to identify, contact and convince enough of his fellow investors, accounting for at least a 10% ownership interest in the Project as specified in Article 7 of the Co-Ownership Agreement, before a meeting could be called at which replacement of LDC could be considered and voted on. This must in practice be a difficult endeavour because the

investors did not know one another. It would also be difficult for investors to learn the identity of their fellow investors in the absence of Schedule "B" to the Co-Ownership Agreement, which purportedly provides a "complete co-owners list to be provided at the first meeting", but which appears never to have been compiled or provided to the investors. An investor would also need the co-operation of LDC and Archer, to whom notice of a meeting must be given and who are responsible for actually giving notice of the meeting to the other investors. Even overcoming these hurdles, investors would have to show that the termination of LDC was for "just cause", a very high threshold not easily established. Finally, the investor would have to obtain the approval of 51% of the Co-Owners present at the meeting. Practically, the investors have no choice but to continue with LDC as the manager of the Project.

[para 69]
We find in these circumstances that the third prong of the *Williamson test* is met in this case.

(c) *Williamson* test met

[para 70]
We find that all three circumstances set out in *Williamson* are present in this case. The investors' role in the Projects is passive. They have neither legal power nor experience or knowledge necessary to control or manage the Projects. They depend almost entirely on the efforts of LDC and Archer to develop and enhance the value of the Projects.

[para 71]
The American cases referred to us apply the *Williamson* test to determine whether an investor's interest in either a joint venture or general partnership can be an investment contract in spite of the partnership form which the investment took. However, in our view all of the factors relevant to applying the *Williamson* test are also relevant to assessing the degree to which investors retain a real measure of control over the management over the business in which they are investing.

[para 72]
Our findings from applying the *Williamson* test demonstrate that LDC and Archer provide the "essential managerial efforts" that would affect the success or failure of their investment in the Project.

[para 73]
It follows that, whether or not the Projects are joint ventures, the investors were led to expect profits solely from the efforts of others, meeting the third element of the *Howey* test, with the result that the interests sold to Project investors are investment contracts and therefore securities.

(d) Are these joint ventures?

[para 74]
Counsel presented arguments as to whether the Projects are joint ventures. For the reasons set out above, it is not necessary for us to make a finding on this point, because we have found the investments in the Projects to be securities.

[para 75]
If it were necessary for us to make a finding on this point, we would look to the Nova Scotia Supreme Court in its decision *Central Mortgage & Housing Corp. v. Graham et al.* (1973), 43 D.L.R. (3rd) 686 (N.S.S.C.) *(Graham).* In that case Jones, J., quoting from *Barrett & Seago on Partners and Partnerships*, as well as *Williston's Treatise on the Law of Contract* set out the law relating to joint ventures [at p. 707]:

> Although its existence depends on the facts and circumstances of each particular case, and while no definite rules have been promulgated which will apply generally to all situations, the decisions are in substantial agreement that the following factors must be present:
>
> (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
> (b) A joint property interest in the subject matters of the venture;
> (c) A right of mutual control or management of the enterprise;
> (d) Expectation of profit, or the presence of "adventure", as it is sometime called;
> (e) A right to participate in the profits;
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.

[para 76]
This discussion of the characteristics of a joint venture has been quoted with approval in a number of other decisions: See *Fraser-Bruce Maritimes Ltd. v. Central Mortgage and Housing Corp.* (1980), 117 D.L.R. (3rd) 312 (N.S.S.C. App. Div.); *Central Mortgage and Housing Corporation v. Omega Investments Ltd.* (1981), 34 N.B.R. (2d) 291 (N.S.S.C.); *Westcan Malting Ltd. v. Canada* [1998] T.C.J. No.252 (Q.L.) (T.C.C.) and *Dover Financial Corp. v. Sharpe* (W.K.) and *Sons Contractors Ltd.* (1996), 147 N.S.R. (2d)186 (N.S.C.A.) (*Dover*). In our view, the relevant issue is whether the third factor from the *Graham* decision is present in this case. Did the investors have practical, effective right of mutual control or management of the enterprise? In our view, this question is so similar to that addressed by the *Williamson* test that, in answering it, we would apply an analysis substantially indistinguishable from our analysis above as to whether the *Williamson* test was satisfied. In reapplying the *Williamson* analysis for this purpose, we would conclude that the investors did not have practical, effective right of mutual control or management of the Projects. As such, under *Graham*, we would conclude that the Projects are not joint ventures.

(e) Alternative Approach to *Howey* Test Element 3 – Significance of Manager's Efforts

[para 77]
We also undertook an alternative analysis of the third prong of the *Howey* Test.

[para 78]
Counsel for LDC and Archer argued that, in our analysis of whether the efforts of a third party are "undeniably significant" to the success or failure of an investment, we must consider whether it is the essential efforts of that party alone that will bring about the resulting benefits to the investor.

[para 79]
Counsel for LDC and Archer submitted that the success of the Projects is more dependent on external factors than on the management efforts of LDC and Archer. For example, development of the Projects will require certain approvals, namely re-zoning and subdivision approval from the Municipal District of Rockyview. In addition, the eventual price for which the individual developed lots are sold, and the resulting profit to investors, is dependent on the growth of the City of Calgary and attendant appreciation of City and nearby real estate values over time. Because the eventual value of the Projects is dependent on factors over which neither the investor nor LDC and Archer have ultimate control, counsel submits that control over the success of the Projects does not lie substantially in the hands of LDC and Archer. Accordingly, the argument goes, the sale of the undivided interests does not satisfy the attributes of an investment contract. Counsel cited *Sunfour; Fargo; Schultz* and *Rodriguez v. Banco Central Corporation*, 990 F. 2d. 7 (*Rodriguez*) in support of this position.

