

2008 BCSECCOM 588

**Henry Jung, David John Allen
and Reginald Clarke Handford**

Sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken Kenneth G. Hanna David J. Smith	Vice Chair Commissioner Commissioner
Dates of Hearing	June 16-20 and 25, 2008	
Date Submissions Completed	August 13, 2008	
Date of Findings	November 5, 2008	

Appearing

Graham R. MacLennan Shawn R. McComb	For the Executive Director
Henry Jung David John Allen	For himself For himself

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I Introduction

- ¶ 1 These findings result from a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.
- ¶ 2 The executive director, in a notice of hearing dated August 2, 2007 (see 2007 BCSECCOM 473), alleges that
1. from July 2001 to March 2004, Henry Jung failed to file insider trading reports for trades he made in shares of Bright Star Ventures Ltd., contrary to section 87 of the Act;
 2. from February 2002 to June 2003, Jung traded debentures of Bright Star without being registered, and distributed them without filing a prospectus, contrary to sections 34(1) and 61(1) of the Act; and
 3. in 2002 and 2003, David John Allen and Reginald Clarke Handford provided false or misleading information to the commission, contrary to section 168.1(1)(b) of the Act.
- ¶ 3 None of the respondents was represented by counsel at the hearing. Jung appeared throughout the hearing; Allen appeared only on the first day. Handford did not appear, but filed a document entitled “Initial Defence of Reg. C. Handford.” All three respondents filed a joint submission in response to the executive director’s submissions filed after the conclusion of the oral hearing.

II Application to Dismiss the Notice of Hearing

- ¶ 4 The respondents say that they were denied a fair hearing and ask that we dismiss the allegations in the notice of hearing.

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- ¶ 5 There are three grounds for this submission:
- the respondents were not granted sufficient time to prepare adequately for the hearing
 - the will-say statement relating to the expected testimony of the commission staff investigator was inadequate
 - the staff investigator has a conflict of interest.
- ¶ 6 The commission considered the respondents' submissions on the first ground when Vice Chair Aitken and Commissioner Smith considered the respondents' adjournment application on April 29, 2008 (which they dismissed) and the respondents' application to this panel on June 9 (which we granted, in part).
- ¶ 7 The executive director delivered the staff investigator will-say statement to the respondents on or about March 20, 2008. The respondents did not raise the issue of its adequacy at the hearing conference with Vice Chair Aitken held on April 16, nor at either of their subsequent adjournment applications, although Jung did raise it during the hearing.
- ¶ 8 We have reviewed the will-say statement and considered it in light of the staff investigator's testimony. In our opinion, it was adequate.
- ¶ 9 The respondents say that the staff investigator who testified has a "conflict of interest" because he was formerly employed by the predecessor of the TSX Venture Exchange and in that capacity participated in the exchange's review of the debenture financing for which Bright Star was seeking exchange approval. They allege that he attempted to conceal evidence.
- ¶ 10 The investigator's former employment by the exchange is not relevant. He testified to the origin of documents entered as evidence, to statements made by persons in interviews the transcripts of which are entered as evidence, and to summary charts that he prepared based on documents entered as evidence. We did not rely on any of his testimony to establish any fact that was not apparent from the documents and transcripts entered through his examination.
- ¶ 11 We find no evidence to support the allegation that the staff investigator attempted to conceal evidence. An allegation that an investigator has concealed evidence is an extremely serious matter. When, as here, there is no evidence to support it, it is reckless and irresponsible to make the allegation. We note that the respondents are not represented and perhaps do not understand this.
- ¶ 12 We dismiss the respondents' application to dismiss the allegations in the notice of hearing.

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III Background

A General

- ¶ 13 Jung was involved in Bright Star's affairs as described below. Jung has never been registered under the Act.
- ¶ 14 Allen and Handford were directors of Bright Star and both had terms as its president. Handford was its president from August 2001 until July 2003, when he resigned as a director and officer of the company. Upon Handford's resignation, Allen became president.
- ¶ 15 The other directors of Bright Star were Gary Wong and David Cooke.
- ¶ 16 During much of the relevant period, Bright Star was active in mineral exploration, spending over \$2 million on property acquisition and exploration, primarily in the Tulameen area in southwestern British Columbia.
- ¶ 17 In early 2002, Bright Star entered into a financing arrangement that Jung negotiated with John Cornwall of Ottawa. Bright Star issued three debentures to three Ontario companies controlled by Cornwall: CGC Financial Services Ltd., Preston Beach Club Ltd., and Dagmar Holdings Ltd. The Cornwall companies paid Bright Star for these debentures with promissory notes. Cornwall then found 130 individual investors who invested in debentures of Bright Star for cash in the aggregate of just under \$3 million.
- ¶ 18 During the relevant period, Bright Star was a reporting issuer traded on what is now the TSX Venture Exchange. In April 2006 the exchange delisted Bright Star and in January 2007 the British Columbia Corporate Registry dissolved it for failure to file its annual returns.

B Jung's role at Bright Star

- ¶ 19 Jung's role at Bright Star is relevant to whether he contravened section 87 of the Act, and to whether Allen and Handford contravened section 168.1(1)(b). Both contraventions depend on a finding that Jung was a *de facto* director or officer of Bright Star.
- ¶ 20 Jung gave evidence under oath at three compelled interviews with commission staff in December 2005 and January 2006. In his testimony at the hearing, Jung contradicted significant aspects of the evidence he gave in these interviews.
- ¶ 21 Handford and Allen also gave evidence under oath at separate compelled interviews. Commission staff interviewed each of them twice, in November

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2005 and January 2006. Neither of them testified at the hearing. The “Initial Statement of Defence” filed by Handford contradicted significant aspects of the evidence he gave in his interviews. The contents of this document are not sworn nor were they tested by cross-examination. To the extent the document contains evidence, we gave it no weight.

- ¶ 22 Cooke and Wong both gave evidence under oath at separate compelled interviews with commission staff in February 2006. They also testified at the hearing. Their evidence at the hearing was generally consistent with the evidence they gave in their interviews.

History of Jung’s involvement

- ¶ 23 Jung is a chartered accountant whose involvement with Bright Star began in 2001. He knew the company’s then president, Jesse Chan, who was a client of Jung’s accounting partner. Jung says that at that time Bright Star was not very active.
- ¶ 24 Jung’s daughters had invested about \$200,000 in shares of the company, and Jung began trading in Bright Star shares in July.
- ¶ 25 Jung brought a mining prospect in the Tulameen area to the company. Sometime in early 2001 Chan told Jung that he was intending to leave the company and told him, “hopefully you can find some other directors to help you with this project.”
- ¶ 26 The Bright Star board accepted Chan’s resignation on August 9, 2001. At that point Jung became, as he described it in his interviews, Bright Star’s “manager.”
- ¶ 27 By August 2001 Jung was significantly involved in Bright Star’s affairs. Based on the evidence he gave in his interviews, he had taken steps before August that resulted in a significant reorganization of Bright Star’s direction and management.
- ¶ 28 Prior to Chan’s departure, Bright Star hired Bruce Yeomans as Vice President, Exploration. In his interviews, Jung said he hired Yeomans and negotiated his contract. His recollection is that Yeomans was hired before Chan left.
- ¶ 29 In his interviews, Jung said that he also hired Doug Hickey in June as “Vice President of Corporate Finance.” Hickey had contacted Chan, who asked Jung to meet with him. Hickey left the company in July 2002.
- ¶ 30 Before Chan departed Bright Star, Jung also took steps that led to Wong’s

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appointment to the board. Wong came to Jung's attention through his cousin, who was a friend of Wong's. Jung arranged a lunch for Chan, Wong and Jung to meet, although in the event Jung did not attend. Wong later agreed to become a director.

- ¶ 31 Also before Chan's departure, Jung asked Handford to become Bright Star's president and a director. Handford agreed. At Handford's suggestion, Jung also asked Allen to become a director, and Allen agreed.
- ¶ 32 Handford knew Cooke and thought he would be a good addition to the board. Cooke agreed to act as a director.

