Citation: 2014 BCSECCOM 96

Saafnet Canada Inc., Nizam Dean, and Vikash Sami

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Brent W. Aitken	Vice Chair
	Judith Downes	Commissioner
	Suzanne K. Wiltshire	Commissioner
Date of Hearing	February 13, 2014	
Date of Decision	March 14, 2014	

Appearing

Joyce Johner	For the Executive Director
Owais Ahmed	For Saafnet Canada Inc., Nizam Dean, and Vikash Sami

Decision

I Introduction

¶ 1 This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. Our Findings on liability made on October 16, 2013 (2013 BCSECCOM 442) are part of this decision.

¶ 2 We found that:

1. Saafnet contravened section 61(1) of the Act when it made trades to 14 investors, for proceeds of $C9,100 and US$604,479, without filing a prospectus and for which no exemptions were available, and

2. Dean and Sami contravened section 61(1) under section 168.2(1) when they authorized, permitted and acquiesced in Saafnet's contraventions of section 61(1).

II Analysis

A Positions of the parties

¶ 3 The executive director seeks orders against Saafnet:

- prohibiting it from trading or purchasing securities for five years,
- requiring disgorgement, and

- imposing a $50,000 administrative penalty.

¶ 4 Saafnet says we should make no orders against it.

¶ 5 The executive director seeks orders against Dean and Sami prohibiting them for five years from:
- trading or purchasing securities,
- acting as directors or officers of any issuer,
- acting in management or consultative capacity in connection with activities in the securities market, and
- engaging in investor relations activities.

¶ 6 The executive director also seeks disgorgement orders against Dean and Sami and a $50,000 administrative penalty against each of them.

¶ 7 Dean and Sami say that the prohibitions should
- not exceed one year,
- permit each of them to trade and purchase securities through a registered dealer in their own accounts, and
- permit each of them to act as directors and officers of Saafnet and of any company wholly owned by each of them and members of their respective immediate families.

¶ 8 Dean and Sami say that we ought not to order disgorgement against them, nor impose an administrative penalty. If we do order an administrative penalty, they say it should not exceed $10,000 for each of them.

B Factors to consider

¶ 9 Orders under sections 161(1) and 162 of the Act are protective and preventative, intended to be exercised to prevent future harm (*Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission*) 2001 SCC 37).

¶ 10 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission discussed the factors relevant to sanction as follows (at page 24):

> "In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
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> - the seriousness of respondent's conduct,

- the harm suffered by investors as a result of the respondent's conduct,
- the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
- the extent to which the respondent was enriched,
- factors that mitigate the respondent's conduct,
- the respondent's past conduct,
- the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past."

C Application of the factors

Seriousness of the conduct and damage to markets

¶ 11 A contravention of section 61(1) is inherently serious. It is one of the Act's foundation requirements for protecting investors and the integrity of capital markets. It requires those who wish to distribute securities to file a prospectus with the Commission, so that investors and their advisers get the information necessary for an informed investment decision.

¶ 12 The legislation provides exemptions from section 61(1) if the issuer follows specified requirements. Those requirements are designed to protect investors and markets, so an issuer who intends to rely on the exemptions must ensure that they are met.

¶ 13 In our Findings we noted that Saafnet did not appear to have kept adequate records to support its use of the exemptions. Indeed, it was only in the course of its preparation for this hearing that it gathered the information necessary to show that exemptions were in fact available for trades to some of the investors.

¶ 14 This is not the standard of conduct we expect from issuers, or their officers or directors, when raising funds from the public. However, as noted below, it is a mitigating factor that Saafnet sought and obtained legal advice in an attempt to ensure its compliance with the Act.

Harm suffered by investors; enrichment

¶ 15 The 14 Saafnet investors have suffered harm. As a group, they have invested close to $700,000 and it is far from clear whether they will recover any part of their investment.