[para 80]
Staff agreed that it is possible that subdivision and re-zoning approvals may not be obtained from the municipal district and that increases in land values may very well affect the value of this investment. In any investment there are always external factors that might affect the success or failure of the investment. However, staff submitted that, in this case, investors placed their reliance on the efforts of LDC and Archer to use their expertise in land development to obtain the necessary approvals, subdivide and service the property and use their marketing skills to sell the developed lots as a community. Staff submitted that these efforts of LDC and Archer are undeniably significant and essential to the success or failure of the investment and these efforts are what motivated investors to purchase the interests in the Projects.

[para 81]
In our view, the structure and marketing of the Projects focused on the profit or return expected to be derived from participation in the land development business and not merely the potential for appreciation in the value of the raw agricultural real estate itself. However onerous the managerial obligations of LDC and Archer might be, they were undeniably significant, indeed "essential", to successfully developing and marketing for sale the Projects, the purpose underlying the public investments. As LDC's and Archer's advertisements state, "Profits are realized once the community is developed and operational".

[para 82]
This case is distinguishable from the cases referred to us where no investment contract was found. In those cases, the investors retained ultimate control over the operation or management of the investment and any profits to investors were to result not so much from the efforts of the

promoter or manager as from the normal exercise of business judgement (*Fargo*, *Schultz*), real estate appreciation (*Sunfour*, *Beer*), or personal use (*Rodriguez*).

[para 83]
The facts of this case do not support LDC and Archer's contention that the arrangement is essentially a simple purchase and sale of real estate, the success or failure of which will depend primarily on appreciation in the value of the land. LDC and Archer offered the Project primarily as an "investment". These investors did not purchase the undivided interests in the Projects with a view to acquiring and taking possession of land, nor was this investment presented as an opportunity to speculate in appreciation in the value of farmland. As LDC and Archer state in their advertisements: "We are not in this just to sell land. We find excellent future development property and bring the project into fruition. This is how we make our money". The investors here relied upon the collateral arrangement whereby LDC and Archer would perform the "essential managerial efforts" that would affect the failure or success of the Projects.

[para 84]
A big part of the success or failure of the Projects is dependent on the ability, expertise and experience of LDC and Archer in obtaining the necessary development approvals, subdividing the land, servicing the land and creating a marketable, desirable community that will eventually sell at a profit. Investors purchased these interests on the basis of commitments by LDC and Archer that their profit was to come primarily from the efforts of LDC and Archer in developing the land from raw land to residential acreages or as the sales material states, "This win/win proposition leaves the investor fully secured while The Land Development Company develops and enhances the value of the property. This is a common process called "Change of Value Added Real Estate Development".

[para 85]
We find that the investors were enticed to, and did, expect profits from the essential managerial efforts of LDC and Archer, which satisfies the last part of the *Howey* test.

(f) *Howey* Test Element 3 - Finding

[para 86]
We find that these investments satisfied the third prong of the *Howey* test under both analyses: applying the *Williamson* test and looking at the investors' reliance on the managerial skills and essential efforts of LDC and Archer.

4. *Howey* Test – Conclusion

[para 87]
We find the economic reality of this case to have been that people invested money in real estate development projects because they were led to expect profits from the efforts, expertise and management of the promoters LDC and Archer. The purpose of their Project investments was not to take and occupy ones undivided interest or to develop the property by oneself or with the other co-owners, but rather to continue to rely on LDC and Archer to subdivide, service and

resell the Project as a community of two-acre developed residential lots. This is the essence of an investment contract, and hence of a type of security under the Act.

F. The Hawaii "Risk Capital Test"

[para 88]
Although most of the argument at this hearing concentrated on whether the *Howey* test approved in *Pacific Coast Coin* applies to these facts, we find that the sale of undivided interests in the Projects by LDC and Archer also meets the *Hawaii* "risk capital test".

[para 89]
The economic reality of the transaction is that the investors provided the money to pay the development and marketing costs of the Projects, while the management of the Project was left entirely to LDC and Archer. The inducement to the investors to provide the risk capital was their expectation of profit, and the amount of that profit would depend to a large extent upon the managerial skills of LDC and Archer, over which the investor had no practical control.

V. SUBMISSIONS ON ORDERS IN THE PUBLIC INTEREST

[para 90]
We indicated at the adjournment of the hearing that, if we found the investments to be securities, we would reconvene the hearing to consider what, if any, orders ought to be made in the public interest. This case is unusual in that, given our findings, there is a need to address how these types of investments can be brought under the Act which is probably more urgent than the need to address what orders, if any, ought to be made. The panel is prepared to hear the parties' submissions on orders at any time, but we would prefer to do so after it has been determined how these investments can be brought under the Act.

[para 91]
Arrangements to reconvene the hearing should be made through the Secretary to the Commission within 60 days from the date this decision is rendered.

Dated at **Calgary, Alberta**, this 26th day of March 2002.

"Original Signed By"

Glenda A. Campbell, Q.C., Vice Chair

"Original Signed By"

James E. Allard, Member

"Original Signed By"

Thomas G. Cooke, Q.C., Member