Jung's arrangement with Bright Star

- ¶ 33 In his interviews, Jung said that in August 2001 he became more active in the company's operations. He said he was "taking on the role of manager within the company's operations," which he explained as overseeing "the operational matters of the company."
- ¶ 34 Jung says his arrangement with Bright Star was oral, and based on an agreement in the late 1990's between him and Network Gaming International Corporation. Allen was the president of that company. Jung says that he and Allen entered into a written agreement under which Jung would provide services to Network Gaming. His role under that agreement was "office manager". Network Gaming submitted this agreement to the exchange which, as described below, had concerns about Jung's involvement with exchange listed companies. The exchange appears to have accepted the agreement.
- ¶ 35 Jung says that when he became involved with Bright Star, he and Allen agreed that it would be on the same terms as his agreement with Network Gaming. He says they did not reduce it to writing or seek the exchange's approval, assuming that was unnecessary, the exchange having approved what he says was an identical arrangement with Network Gaming.
- ¶ 36 In his testimony at the hearing, Jung repeatedly distinguished the role of "office manager" from that of "general manager." He said he knew the difference, because in the early 90's he had been the general manager of Network Gaming, and had learned then that a person who was a general manager was required to file trading reports under section 87.
- ¶ 37 Jung says he did not consider himself an employee of Bright Star, "rather . . . just billed for services." He says he spent about 50% of his working time on Bright Star's affairs. Bright Star did not pay Jung based on time spent on

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company business. It paid him a flat rate of \$5,000 per month, plus expenses. Jung continued to operate his accounting practice while he worked at Bright Star.

- ¶ 38 None of the Bright Star directors' minutes entered into evidence show Jung's appointment as a director or officer.
- ¶ 39 None of Bright Star's public filings entered into evidence identifies Jung as a director or officer of the company. These include filings with the British Columbia corporate registry, with the exchange, and with the commission.
- ¶ 40 During the relevant period, Bright Star issued stock options to its directors. There is no evidence that Jung received stock options, or that he was identified as a recipient of stock options in any documents Bright Star filed with the exchange.

Handford's evidence

- ¶ 41 For most of the relevant period, Handford was a Bright Star director and its president. According to Handford, he spent little time on Bright Star's affairs, being involved in other matters. He billed Bright Star "only two or three hundred dollars a month." This is how he describes his role at Bright Star:

"I gave very little leadership. I reviewed all the materials and did reality checks. And I probably talked to [Jung] every week or two weeks. . . . And I would review documents in almost a typographic manner, check to see that they made sense. I didn't pass a lot of judgment on any documents, but I'd look at it and see if it made sense, in terms of is it readable, is it clear, are parts missing, is it an irrational deal or a rational deal, and stuff I saw I generally passed on [to Jung] without much comment."
- ¶ 42 Handford admits that he was not giving Bright Star any direction. He presented no initiatives for financing or property acquisition to the company. Asked who was giving the company direction, Handford said, "Jung . . . came up with most new ideas, most new properties." Handford says Jung provided the "impetus" for the company and would recommend ideas to Handford and then implement them if Handford agreed, which he nearly always did.
- ¶ 43 According to Handford, Jung prepared many of Bright Star's news releases, and gave all releases, whether he or others prepared them, to Handford for review. Handford says he cannot recall "anything, other than spelling, that I disapproved of."

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- ¶ 44 Handford says that he did not supervise Yeomans' work and relied on Jung to supervise Yeomans, Hickey (both vice presidents), and other Bright Star staff.
- ¶ 45 Handford characterized Hickey's role as "investor relations." Commenting on Hickey's title (Vice President of Corporate Finance), Handford said, "that is an attempt to make a young fellow just a little more happy and important, but he was the IR guy."
- ¶ 46 Handford says that Jung made decisions about issuing stock options to directors. He
- said, Jung would suggest it "and I would look at it and say, 'Sure, sounds pretty good'."
- ¶ 47 Handford does not recall the terms of Jung's agreement with the company nor its coming to the board for consideration.
- ¶ 48 Handford says he remembers almost nothing about Bright Star's debenture financing – the amounts raised, the number of debentures, their terms, who invested, or how the financings were completed. He signed the debenture Bright Star issued to Dagmar, but does not remember doing so. He says he had no knowledge of John Cornwall. He says he would have reviewed any debenture before signing it, but would not have concerned himself "with the wisdom of it." He says he was not interested at the time as to who the investor was, why they invested, or how the company would pay them back. He says he relied entirely on Jung.
- ¶ 49 Handford signed a letter in February 2002 addressed to Jung which reads as follows:

"Further to our meeting and discussions over the last several weeks regarding the proposed issue of Discounted Convertible Debentures by Bright Star Ventures Ltd., I am authorizing you on behalf of the company to negotiate, arrange, and administer the proposed issuances of such debentures.

You are also instructed to obtain all necessary approvals from the Toronto Venture Exchange [*sic*] and the necessary regulatory approvals relating to the proposed convertible debenture issuances.

Please keep me informed as to your progress in this matter."

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- ¶ 50 Asked if Allen gave Bright Star any direction, Handford replied, “No. He’d be number three in that, I’d be number two, [Jung] was number one.”

Allen’s evidence

- ¶ 51 Allen was also a Bright Star director for most of the relevant period and was its president for a short time after Handford resigned. This is how Allen describes his role:

“Well, I would say every week I would be in discussion with . . . Jung with regard to anything that he might be doing. I would sign the cheques. [Jung] would discuss what he wanted to do, but basically what it amounted to was that I was a signatory on the chequing account.”

- ¶ 52 Allen reviewed news releases and financial statements, but, he says, never objected to anything in them. He presented no initiatives for financing or property acquisition to the company. He says he was not paid.
- ¶ 53 Allen remembers Cornwall as the investor who was going to buy the Bright Star debentures. Other than that, he says he remembers little of the details of the debenture financing. He says he had never seen copies of the debentures to Dagmar, CGC and Preston Beach before his interview, although he did recall that Preston Beach was one of the investors in the debentures.
- ¶ 54 Allen travelled frequently and would sign as many as 50 cheques in blank for Jung to use in his absence to pay Bright Star bills. He says that he did not review the cheques after they had been used. Instead he relied on the auditors to discover irregularities (if any) through the annual audit process.
- ¶ 55 Allen always referred to Jung as the general manager. He says that Jung was primarily responsible for bringing properties to Bright Star for acquisition. He said, “Well, if I wanted to know something, I would go to [Jung]. He’s the general manager.” He describes Jung’s role as follows:

“Q So are you saying that Henry Jung provided the company with direction?

A Yes.

Q So is he like the driving force behind the company?

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A Well . . . somebody has to manage the company. . . . So he's the manager of the company.

Q He was the person?

A Yeah.

Q Anyone else?

A No."

¶ 56 In July 2003 Allen wrote commission staff in response to an order for production. In his letter, he says "The affairs of Bright Star are being managed by Henry Jung, CA."

¶ 57 What Allen recalls about the terms of Jung's agreement is not clear, although his recollection does not include anything other than the compensation level. In his first interview, Allen thought Jung was paid \$8,000 per month, although he could not remember whether that was for Bright Star alone or for both Bright Star and Network Gaming. In that interview, he said the board "would agree he could be paid that" but that "it was never discussed in any detail." He said his recollection of the amount came from having seen it in documents, and that he did not attend any board meeting that dealt with the subject.

¶ 58 In his second interview, he recalled that Jung's compensation was "five plus expenses" but that he did not authorize it because it "had been in existence before I came into the company". Commission staff then told him that they had heard in other interviews that the Bright Star board had authorized Jung's compensation package. Staff then asked him whether he had ever been presented with Jung's compensation "to get your approval or the board's approval." Allen answered "Yes." He went on to say:

"We were told, yeah. Yes, it was agreed. It must have been agreed, because I remember that I wouldn't know it was that much money unless there'd been discussions about it."