¶ 16 Saafnet is now essentially dormant. There is no strategy for it to resume operations. The only opportunity for its investors to recover any part of their investment is through a sale of its technological assets to a third party. Saafnet is in negotiations with a possible buyer. The negotiations are being undertaken solely by Dean and Sami. If we were to prohibit them from acting as directors and officers of Saafnet, there would be no one to pursue the negotiations, and this potential opportunity to recover some value for Saafnet investors would be lost.

¶ 17 Saafnet was enriched by its contravention of section 61(1) in the sense that it received, and used in its business, the proceeds of the financing.

¶ 18 There is no evidence that Dean or Sami were enriched as a result of their contravention of section 61(1). To the contrary, they took very modest salaries in proportion to their efforts in the management of the business. In the 13 years they worked for Saafnet, Dean and Sami took from the company total income, in Dean's case, of $170,000 and, in Sami's case, of $298,000. That works out to an average annual income of $13,000 and $23,000 respectively for what, during most of that period, were more than full-time jobs.

Mitigating or aggravating factors; past conduct

¶ 19 Dean and Sami have acknowledged their wrongdoing and both have expressed remorse. They have both taken the Simon Fraser University directors and officers course (which they did before we issued our Findings).

¶ 20 Dean and Sami also obtained legal advice to ensure compliance with the Act. The first firm they retained incorporated Saafnet and provided general advice, some related to capital raising. They were then referred to another lawyer, who advised them that the documents the first firm provided Saafnet to use for capital raising were not adequate. The second lawyer also gave them advice about the private issuer exemption, which applies only to issuers with less than 50 shareholders.

¶ 21 When the number of Saafnet shareholders was approaching 50, that lawyer recommended that Dean and Sami consult a lawyer who practiced securities law. He recommended a lawyer at larger Vancouver law firm, who advised Saafnet thereafter on capital raising using the exemptions under the Act.

¶ 22 The executive director points out that even when the legal advice Saafnet received was accurate, Dean and Sami did not always comply with it.

¶ 23 Dean and Sami say they did not understand the importance of following the advice to the letter. For example, they understood that an exemption required a close relationship between the investor and someone associated with the company, but they did not appreciate the technical definitions of "close personal friend", "close business associate", "director", "officer" and the like. In our opinion, Dean's and Sami's conduct does not demonstrate a complete disregard for regulatory requirements. Rather, they failed to take the trouble to understand precisely what those requirements entailed.

¶ 24 None of the respondents has any prior disciplinary history.

¶ 25 There are no aggravating factors.

Risk to investors and markets

¶ 26 Dean and Sami obtained legal advice in an attempt to comply with the Act. They took the SFU course. They have acknowledged, and regret, their wrongdoing. Although, as noted above, they did not meet the standard expected when raising funds from the public, there is no evidence that they acted dishonestly or with any motive other than to build what had the appearance of being a successful business. In our opinion, the evidence does not show that either of them presents a significant risk to our capital markets if allowed to participate in them after a prohibition of appropriate duration.

Specific and general deterrence

¶ 27 The orders we are making are intended to deter the respondents from future misconduct and to demonstrate the consequences of inappropriate conduct to other market participants.

Previous orders

¶ 28 The parties cited several previous decisions for our consideration.

¶ 29 *Solara Technologies Inc. and William Dorn Beattie* 2010 BCSECCOM 357 was a $790,000 illegal distribution to 46 investors. The panel found that Solara appeared to operate as a legitimate business. In addition to the illegal distribution, the panel found that Solara contravened the Act when it misrepresented in an offering memorandum that it paid no compensation to Beattie, when in fact it paid him a salary of $70,000. The panel also found that Solara contravened the Act by filing false and misleading reports with the Commission: Solara reported reliance on the offering memorandum exemption for trades made before the date of the offering memorandum, disclosed false dates of distributions, and failed to disclose a finder's fee.