¶ 59 Allen was on the audit committee because, he said, Jung asked him to. However, he does not recall that there was much for the audit committee to do.

Wong's and Cooke's evidence

¶ 60 Wong and Cooke both testified that they dealt solely with Jung on matters of the options they were to receive as directors, and the paperwork in connection with their appointments.

¶ 61 Wong and Cooke received all information related to board matters from Jung, and it was he who most often briefed them on company matters. Usually it was Jung who asked them to do things for the company, and gave them the

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supporting materials.

- ¶ 62 Neither Wong nor Cooke spent any significant time on Bright Star business. Wong said that initially he spent “at most an hour a month” and later spent on average two or three hours per month. Cooke estimated that he spent less than an hour a week. Neither of them presented any initiatives for financing or property acquisition to the company.
- ¶ 63 Both testified that board meetings were infrequent and informal. They say that Jung gave notice of the meetings. Written agendas were rare, but Jung determined what was to be discussed.
- ¶ 64 Neither Wong nor Cooke knew what Jung was paid. “We never talked about his salary,” says Wong, and Cooke says he cannot recall any discussion of Jung’s salary or arrangement at a board meeting.
- ¶ 65 Wong and Cooke both understood that Jung “was the one involved in raising the money.” Wong thought that Jung was at least one of the driving forces of the company. Asked to compare Jung’s involvement with Bright Star to that of Allen, Handford and Cooke, Wong said his impression was “that Jung was more involved than the other directors.”
- ¶ 66 Cooke said his impression was that Jung was carrying the bulk of the decision-making for the company. Asked about his general impression of Jung’s role, he said, “Well, I thought that he ran the company.”

Jung’s activities at Bright Star

- ¶ 67 In his interviews, Jung said he brought Yeomans into the company and negotiated his compensation. He also said he hired Hickey and another investor relations person, Steve Johnson. In his interviews, Jung said he “supervised the investor relations personnel,” referring to Hickey and Steve Johnson.
- ¶ 68 Jung negotiated and signed agreements for Bright Star. For example, he negotiated a media and investor relations agreement with a US firm. He also negotiated with property owners for land acquisition for mineral exploration. Of this role, he said in his interviews:

“ . . . we would approach the adjacent property owners to see if they were . . . prepared to enter into some sort of option agreement. . . . every agreement was quite different and some of them were worked out by Mr. Yeomans and some were worked out by me.”

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- ¶ 69 Jung had responsibility for Bright Star's accounting, and prepared its quarterly unaudited financial statements. According to Handford and Allen, only Jung dealt with Bright Star's auditors.
- ¶ 70 Jung was active in pursuing financing for Bright Star. In March 2002 he travelled to Ottawa. He says the purpose of the trip was "to meet with brokerage firms about discussions about possibilities of financings of their RRSPs, buying shares in the private placement." Jung and Yeomans travelled together to seek financing for Bright Star. For example, Jung says that in early 2003 he and Yeomans went to Toronto "a number of times to look at private placement funding." In his words, "it was an ongoing effort throughout to raise capital."
- ¶ 71 According to Allen, Jung introduced many of the company's property acquisitions. He also travelled to China, South America and the United States to seek opportunities to negotiate property transactions. On these trips he often travelled with Yeomans.
- ¶ 72 Jung also managed Bright Star's cash flow. One of his techniques involved regular loans to Bright Star for working capital from his own funds. He says the loan balance was, at times, as high as \$200,000.
- ¶ 73 Bright Star banking resolutions dated August 2001 name Handford and Jung as Bright Star's authorized signing officers, and permitted them to sign the company's cheques, borrow money on its behalf, or encumber its assets. The certificate to the bank identified no directors, and identified Handford as president.
- ¶ 74 Banking resolutions dated July 2003 name Jung, Allen and Handford as Bright Star's authorized signing officers, and permitted any two of them to sign the company's cheques, borrow money on its behalf, or encumber its assets. The certificate to the bank identified the company's directors as Allen, Handford, Wong, and Cooke, and identified Handford as the company's president and Wong as its secretary.
- ¶ 75 Based on the evidence of Jung, Allen and Handford, it appears that Jung signed all of Bright Star's cheques with one of either Allen or Handford.
- ¶ 76 Jung signed agreements and other documents on behalf of Bright Star. These included:
- an August 2001 direction to Bright Star's bank on the subject of faxed communications; Jung wrote in the title "Manager" under his name

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- a September 2001 letter to the company's transfer agent, indicating his title as "General Manager"
- a September 2001 agreement with a Kenneth Burke about the sale of a mining property and related services
- an October 2001 letter to the company's transfer agent co-signed with Handford, indicating, in Jung's handwriting, his title as "GM", which Jung admits stands for "general manager"

¶ 77 The Bright Star corporate seal was in Jung's office. He said that "for the most part, only he would have access to it."

Jung's evidence about his role at Bright Star

¶ 78 The facts cited above are based on the documentary record, on the evidence of Bright Star's directors, and on the evidence that Jung gave in his interviews with commission staff in late 2005 and early 2006.

¶ 79 However, as noted above, Jung's testimony at the hearing differed significantly in some respects from the evidence he gave in his interviews. This section describes those discrepancies.

On the history of his involvement with Bright Star

¶ 80 Jung now says that although he had brought the Tulameen project to the company when Chan was president, he had no further involvement with the project. He says he could not have hired Yeomans as geologist for that project, hired Hickey, or brought in Handford, Allen and Wong, because those things all happened before August 2001, and his involvement with Bright Star was not significant before August. He says his recollection has been refreshed by reviewing documents that put his arrangement with Allen in August.

On his role generally

¶ 81 As to his role generally, Jung now says that he was an " 'office administrator' who would facilitate the company's activities between the president and its board of directors and the various consultants and employees of the company in pursuing its exploration projects."

¶ 82 He says he dealt only with "administrative type decisions" and "referred all other matters that were beyond his list of responsibilities to Bright Star's president or its board of directors."

On his role compared to Yeomans

¶ 83 Jung says that although he introduced Yeomans to Bright Star, Chan hired him.

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¶ 84 Jung cites extensive evidence of Yeomans' role at Bright Star, including all the things one would expect to see a geologist do in managing an exploration program. Jung says this evidence also shows that Yeomans had the authority to represent the company in these matters.

¶ 85 This, says Jung, shows that his role was not significant. He denies that he supervised Yeomans because, he says, he is not qualified to do so. He says Handford initially supervised Yeomans, but later directed Yeomans to report to Cooke.

On his role compared to Hickey's

¶ 86 He says he did not know Hickey before he was hired, that he did not introduce Hickey to Bright Star, and that Chan hired Hickey.

¶ 87 Jung now denies that he was responsible for financing. He says the financing role at Bright Star was "delegated" to Hickey and cites evidence of Hickey's activities that he says shows Hickey's role in financing matters. Although Jung says he would sometimes negotiate the terms of financings, he says the board made decisions about "financing matters".

¶ 88 When Jung was asked who knew that the Cornwall companies were paying for their debentures with promissory notes, he said Handford, Allen and Wong knew, and that Hickey "might have known."

On Steve Johnson

¶ 89 Jung now says that he did not hire Steve Johnson, and that the final decision to hire was Handford's. Jung also denies supervising the investor relations personnel, as he said he did in his interviews.

On the execution of agreements

¶ 90 Jung cites evidence showing that Handford and Chan signed several of Bright Star's property acquisition agreements.

¶ 91 Jung says the title of general manager on the September 2001 letter to the transfer agent could have appeared because he may have cut and pasted the form of the letter from a precedent when he was the general manager of Network Gaming. He says he wrote his title as "GM", which he admits was intended to mean "general manager", on the October 2001 letter in a moment of confusion, stemming from his earlier role as the general manager of Network Gaming.

On his role with the board

¶ 92 Jung says that it was Handford, not him, who decided on the allocation of stock options to Bright Star's directors.