¶ 30 The panel considered these factors in ordering a $50,000 administrative penalty and 5-year market prohibitions against Beattie, Solara's principal:

- Of the 46 trades involved in Solara's illegal distribution, an exemption applied to only one, a trade to Beattie's sister.
- Solara or Beattie "were sloppy about ensuring that the exemptions were available" and their "carelessness and demonstrated failure to ensure compliance with requirements when raising capital suggests the potential for significant risk to our capital markets".
- Beattie showed no contrition or remorse. His acceptance that his conduct was "in breach of the Act", was qualified by his insistence that he relied on others, which the panel observed was "consistent with his evidence at the hearing, where he appeared to consider himself largely blameless for Solara's contraventions of the Act."

¶ 31 The executive director did not apply for, and the panel did not order, disgorgement.

¶ 32 *VerifySmart* 2012 BCSECCOM 176 was a $1.2 million illegal distribution to 99 investors. The panel ordered disgorgement against all of the respondents and imposed a $50,000 administrative penalty and 5-year market prohibitions against each of the individual respondents.

¶ 33 In considering the administrative penalties the panel considered that the circumstances were similar to *Solara*. There was no evidence that any of the exemptions applied. Although the individual respondents in *VerifySmart* claimed to have sought legal advice, the panel did not consider their evidence sufficient on that point.

¶ 34 In making the disgorgement orders, the panel said:

> "29 As a matter of principle, we agree that if capital is raised in contravention of the Act, it follows that it is appropriate that the amount raised be disgorged to the Commission. We have accordingly made an order to that effect against all of the respondents."

¶ 35 *Pacific Ocean Resources Corporation* 2012 BCSECCOM 104 was an $800,000 illegal distribution to 83 investors. The panel imposed a $65,000 administrative penalty and 10-year market prohibitions against the individual respondent.

¶ 36 In considering the administrative penalties the panel was guided by *Solara*. It imposed an administrative penalty higher than the one in *Solara* because it found that, unlike Solara, whose compliance failure was "sloppy", the failure in Pacific Ocean was "deliberate". There were also other aggravating factors.

¶ 37 As in *VerifySmart*, the individual respondents claimed to have sought legal advice, but the panel did not consider the evidence of that to be sufficient.

¶ 38 The panel did not order disgorgement because none of the proceeds of the illegal distribution went to the respondents, but to a related company not named as a respondent in the notice of hearing.

¶ 39 *John Arthur Roche McLoughlin, MCL Ventures Inc., Blue Lighthouse Ltd., and Robert Douglas Collins* 2011 BCSECCOM 299 was a $300,000 illegal distribution to 22 investors. The panel imposed a $50,000 administrative penalty and 15-year market prohibitions against McLoughlin, a $20,000 administrative penalty and 5-year market prohibitions against Collins, and ordered disgorgement against Collins. (The executive director did not apply for, and the panel did not order, disgorgement against McLoughlin.)

¶ 40 The panel said the higher administrative penalty against McLoughlin reflected "his greater role in the illegal distribution, his continuation of the misconduct in the face of warnings from Commission staff, and his breach of a prior order of the Commission."

¶ 41 In ordering disgorgement against Collins, the panel observed that he used Blue Lighthouse "as a vehicle to illegally raise funds from investors" and that he "benefited from his illegal activity by receiving $14,607 personally from investors' funds." The disgorgement order was for that amount.

¶ 42 *Photo Violation Technologies Corp.* 2013 BCSECCOM 276 was a $3.6 million illegal distribution to 272 investors. The panel ordered 5-year market prohibitions against the individual respondents. It did not order administrative penalties or disgorgement. It made no orders against the corporate respondent because it was "bankrupt and dormant."