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- ¶ 93 Jung says that members of the Bright Star audit committee played a significant role in the relationship with Bright Star's auditors. However, neither Handford nor Allen, both of whom were on the audit committee, have any recollection of meeting with the auditors.

Actions of the exchange

- ¶ 94 Between the time that Jung was Network Gaming's general manager, and the time he returned to Network Gaming as an "officer manager", the exchange became concerned about his suitability as an officer or director of exchange listed companies. In May 1996 the exchange wrote Jung:

"Re Global Focus Resources Ltd. (the "Company")

"The Exchange has reviewed the activities of the Company. The Exchange has also reviewed the affairs of other listed companies with which you have been associated, some of which have been delisted subsequent to extensive investigations by regulators. Others have been suspended from trading, or taken over by a new management group due to poor financial and business history or are currently in a financially weak position due to poor control of corporate funds. The findings of our review have led us to conclude that in most cases where you were not officially appointed as a director, you performed a significant role similar to that of a director or officer of these companies.

"This is to advise you that in view of your track record in Exchange listed companies, it is the Exchange's position that your suitability as a director or officer or someone who performs similar functions to those of a director is questionable. Therefore the Exchange requires that you restrict your involvement with any listed company at the current level. Should any listed company propose your involvement in the future, the listed company proposing to retain your services must provide advance notice to the Surveillance Department for acceptance."

- ¶ 95 Jung says that this letter was the reason he did not put his name forward to be a director of Bright Star.
- ¶ 96 In a letter dated July 29, 2005 captioned "Suitability Review – Henry Jung / Bright Star Ventures Ltd.", the exchange notified Jung that it was reviewing his suitability to act as a director or officer of exchange listed companies. In

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November 2005, having had no response from Jung to its July 2005 letter, the exchange notified Jung that he is unsuitable to act as a director or officer of an exchange listed company or “perform any functions for any Exchange listed company which are similar to those normally performed by an individual occupying the position of” director or officer.

- ¶ 97 In January 2006, the exchange notified Allen that he is unsuitable to act as a director or officer of, or fulfill any similar role for, an exchange listed company, on the same terms as their notification to Jung. The exchange cited two main reasons for its decision: irregularities in connection with the Bright Star debenture financing, and Jung’s role in the company. In connection with the latter reason, the exchange said:

“Contrary to our requirement that Jung’s involvement with any listed issuer would be limited to non-managerial, general administrative duties only . . . he appears to have fulfilled the role of a senior officer of the Company and appears to have had a much greater involvement in the affairs of the Company than the Company’s own directors.

. . .
. . . it is clear that Jung’s involvement in the affairs of the Company extended far beyond just general administrative duties. . . . Jung was in direct communication with the Company’s former counsel with respect to the structuring and trading of the debenture financings and also discussed a debenture financing plan with . . . Cornwall. . . . Jung also executed the documentation related to the financing”

- ¶ 98 In April 2006, the exchange notified Handford that he is unsuitable to act as a director or officer of, or fulfill any similar role for, an exchange listed company, on the same terms as their notifications to Jung and Allen. The primary reason for the exchange’s decision was the irregularities in connection with the debenture financing. The exchange said, “We have determined that you, as President, a Director and a member of the audit committee of the Company during the review period failed to act in the best interests of the Company”

C Bright Star’s debenture financing

- ¶ 99 In 2001 Jung learned of an individual in Ottawa, John Cornwall, who had been successful in the past in raising capital from individual investors for small businesses. Jung contacted Cornwall about raising money for Bright Star.
- ¶ 100 Cornwall understood from Jung that Bright Star was looking for financing in the range of \$1 million to \$2 million. He told Jung that he would see if he could

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raise some money, but that it would be on a best efforts basis, as he could make no guarantees.

- ¶ 101 Jung and Cornwall began discussions. Through the discussions and negotiations between Cornwall and Jung over the next few months the convertible debenture structure emerged that was ultimately put in place. During this period, Jung negotiated the terms and forms of the debentures with Cornwall, worked with Bright Star's counsel, and managed the other details of the financing, including the necessary regulatory approvals from the exchange.
- ¶ 102 Cornwall says that Jung never told him what his role was in Bright Star, other than to say that "he was the accountant in charge of financing for Bright Star." Cornwall thought that Jung "was the chief financial officer, that was very apparent."
- ¶ 103 In February 2002 Bright Star issued two debentures: one on February 22 to Preston Beach Club Ltd. with a face value of \$1,519,215 and due December 31, 2006; and one on February 28 to CGC Financial Services Ltd. with a face value of \$1 million and due December 31, 2011. Jung signed both debentures alone on behalf of Bright Star and affixed the company's corporate seal.
- ¶ 104 On March 12, 2002 Bright Star issued a debenture to Dagmar Holdings Ltd. with a face value of \$688,000 and due December 31, 2007. Handford signed this debenture on behalf of Bright Star.
- ¶ 105 CGC, Preston Beach, and Dagmar were all Ontario companies controlled by Cornwall.
- ¶ 106 Bright Star issued a fourth debenture to Allen on terms substantially identical to the debenture issued to Dagmar, but the transaction did not close as Allen had second thoughts and did not invest.
- ¶ 107 CGC, Preston Beach, and Dagmar paid for the debentures with promissory notes. According to Cornwall, neither he nor the companies had any means to repay the promissory notes other than by raising cash from individual investors.
- ¶ 108 The debentures were unsecured with a nominal interest rate of 2% per annum, although, in lieu of cash interest payments, the debentures were issued at a 50% discount. On maturity, Bright Star had the right to repay the principal amount in shares instead of cash.
- ¶ 109 All of the debentures issued to the Cornwall companies contain a provision that they are to be governed by the laws of British Columbia.

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- ¶ 110 Cornwall placed newspaper advertisements offering people with locked-in registered retirement plans the opportunity to free up some cash from those plans. Responses to the advertisements account for almost all of the Bright Star investors.
- ¶ 111 Cornwall persuaded investors to liquidate the holdings in their locked-in accounts and transfer the cash to new accounts at one of two intermediaries, Octagon Capital Corporation, an investment dealer, or B2B Trust, a division of the Laurentian Bank. The investors then used the cash in the new accounts to purchase Bright Star debentures for the full amount of the face value.
- ¶ 112 The objective was to enable investors to convert some of the value in their locked-in accounts to cash that they could spend as they wished. To accomplish this, each investor put up 100% of the face value of the debenture they purchased. Cornwall kept 10% of the proceeds, 50% went to Bright Star, and the investor received a refund of 40%. The result was that investors paid \$60 for each \$100 of face amount of debenture.
- ¶ 113 After the transaction was complete, each investor held a Bright Star debenture in their locked-in account with a face amount roughly equal to the account's value when it was transferred to Octagon or B2B. The investor also received a cash payment of roughly 40% of the value of their locked-in account.
- ¶ 114 The investors whose interview transcripts are in evidence say that they were told little about Bright Star, its business, or its prospects. These investors appear to have had little understanding of the nature of their investment, or the associated risk. Cornwall told several investors that the face value of the debenture was "guaranteed."
- ¶ 115 Bright Star issued just under \$3 million face value of debentures to about 130 individual investors in British Columbia, Alberta, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland.
- ¶ 116 The debentures are now worthless.
- ¶ 117 It was Jung who brought about Octagon's involvement in the financing. He knew a broker, Barry Leung, at Octagan. Leung says that Jung expressed dissatisfaction with the speed at which B2B was processing the transactions with the individual investors, and asked if Leung could help.
- ¶ 118 After obtaining his manager's approval, Leung agreed to open accounts for the individual Bright Star investors. Leung received a fee of \$200 for each account

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opened. Leung says he negotiated his fee with Jung, not Cornwall, “because the debentures come from Bright Star. So it’s only logical that you discuss with Bright Star . . . [Jung] is the connection here . . . not Cornwall.”