¶ 43 In considering the appropriate sanction, the panel referred to *Solara*. It said:

> "23 *Solara* provides some guidance in determining the appropriateness and degree of Mitschele's and Minor's continued participation in the capital markets, but there are relevant differences between the facts in *Solara* and those here. The most significant difference is that in *Solara*, there was no evidence that Solara or Beattie made any attempt to obtain legal advice. Here, Mitschele and Minor took considerable steps on behalf of PVT to obtain the necessary advice to ensure compliance with the Act, unfortunately, as it happened, in vain. In *Solara* the panel also found that the respondents made a misrepresentation, and filed false and misleading reports with the Commission.
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> . . .
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> 27 We have not ordered administrative penalties against either of Mitschele and Minor. Sanctions imposed under the Act are

> intended to be preventative and protective, not punitive. In our opinion, an administrative penalty is not required for preventative or protective purposes here. Mitschele and Minor made good faith efforts to obtain the legal advice necessary to ensure that PVT conducted its financing activities in compliance with the Act and to sort out PVT's problems with commission staff. They invested, and likely have lost, large sums in PVT."

¶ 44 The panel did not order disgorgement, but gave no reasons.

¶ 45 Returning to the circumstances of this case, these are factors that in our opinion are relevant in the context of the decisions cited to us:

- Of the trades to 72 investors alleged in the original notice of hearing, the respondents were able to establish that exemptions applied to 38 of them. It appears that Dean and Sami, although they failed to get right the details of the regulatory requirements, understood them enough that nearly half of the impugned trades in fact qualified for exemptions.

- Dean and Sami were personally involved and took steps to ensure compliance with the Act. Unlike *Solara*, where it was apparent that Beattie did not appreciate that he was ultimately responsible for ensuring compliance, Dean and Sami fully understand, and take responsibility for, their conduct.

- There is credible evidence that Dean and Sami were diligent in obtaining legal advice in an attempt to ensure compliance with the Act.

- There is no evidence of deliberate misconduct, prior orders, or other aggravating factors.

- There were no allegations or findings of misconduct beyond the illegal distribution.

III Decision

¶ 46 We are making orders against all of the respondents that restrict their ability to trade and for others to trade securities of Saafnet.

¶ 47 We are making orders prohibiting Dean's and Sami's participation in securities markets. Considering all of the factors, we agree that the one-year prohibition proposed by the respondents as a maximum, is appropriate. However, as noted above, any opportunity the Saafnet investors may have for recovery of their investment appears to depend on the efforts of Dean and Sami to negotiate a sale of Saafnet's technology. The orders therefore allow Dean and Sami to continue as directors and officers of Saafnet.

¶ 48 We are making a disgorgement order against Saafnet in order to provide investors with the mechanism intended by the Act to facilitate recovery of their investment. It will be a means to protect the proceeds of any sale of Saafnet's technology that Dean and Sami are successful in completing.

¶ 49 We are not making the disgorgement order against Dean and Sami. We agree with the statement in *VerifySmart* that, as a matter of general principle, the amount raised in contravention of the Act should be disgorged. However, the decision whether to order disgorgement is for each panel to decide, based on the circumstances of the case before it. This is apparent from the cases described above.

¶ 50 Even where disgorgement is ordered against an issuer, it does not necessarily follow that the order will be made against individual respondents. Here, we do not think it appropriate to order disgorgement against Dean and Sami because the evidence is clear that their entire efforts in association with Saafnet were to strive to make it a commercial success, that they endeavoured to comply with regulatory requirements, that they did not profit from their efforts, and that they did not misuse investors funds in any way.

¶ 51 The amounts invested through the illegal trades were C$9,100 and US$604,479. For the purposes of the disgorgement order, we converted the US dollar investments to Canadian dollars using the Bank of Canada noon exchange rate on the date of each investment (based on the date of the investor's subscription agreement). Using that conversion, the US dollar investments equalled C$677,462. The total disgorgement amount is therefore C$686,562, including the $9,100 Canadian dollar investment. Our calculations are summarized in the table in Schedule A to this decision (the investors and amounts invested are from the table in paragraph 60 of our Findings).

¶ 52 We have ordered an administrative penalty of $10,000 against each of Dean and Sami. We agree that a penalty in this amount as proposed by the respondents as a maximum, is appropriate in light of the factors we have discussed above. We have made a disgorgement order against Saafnet for the reasons stated above. Given that it is dormant and has no significant assets other than the potential sale of its technology, we do not think an administrative penalty against Saafnet is necessary or appropriate.