- ¶ 119 Cornwall says that Jung knew that he would not be putting up the funds himself, but through funds raised from other investors. Jung denies any knowledge before Bright Star issued the debentures to the Cornwall companies that Cornwall intended to fund the purchase of the debentures through investments by individual investors. He says that he took CGC, Preston Beach, and Dagmar to be the investors Cornwall referred to earlier.
- ¶ 120 A Bright Star directors’ resolution dated January 3, 2002 authorizes the transfer of any portion of the debentures to any third party “in compliance with applicable securities legislation.”
- ¶ 121 B2B required investors to provide an opinion that the debentures were eligible under the *Income Tax Act* for investment in registered retirement plans. Jung provided these eligibility opinions on the letterhead of his accounting firm. The earliest opinion is dated February 14, 2002. The subscription agreement related to this investment, also signed by Jung (as treasurer of Bright Star) was dated February 13, 2002.
- ¶ 122 Jung says that “Cornwall never informed me that he was going to split up the debentures. However, in the discussions we were aware that the debentures could be split up. But he never informed me that he intended to split them up.” Jung says these discussions occurred in late 2001, before the debentures were issued to CGC, Preston Beach and Dagmar.
- ¶ 123 There were subscription agreements between investors and Bright Star. Each agreement has Bright Star’s name at the top and is entitled “Subscription Agreement for Canadian Dollar Debenture Contract”. These are excerpts from the agreement:

“The . . . Subscriber . . . hereby subscribes for the aggregate principal amount of debenture of Bright Star Ventures Ltd. . . . as set forth on the last page hereof and as described in the Term Sheet attached hereto as Appendix ‘A’.

The Subscriber hereby acknowledges receipt of the term sheet and confirms that he has thoroughly read its contents and understands the nature of the proposed placement. . . .

. . .

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The offering and sale of the Debenture was not made through an advertisement of the Debenture in printed media of general and paid subscription . . .

. . .

The Subscriber is capable of assessing the proposed placement because of the Subscriber's knowledge and experience in financial and business affairs or of advice received from a certified person . . . and is capable of evaluating the merits of and risks associated with the present placement.

. . .

This Subscription is hereby accepted and agreed to on behalf of Bright Star Ventures Ltd. . . .”

- ¶ 124 Bright Star issued a debenture to each investor. Each debenture contained a provision in which the investor acknowledged that the debenture had not been “qualified under the British Columbia Securities Act . . . for distribution to the public” and that the issuance of the debentures “is to be by way of private placement exempted from the registration . . . and prospectus requirements of the Act.” The debentures contained a provision that they were to be governed by the laws of British Columbia.
- ¶ 125 The operative language in the eligibility opinions that Jung provided B2B says: “The convertible debenture issued by Bright Star Ventures Ltd. to the [investor] meets the definition as a qualified investment for a RRSP/RRIF investment as defined in section 146(1) of the Canada Income Tax Act.”
- ¶ 126 At Jung's request, Cornwall ensured that each investor signed a letter addressed to Bright Star headed “RE: Application to Purchase Convertible Debentures”. The letter states: “This is to confirm my purchase and the transfer to me of a portion of an existing . . . convertible debenture that has been previously issued.”
- ¶ 127 Jung explained this letter at the hearing. He testified:

“Now the one thing that I also want to comment on is I never did speak or talk to any of these investors. They all dealt directly with Mr. Cornwall. But I wanted to assure myself, and also for Bright Star, that these people, were, in addition to, you know, reading the debenture documents that Mr. Cornwall was preparing which was very similar to the big debenture, I asked Mr. Cornwall to have each person provide confirmation that they are buying an existing debenture that has been issued . . . [and] not buying it directly from Bright Star. . . . I'm seeing that he's

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doing these resales I'm saying get something . . . that says that, you know, they're buying it, something that's already been issued and it's not being issued by the company directly to these investors."

- ¶ 128 Jung signed all of the investor debentures and affixed Bright Star's corporate seal to them. Bright Star's board did not approve any of them, although he says he informed the board "generally" that he was signing them.
- ¶ 129 All of the debentures Bright Star issued to clients of B2B Jung signed as "Treasurer". Jung says he showed his title as "Treasurer" because an employee of B2B asked him to do so.

D Jung's trading in Bright Star shares

- ¶ 130 Jung does not dispute that between July 2001 and September 2004, he made hundreds of trades totalling about 5.7 million Bright Star shares, about 3.1 million of which were buys and 2.6 million were sales. He made the trades both in his own name and through companies that he owned and controlled. Jung did not file insider trading reports for any of these trades.

E Bright Star's quarterly and annual filings

- ¶ 131 In 2002 and 2003, Bright Star filed eight quarterly and annual reports with the commission. Allen and Handford signed the reports on behalf of Bright Star. None of the reports identifies Jung as a director or officer of Bright Star.

IV Analysis and Findings

- ¶ 132 During and since the relevant period, the Act has been amended. All references to the Act in these findings are to the legislation in force at the time of the alleged misconduct.

A Was Jung a director or senior officer of Bright Star?

- ¶ 133 Whether Jung was a director or officer of Bright Star is relevant to the allegations that Allen and Handford contravened section 168.1(1)(b). Whether Jung was a director or a senior officer, and therefore an insider, of Bright Star is relevant to the allegation that he contravened section 87.
- ¶ 134 Section 1(1) defines director and senior officer:

" 'director' means a director of a corporation or an individual performing a similar function or occupying a similar position for a corporation . . .

. . .
'senior officer' means

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(a) the chair, or a vice chair of the board of directors, the president, a vice president, the secretary, the treasurer or the general manager of a corporation,

(b) any individual who performs functions for a person similar to those performed by an individual occupying any office specified in paragraph (a)”

- ¶ 135 Jung was not formally appointed as a director, nor to any of the positions listed in paragraph (a) of the definition of senior officer. If he was a director or a senior officer of Bright Star, it was under the *de facto* tests in the definitions. Those *de facto* tests measure the individual’s function in the organization. This involves an inquiry into what the individual’s activities are on the organization’s behalf to determine whether they are similar to the functions of a director, or to one or more of the positions listed in paragraph (a) of the definition of senior officer.
- ¶ 136 The nature of the individual’s activities are determinative in applying the *de facto* tests, regardless of
- the individual’s title or description
 - the existence of any agreement for the person’s services, the description of that agreement, or any of its terms
 - the role played by others in the organization

Jung’s function compared to that of a senior officer

- ¶ 137 Much of the respondents’ submissions are based on the agreement that Jung alleges existed between him and Bright Star – the oral agreement that he says duplicated his consulting agreement with Network Gaming. Jung says that he made the agreement with Allen and that the board of directors approved it.
- ¶ 138 Other than Jung’s assertions, there is no evidence that this agreement existed. Commission staff asked all of the directors specifically about Jung’s arrangement. Handford, Wong and Cooke all say that they had no knowledge of the terms of his arrangement, and none of them recalls any discussion of it at a board meeting. Allen’s evidence, although confusing, deals only with how much Jung was paid. There is no evidence about the other terms of the alleged agreement, including the scope of Jung’s responsibilities.
- ¶ 139 Even if the agreement did exist, Jung’s submissions that he was acting within its scope are not relevant. The test is not whether he was acting within the scope of

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his agreement, or even what the agreement said about scope. The test is whether he functioned as a senior officer.

- ¶ 140 The respondents argue that the significant roles of others at Bright Star show that Jung was not a senior officer. Even if we were to accept as fact Jung's description of Yeomans' and Hickey's activities, all that speaks to is their roles. Just because others were busy at the officer level at Bright Star does not mean Jung was not a senior officer. A company can, and most do, have several senior officers.
- ¶ 141 The evidence shows that Jung's activities on behalf of Bright Star included the following:
- hiring and supervising key staff
 - negotiating and signing agreements
 - managing the company's cash flow
 - preparing and signing cheques
 - being solely responsible for the company's accounting
 - preparing unaudited financial statements
 - managing the relationship with the company's auditors
 - seeking financing
 - seeking property acquisitions
- ¶ 142 Jung also managed and directed the debenture financing. He was Bright Star's sole contact with Cornwall. He negotiated the terms of the debentures. He alone dealt with Bright Star's counsel on legal issues related to the financing. He was the sole signatory of the debentures issued to CGC and Preston Beach. He alone signed the subscription agreements with the individual investors and the debentures issued to them, and did so without formal board approval. He arranged the involvement of Octagon in setting up accounts for the individual investors.
- ¶ 143 Cornwall said that Jung told him "he was the accountant in charge of financing for Bright Star." Cornwall thought that Jung "was the chief financial officer, that was very apparent."
- ¶ 144 As noted above, Jung's evidence relevant to his activities is contradictory. We attach greater credibility and weight to the evidence he gave in his interviews, for these reasons:
1. Jung's interviews were in late 2005 and early 2006, soon after the events in question. The hearing was in mid-2008, some four to six years after the relevant period.

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2. The evidence in Jung's interviews is generally consistent with
 - the evidence given by Allen and Handford in interviews with commission staff contemporaneously with Jung's interviews
 - the evidence given by others, including Wong, Cooke and Cornwall, in interviews with commission staff
 - the evidence given at the hearing by Wong and Cooke
 - the other evidence of his role at Bright Star
3. Jung's explanations of the discrepancies between the evidence he gave in his interviews and the evidence he gave at the hearing are not convincing. These explanations occurred mostly during the executive director's cross-examination of Jung at the hearing. Jung's demeanour in cross-examination was noticeably guarded, argumentative and, at times, evasive, compared to his demeanour in his interviews and in his testimony in chief at the hearing, which, for the most part, was direct and straightforward. Jung did not produce any corroborating evidence to support his explanations.

- ¶ 145 Jung says that Handford initially supervised Yeomans and later handed off that responsibility to Cooke. This conflicts with his earlier interview evidence and Handford's, and there is no corroborating evidence from Cooke.
- ¶ 146 Jung denies he hired Johnson and supervised the investor relations personnel as he stated in his interview, but there is no evidence that corroborates his denial.
- ¶ 147 Jung says that he signed one of the documents in evidence as "General Manager" through an editing error from another precedent, and the other in a moment of confusion, both arising from the time he was general manager for Network Gaming. He says that he signed the debentures issued to B2B Trust clients as "Treasurer" because an employee of B2B asked him to do so. As proof, he says we should rely on his knowledge that he was not appointed as the company's treasurer and so the only reason he would do so was because he was asked to do so.
- ¶ 148 We find none of these explanations convincing, and we note that Jung, in spite of knowing that he was not appointed treasurer, was prepared to hold himself out as Bright Star's treasurer by signing the debentures with that title.
- ¶ 149 Jung testified at the hearing that when he used blank pre-signed cheques that Allen left before travelling, sometimes up to 50 at a time, Allen would review them with him upon his return. However, Allen, when asked to turn his mind to this issue in his interview, said he never reviewed cheques used while he was away. He recalled that he did not do so because he thought he could instead rely

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on the auditors to find any irregularities. We accept Allen's evidence. This practice put Jung in the position of sole signing authority on the company's cheques while Allen was away.

- ¶ 150 Jung denies that he was solely responsible for dealing with the company's auditors. He says that the audit committee had that responsibility. This conflicts with the evidence of both Allen and Handford – both audit committee members – who say they never had any contact with the external auditors. We accept Allen's and Handford's evidence.
- ¶ 151 Jung says that Hickey had sole management responsibility for financing and that the board dealt with financing matters. This is not corroborated by the evidence. For example, when Jung was asked who knew that the Cornwall debentures were issued for promissory notes, he said Handford, Allen and Wong knew (none admit to knowing), and that Hickey "might have known." Had Hickey been solely responsible for financing matters for Bright Star, he would have known all about the debentures. In fact there is no evidence that Hickey had anything to do with the debenture financing. Wong testified that he thought Jung "was the one involved in raising the money."
- ¶ 152 Jung characterized his own role as a mere "administrator" and asks us to believe that all the real decision-making was done by Handford and the board of directors. This contrasts sharply with the directors' descriptions of their own roles.
- ¶ 153 Handford says he provided no direction, reviewed documents but made no significant changes, and rarely turned down anything that Jung proposed. He apparently signed anything that Jung asked him to. The exchange found Handford's attention as a director and officer to Bright Star's business so wanting that they determined that he failed to act in the best interests of the company. Allen says his role boiled down to being a signatory on cheques. Wong and Cooke describe their roles as similarly minor. The evidence of the directors, taken as a whole, suggest that the board's function at Bright Star was essentially to rubber-stamp Jung's initiatives and proposals.
- ¶ 154 The exchange's November 2005 letter to Jung notifying him that he is unsuitable to be a director or officer of an exchange listed company did not specifically cite his role in Bright Star, but the exchange included the company's name in the caption to the letter. We conclude that Jung's role in Bright Star must have been at least part of the exchange's concerns. The exchange specifically cited Jung's role in Bright Star as one of the reasons for finding Allen unsuitable as a director or officer of an exchange listed company.

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- ¶ 155 Jung bound the company in significant matters. Some of these were nominally subject to the approval of the board, but board approval at Bright Star was essentially only a matter of form. We find that Jung’s exercise of that level of autonomy and responsibility was a function similar to that of a president or a vice president.
- ¶ 156 We find that Jung’s activities in cash management, banking, accounting, financial statement preparation, management of the auditor relationship, and financing were functions similar to that of a treasurer.
- ¶ 157 We find that Jung’s activities with the board, his execution of documents on behalf of Bright Star, and his custody of the corporate seal were, at a minimum, functions similar to that of a secretary.
- ¶ 158 The evidence of Jung’s activities is completely consistent with how the directors described his role. The directors’ descriptions of that role are strikingly similar. Handford said Jung provided the “impetus” for the company, and was the “number one” person providing direction to the company. Allen referred to Jung repeatedly as the “general manager” and said Jung was the “driving force” behind the company, “the manager” and that there was no one else managing. Wong thought Jung was “more involved than the other directors,” and Cooke thought that Jung “ran the company.”
- ¶ 159 Jung’s activities are also consistent with how he described his own role in his interviews – as “manager”, which he described as overseeing “the operational matters of the company.” In our opinion, overall responsibility for a company’s operations is similar to the responsibilities of a general manager. We find that Jung’s function overall in Bright Star’s affairs was similar to that of a general manager.
- ¶ 160 The respondents argue that Bright Star’s auditors determined that Jung was not an officer, because they provided an audit opinion on the company’s annual financial statements and participated in the preparation of the company’s quarterly and annual filings with the commission. This argument is specious, there being no evidence that the auditors ever turned their minds specifically to this issue, or that Bright Star asked them to do so. In any event, the auditors’ opinion would not determine the issue.
- ¶ 161 We find that Jung was a senior officer of Bright Star under paragraph (b) of the definition of senior officer because the functions he performed for the company were similar to these senior officer positions listed in paragraph (a) of the definition: president, vice president, secretary, treasurer and general manager.

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Jung's function compared to that of a director

- ¶ 162 All of the directors identified Jung as the individual who set the overall direction for the company. It was Jung who brought in Allen, Handford and Wong as directors, and asked Handford to be president. Jung decided how many stock options the directors received. Jung asked Allen and Wong to be on the audit committee, and assigned tasks to Wong and Cooke.
- ¶ 163 Jung determined what matters went before the board, although as a matter of practice he operated autonomously. Bright Star's principal activities were mineral exploration and financing. Jung was the one who made the significant decisions about both. Jung used his own funds to provide Bright Star with working capital. Jung did everything significant in connection with Bright Star's largest financing, the debenture issue.
- ¶ 164 All of these activities are consistent with the function of a director of a junior mineral exploration company. Jung says that the reason he did not put his name forward to be a director was because of the May 1996 letter from the exchange to Global Focus Resources.
- ¶ 165 In contrast to what Jung was doing, the other directors were not doing much. In fact, apart from the day-to-day management of the exploration program by Yeomans, Jung did everything of significance at Bright Star that needed doing and, apart from Yeoman's help on exploration matters, did it largely alone (for example, he issued the debentures to the 130 individual investors without seeking formal board approval).
- ¶ 166 We find that Jung was a director of Bright Star because he performed functions for the company similar to those performed by a director of a corporation.