IV Order

¶ 53 Therefore, considering it to be in the public interest, we order:

Saafnet

1. under section 161(1)(b) of the Act, that all persons permanently cease trading in, and be permanently prohibited from purchasing, securities of Saafnet;

2. under section 161(1)(g), that Saafnet pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of its contravention of the Act, which we find to be $686,562;

Dean

3. under section 161(1)(b), that Dean cease trading securities and exchange contracts, except that Dean may trade for his own account through a registrant, if he gives the registrant a copy of this decision;

4. under section 161(1)(d)(i), that Dean resign any position he holds as a director or officer of any issuer, other than Saafnet and any issuer all the securities of which are owned beneficially by him or members of his immediate family;

5. under section 161(1)(d)(ii), that Dean is prohibited from acting as a director or officer of any issuer, other than Saafnet and any issuer all the securities of which are owned beneficially by him or members of his immediate family;

6. under section 161(1)(d)(iv), that Dean is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

7. under section 161(1)(d)(v), that Dean is prohibited from engaging in investor relations activities;

8. under section 162, that Dean pay an administrative penalty of $10,000;

9. that the orders in paragraphs 3 and 5 through 7 of these orders remain in force until the later of March 14, 2015 and the date Dean pays the amount in paragraph 8 of these orders;

Sami

10. under section 161(1)(b), that Sami cease trading securities and exchange contracts, except that Sami may trade for his own account through a registrant, if he gives the registrant a copy of this decision;

11. under section 161(1)(d)(i), that Sami resign any position he holds as a director or officer of any issuer, other than Saafnet and any issuer all the securities of which are owned beneficially by him or members of his immediate family;

12. under section 161(1)(d)(ii), that Sami is prohibited from acting as a director or officer of any issuer, other than Saafnet and any issuer all the securities of which are owned beneficially by him or members of his immediate family;

13. under section 161(1)(d)(iv), that Sami is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

14. under section 161(1)(d)(v), that Sami is prohibited from engaging in investor relations activities;

15. under section 162, that Sami pay an administrative penalty of $10,000; and

16. that the orders in paragraphs 10 and 12 through 14 of these orders remain in force until the later of March 14, 2015 and the date Sami pays the amount in paragraph 8 of these orders.

¶ 54 March 14, 2014

¶ 55 **For the Commission**

Brent W. Aitken
Vice Chair

Judith Downes
Commissioner

Suzanne K. Wiltshire
Commissioner

Schedule A

INVESTOR	AMOUNT INVESTED (US$)	DATE OF INVESTMENT	MONTHLY AVERAGE EXCHANGE RATE	AMOUNT INVESTED (CAN$)
Dhanda, B & K	$50,000	27 Feb 2006	$1.14	$57,000
Dulay, J	$135,979	08 May 2006	$1.11	$150,937
Liddar	$145,000	08 May 2006	$1.11	$160,950
Hayre, J	$10,000	15 May 2006	$1.11	$11,100
Madahar	$35,000	16 May 2006	$1.11	$38,850
Hayre, R & S	$50,000	25 Sep 2006	$1.12	$56,000
Monsma	$3,000	26 Sep 2006	$1.12	$3,360
Hayre, G & J	$5,000	27 Sep 2006	$1.12	$5,600
Dhanda, K	$100,000	27 Sep 2006	$1.12	$112,000
Bailes	$20,000	20 Feb 2007	$1.17	$23,400
Dulay, S	$30,000	28 Feb 2007	$1.17	$35,100
Sandhu, A	$10,000	15 Apr 2007	$1.13	$11,300
Sandhu, M	$7,500	18 Apr 2007	$1.13	$8,475
McEachern	$3,000	18 Apr 2007	$1.13	$3,390
Total	$604,479			$677,462