B Did Jung contravene section 87 of the Act?

- ¶ 167 Section 1(1) of the Act says that "insider" means "a director or senior officer" of an issuer.
- ¶ 168 Section 87 requires a person who is an insider of a reporting issuer to file an insider report if there are changes in the person's "direct or indirect beneficial ownership of, or control or direction over, securities of the reporting issuer."
- ¶ 169 We have found that during the relevant period, Jung was a director and senior officer, and therefore we find that he was also an insider of Bright Star. The evidence is undisputed that Jung's direct or indirect beneficial ownership of, or control or direction over, Bright Star shares changed. He made hundreds of trades in Bright Star shares in his own name and through companies controlled

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by him – trades representing a total volume of about 5.7 million shares during the relevant period.

¶ 170 Jung was therefore required to file insider reports. The evidence is undisputed that he did not do so. We therefore find that Jung contravened section 87.

C Illegal trading and distribution

¶ 171 The executive director alleges that Jung, through his activities in connection with the Bright Star debenture financing, contravened sections 34(1) and 61(1).

¶ 172 Section 34(1) says “a person must not . . . trade in a security . . . unless the person is registered in accordance with the regulations . . .”

¶ 173 Section 61(1) says “. . . a person must not distribute a security unless . . . a preliminary prospectus and a prospectus respecting the security have been filed with the executive director” and the executive director has issued receipts for them.

¶ 174 If we are to find that Jung contravened sections 34(1) and 61(1), we must first find that

1. he traded the Bright Star debentures in British Columbia, and
2. for section 61(1), those trades were a distribution.

Did Jung trade the Bright Star debentures?

¶ 175 Section 1(1) defines trade:

“ ‘trade’ includes

(a) a disposition of a security for valuable consideration whether the terms of payment be on margin, instalment or otherwise . . .

. . .

(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e)”

¶ 176 The executive director says that Jung traded in the debentures both when Bright Star issued them to the Cornwall companies and when they were issued to the individual investors.

¶ 177 There is no issue that the debentures are securities as defined in the Act. Nor is there any question that there was a disposition of the debentures for valuable

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consideration. Bright Star issued the debentures to the Cornwall companies for promissory notes and issued the debentures to the individual investors for cash. The question is whether Jung's activities in connection with the debenture financing meet the criteria in paragraph (f) of the definition of trade.

- ¶ 178 Jung managed and directed the debenture financing. He was Bright Star's sole contact with Cornwall. He alone dealt with Bright Star's counsel on legal issues related to the financing. He was the sole signatory of the debentures issued to CGC and Preston Beach. He alone signed the subscription agreements with the individual investors and the debentures issued to them. He arranged the involvement of Octagon in setting up accounts for the individual investors.
- ¶ 179 Jung's activities in connection with the debenture financing were acts, conduct and negotiations in furtherance of the disposition of the Bright Star debentures to the Cornwall companies and to the individual investors within the meaning of paragraph (f) of the definition. All of this activity Jung undertook on Bright Star's behalf and with the goal of raising funds through the sale of the debentures.
- ¶ 180 Jung argues that he did not trade in British Columbia because the Cornwall company debentures were issued in Ontario. We disagree. Jurisdiction is not determined solely by the location of the buyer. Jung's trading falls within the jurisdiction of the Act because he carried on activities in British Columbia in furtherance of the sale of the debentures. At least some of the negotiations with Cornwall took place while Jung was in British Columbia. It was here that he signed the subscription agreements and the debentures. It was here that he sought and obtained legal advice for Bright Star about the financing. The mind and management of the company was in British Columbia. All of the debentures provided that they were to be governed by British Columbia law.
- ¶ 181 We find that Jung traded Bright Star debentures in British Columbia.

Did Jung's trades in the Bright Star debentures constitute a distribution?

- ¶ 182 Section 1(1) defines distribution:

“ ‘distribution’ means . . .

(a) a trade in a security of an issuer that has not been previously issued,

. . .

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(f) a transaction or series of transactions involving further purchases and sales in the course of or incidental to a distribution . . .”

- ¶ 183 The Bright Star debentures were securities not previously issued when Bright Star issued them to the Cornwall companies. Jung argues that an exemption covered that distribution, and the subsequent sales of debentures to the individual investors were separate transactions.
- ¶ 184 Jung characterizes the sales to individual investors as assignments from the Cornwall companies to them. The executive director disagrees, but says that even if Jung’s interpretation is correct, the issue of the debentures to the Cornwall companies and their subsequent assignment to the individual investors are a single distribution under paragraph (f) of the definition.
- ¶ 185 Jung’s characterization of the sale of debentures to the individual investors does not withstand scrutiny.
- ¶ 186 We start with the documentation. Nowhere among the documents relating to the sale of debentures to the individual investors is there any agreement purporting to be an assignment from any of the Cornwall companies. In fact, there is no agreement of any kind in evidence between the investors and those companies.
- ¶ 187 Rather, the documentation shows that the investors were purchasing their debentures directly from Bright Star. The subscription agreement is between each investor and Bright Star and signed by both. In it, the investor “subscribes” for a debenture from Bright Star, which accepts the subscription. The investor acknowledges the risk of the “present placement.”
- ¶ 188 The debenture itself is between the investor and Bright Star. One of its provisions says that the issuance of the debenture is “by way of private placement.”
- ¶ 189 The opinion letter Jung provided to B2B for its clients refers to the “convertible debenture issued by Bright Star.”
- ¶ 190 This documentation is more consistent with a private placement of debentures from Bright Star to the individual investors than with an assignment of previously-issued debentures by Cornwall.
- ¶ 191 Jung says the Cornwall companies assigned portions of their debentures to the individual investors and used the proceeds to retire their promissory notes. In

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light of the documents in evidence, a more plausible interpretation is that Bright Star sold debentures to the individual investors, treated those debentures as replacing the debentures issued to the Cornwall companies, and treated the proceeds as though received to retire the Cornwall companies' promissory notes.

- ¶ 192 Even the letter that Jung obtained from each investor in an apparent attempt to show that the transaction was an assignment and not a purchase is signed by the investor, addressed to Bright Star, and captioned "Application to Purchase Convertible Debentures" – a reference to the investor's subscription to Bright Star to purchase debentures.
- ¶ 193 As for the letter itself, it cannot and does not alter the fact, as reflected in the documents, that the investors purchased their debentures from Bright Star, not the Cornwall companies. The significance of the letter is also diluted by Jung's testimony about it. He says that he wanted the investors to provide the letter in addition to "reading the debenture documents." Yet the debenture documents reflect a purchase from Bright Star – a transaction inconsistent with the letter.
- ¶ 194 In his testimony about the letter, Jung says that the debenture documents that Cornwall was preparing were "very similar to the big debenture." If the transactions were, as Jung argues, an assignment of an existing debenture, he would have expected the debenture documents for the individual investors to have been identical in all respects, other than principal amount, to the debentures issued to the Cornwall companies.
- ¶ 195 We therefore conclude that Bright Star's issue of debentures to the individual investors was a distribution of securities not previously issued under paragraph (a) of the definition.
- ¶ 196 However, if we were to accept Jung's interpretation of the transactions, the evidence shows that the parties contemplated that the real financing would be accomplished through the sale of debentures to individual investors. For Cornwall's part, that was his intention from the start – it was his only potential source of funds.
- ¶ 197 The January 3, 2002 Bright Star directors' resolution authorizing assignment of the debentures suggests that the company contemplated sales to investors other than the Cornwall companies. Given Jung's role in the debenture financing, it is inconceivable that this was not in his contemplation as well.
- ¶ 198 Jung also knew, when he issued his first eligibility opinion to B2B on February 14, 2002, that individuals were investing in the debentures, because only

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individuals can open registered retirement savings accounts under the Income Tax Act. He also signed subscription agreements as early as February 13th.

- ¶ 199 As the offering proceeded, Jung signed subscription agreements, and issued debentures to all 130 investors. Jung emphasizes that he met none of the investors, but that is not relevant. Through the subscription agreements and the debentures themselves, he entered into agreements on Bright Star's behalf with all of them. In the case of the investor debentures, he did not seek the approval of the Bright Star board before signing them.
- ¶ 200 All of this contradicts Jung's evidence that he had no knowledge of Cornwall's plans to sell debentures to individual investors.
- ¶ 201 In our opinion, the evidence shows that Bright Star's issue of debentures to the Cornwall companies and its subsequent issue of debentures to the individual investors were a series of transactions in the course of a distribution, and so also a distribution under paragraph (f) of the definition.
- ¶ 202 We find that Jung's trading in the Bright Star debentures to individual investors was a distribution in British Columbia.

Contravention of sections 34(1) and 61(1)

- ¶ 203 We have found that Jung traded and distributed Bright Star debentures in British Columbia. Jung has never been registered under the Act, nor was a prospectus filed relating to the Bright Star debentures. Therefore, in the absence of an exemption, Jung contravened sections 34(1) and 61(1) when he traded and distributed the Bright Star debentures.
- ¶ 204 The legislation provides exemptions from sections 34 (1) and 61(1). The onus of showing that any of those exemptions applies rests on the person who seeks to rely on the exemption (*Bilinski* 2002 BCSECCOM 102). There is no evidence that any of the exemptions apply to Bright Star's distribution of debentures to the individual investors.
- ¶ 205 We therefore find that Jung contravened sections 34(1) and 61(1) when he traded and distributed the Bright Star debentures.

D Did Allen and Handford contravene section 168.1(1)(b)?

- ¶ 206 The executive director also alleges that the quarterly and annual reports filed by Bright Star in 2002 and 2003 were false and misleading because they did not disclose Jung as a director or officer of Bright Star. As a result, the executive director alleges that Allen and Handford, who signed the reports, contravened

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section 168.1(1)(b).

¶ 207 Section 168.1(1)(b) says:

“168.1 (1) A person must not

...

(b) make a statement or provide information in any record required to be filed, provided, delivered or sent under this Act that, in a material respect and at the time and in light of the circumstances in which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading.

- ¶ 208 During the relevant period, section 152 of the *Securities Rules BC Reg. 194/97*, required a reporting issuer that is an “exchange issuer” to file quarterly and annual reports with the commission in a prescribed form. An “exchange issuer” is an issuer whose securities are listed and posted for trading on the TSX Venture Exchange. The prescribed form required the reporting issuer to disclose its directors and officers in a schedule to the form.
- ¶ 209 Bright Star was a reporting issuer whose securities were listed and posted for trading on the TSX Venture Exchange and was therefore an exchange issuer and required to file reports.
- ¶ 210 We have found that during the relevant period Jung was a director and senior officer of Bright Star. Bright Star did not list Jung as one of its directors and officers in any of the eight forms it filed in 2002 and 2003.
- ¶ 211 The identity of a reporting issuer’s directors and officers is material information. This is particularly so in this case, given that the exchange had concerns about Jung’s acting as director or officer of an exchange listed company. We find that the eight forms that Bright Star filed in 2002 and 2003 were false and misleading in a material respect. Accordingly, Bright Star contravened section 168.1(1)(b).
- ¶ 212 The allegation, however, is not that Bright Star contravened the section, but that Allen and Handford did. The executive director asserts that Allen and Handford, as directors and presidents of Bright Star, had an obligation to disclose the fact that Jung was acting as a director and officer, and their failure to do so is a contravention of section 168.1(1)(b).
- ¶ 213 To contravene section 168.1(1)(b), a person must “make a statement or provide information” that is materially false or misleading, overtly or through omission. The executive director cites no provision in the legislation that makes directors

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and officers directly responsible for the accuracy of the information in the prescribed forms filed by a reporting issuer under section 152 of the Rules. Therefore, if we are to find that Allen and Handford contravened section 168.1(1)(b), the basis for that finding must be in section 168.1(1)(b) itself or in the prescribed forms.

- ¶ 214 The certificate in the prescribed form signed by Allen and Handford states the following:

“The three schedules required to complete this Report are attached and the disclosure contained therein has been approved by the Board of Directors. A copy of this Report will be provided to any shareholder who requests it.”

- ¶ 215 One of the schedules requires disclosure of the issuer’s directors and officers. Unlike other certificates required under the legislation, this certificate contains no assertion that the information in the schedules is true. It certifies only that Bright Star’s board of directors has approved the disclosure the schedules contain.
- ¶ 216 The prohibition in section 168.1(1)(b) is not limited only to the person that has the obligation to file. It applies to any person who makes a statement or provides information that is materially false and misleading in a record required to be filed.
- ¶ 217 However, to find that Allen and Handford contravened section 168.1(1)(b), we would have to find that they, as individuals, made a statement or provided information that is materially false or misleading; in this case, the omission to state that Jung was a director and an officer. If the certificate in the prescribed form had required them to certify the accuracy of the schedules, then it may have been possible for us to find that they had contravened the section.
- ¶ 218 However, the certificate they signed speaks only to whether the board approved the disclosure. Therefore, the statement in the certificate could be false or misleading only if the board did not approve the disclosure. There is no evidence of that, never mind what the materiality might have been of a misstatement that the board had approved the disclosure when in fact it had not.
- ¶ 219 The executive director’s argument is essentially that a director’s approval of schedules to the form that he knows are inaccurate constitutes the making of a statement or the providing of information that is false or misleading for the purposes of section 168.1(1)(b).

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- ¶ 220 We disagree. In our opinion, the language of the section is not broad enough to impose liability on a director only on the basis that he approved the schedules. Even if it were, the executive director would have to prove that the director actually approved the schedules. Here, we have no evidence of Allen's or Handford's participation in the process (meeting or consent resolution) that the board followed to approve the schedules.
- ¶ 221 That is not to say that directors are not accountable for information filed with the commission. We note that the effect of section 168.2 of the Act is to deem directors to have contravened the legislation if they "authorize, permit or acquiesce in" a contravention of the Act by the issuer of which they are directors. Here, Bright Star contravened section 168.1(1)(b). The foundation is there for the executive director to have shown that Allen and Handford authorized, permitted or acquiesced in that contravention, but the notice of hearing does not allege contraventions by Allen and Handford under section 168.2.
- ¶ 222 We find that Allen and Handford did not contravene section 168.1(1)(b).

V Summary of Findings

- ¶ 223 We find that Jung was a director and senior officer, and therefore an insider of Bright Star, and traded securities of Bright Star without filing reports of those trades, contrary to section 87 of the Act.
- ¶ 224 We find that Jung traded in Bright Star debentures without being registered to do so, contrary to section 34(1), and distributed those securities without filing a prospectus, contrary to section 61(1).
- ¶ 225 We find that Allen and Handford did not contravene section 168.1(1)(b).

VI Submissions on Sanctions

- ¶ 226 We direct the parties to make their submissions on sanctions as follows:

By November 19 The executive director delivers submissions to Jung and the secretary to the commission

By December 12 Jung delivers response submissions to the executive director and the secretary to the commission

A party seeking an oral hearing on the issue of sanctions applies to the commission to hold one.

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By December 19 The executive director delivers reply submissions (if any)
to Jung and the secretary to the commission

¶ 227 November 5, 2008

¶ 228 **For the Commission**

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner

David J. Smith
Commissioner