

BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re SunCentro, 2017 BCSECCOM 58

Date: 20170220

SunCentro Corporation, John Leonard Carswell, Robert Thomas Helina, Donald Weiss, YDS Energy, Resources and Humanitarian Relief Corporation, Yawar Sattar Khan, and David Kenge Kato

Panel	Nigel P. Cave	Vice Chair
	Gordon L. Holloway	Commissioner
	Suzanne K. Wiltshire	Commissioner

Hearing dates February 15, March 22 and August 31, 2016

Submissions Completed October 4, 2016

Decision date February 20, 2017

Appearing

Shaneel Sharma	For the Executive Director
Robert Thomas Helina	For Robert Thomas Carswell and SunCentro Corporation
David Kato	For David Kato and YDS Energy, Resources and Humanitarian Relief Corporation
John Carswell	For John Carswell

Reasons for Decision

I. Introduction

- [1] This is a hearing under sections 161(1) and 162 of the *Securities Act*, BCSC 1996, c. 418.
- [2] The executive director issued a notice of hearing in respect of the respondents on June 30, 2015 (2015 BCSECCOM 166).
- [3] In the notice of hearing the executive director alleges that:
- a) by trading in securities without an exemption and without being registered, each of the respondents contravened section 34 of the Act;
 - b) by distributing securities to investors without an exemption and without filing a prospectus, each of the respondents contravened section 61 of the Act;

- c) John Carswell and Robert Helina, as directors and officers of SunCentro Corporation, authorized, permitted or acquiesced in SunCentro's contraventions of sections 34 and 61 of the Act and, therefore, pursuant to section 168.2 of the Act, Carswell and Helina also contravened those sections of the Act; and
- d) Yawar Sattar Khan and David Kenge Kato, as directors and officers of YDS Energy, Resources and Humanitarian Corporation, authorized, permitted or acquiesced in YDS' contraventions of sections 34 and 61 of the Act and, therefore, pursuant to section 168.2 of the Act, Khan and Kato also contravened those sections of the Act.

[4] During the hearing, the executive director withdrew the allegations in the notice of hearing that the respondents had contravened section 34 of the Act. The executive director also refined the allegations against the respondents with respect to the remaining contraventions, as follows:

- a) SunCentro contravened section 61 of the Act with respect to the issuance of securities to 26 investors in the amount of US\$249,525;
- b) Carswell contravened section 61 of the Act with respect to the issuance of securities to 26 investors in the amount of US\$249,525;
- c) Helina contravened section 61 of the Act with respect to the issuance of securities to 19 investors in the amount of US\$165,500;
- d) YDS contravened section 61 of the Act with respect to the issuance of securities to 19 investors in the amount of US\$165,500;
- e) Kato contravened section 61 of the Act with respect to the issuance of securities to 19 investors in the amount of US\$165,500;
- f) Khan contravened section 61 of the Act with respect to the issuance of securities to 19 investors in the amount of US\$165,500;
- g) Weiss contravened section 61 of the Act with respect to the issuance of securities to 6 investors in the amount of US\$78,025;
- h) Carswell and Helina, as directors of SunCentro, are liable under section 168.2 of the Act for SunCentro's contraventions of section 61; and
- i) Kato and Khan, as directors of YDS, are liable under section 168.2 of the Act for YDS' contraventions of section 61.

[5] The parties, other than Donald Weiss, tendered agreed statements of facts (described below). Weiss provided an affidavit dated February 12, 2016 (described below). Those

statements of fact and the Weiss affidavit purport to contain admissions of liability by each of the respondents to certain contraventions of the Act.

- [6] However, following the conclusion of the evidence adduced by the respondents during the hearing, it became clear to the panel that the availability of a due diligence defence to certain of the allegations against certain of the respondents was an issue in this case. Therefore, following oral submissions on liability, the panel asked the parties for written submissions on this issue. We received written submissions from all of the parties. In the written submissions received from Weiss in response to this request, he referred to a number of factual matters that were not introduced as evidence during the hearing. We have not given any weight to those factual matters that were not otherwise supported by evidence adduced during the hearing.
- [7] During the hearing, the executive director called three witnesses, a Commission investigator and two investors, tendered documentary evidence and provided oral and written submissions.
- [8] Helina testified at the hearing. The respondents tendered documentary evidence and made written (with respect to the issues related to due diligence defences) and oral submissions.
- [9] The following are our findings on liability and our decision on sanctions. These are the reasons of all panel members on all issues, except for the decision on an order under section 161(1)(g) of the Act against SunCentro. Vice Chair Cave's dissenting reasons on that order are set out below. All dollar amounts are in CDN dollars unless otherwise specified.

II. Background

Statement of Facts/Affidavit

- [10] As noted above, the executive director entered as evidence statements of fact signed by each of the respondents (other than Weiss) and an affidavit sworn by Weiss. Each of these is set out below.

SunCentro

- [11] The following is an excerpt from the Agreed Statement of Facts with SunCentro Corporation:
1. SunCentro is a Nevada corporation with a head office located in Vancouver, British Columbia. Its business is solar energy.
 2. John Leonard Carswell (Carswell) is a resident of British Columbia and has been a director of SunCentro since August 2010. He has been President and Chief Executive Officer of SunCentro since August 2012, Chief Financial Officer since April 2012, and Secretary and Treasurer since August 2010. He has never been registered under the Act.

3. Robert Thomas Helina (Helina) is a resident of British Columbia and has been a director of SunCentro since April 2010. He has been Chairman of SunCentro since August 2010. Helina was registered under the Act from 1991 to 2008. He is not currently registered under the Act.
4. YDS Energy, Resources and Humanitarian Relief Corporation (YDS) is a British Columbia corporation with its office in Delta, British Columbia.
5. SunCentro has never filed a prospectus under the Act. It has relied on prospectus exemptions to raise money from investors.
6. In 2011, SunCentro and Donald Weiss (Weiss) entered into an agreement authorizing Weiss to raise money for SunCentro.
7. Between 2011 and 2012, Weiss referred six B.C. investors, who invested a total of US\$78,025 in the company.
8. SunCentro paid commissions to Weiss for referring these investors.
9. None of these investors qualified under a registration or prospectus exemption.
10. In 2011, SunCentro and YDS entered into a business development agreement authorizing YDS to provide marketing and financing services for SunCentro.
11. Between 2011 and 2012, YDS referred nineteen B.C. investors to SunCentro, who invested a total of US\$165,500 in the company.
12. None of these investors qualified under a registration or prospectus exemption.
13. In 2013, Carswell raised US\$6,000 for SunCentro from an investor.
14. This investor did not qualify under a registration or prospectus exemption.
15. By distributing securities to investors without an exemption and without filing a prospectus, SunCentro contravened section 61 of the Act.

Helina

[12] The following is an excerpt from the Agreed Statement of Facts with Robert Thomas Helina:

1. SunCentro Corporation (SunCentro) is a Nevada corporation with a head office located in Vancouver, British Columbia. Its business is solar energy.
2. Robert Thomas Helina (Helina) is a resident of British Columbia and has been a director of SunCentro since April 2010. He has been The Chairman of the Board

of Directors of SunCentro since August 2010. Helina was registered under the Act from 1991 to 2008. He is not currently registered under the Act.

3. YDS Energy, Resources and Humanitarian Relief Corporation (YDS) is a British Columbia corporation with its office in Delta, British Columbia.
4. SunCentro has never filed a prospectus under the Act. It has relied on prospectus exemptions to raise money from investors.
5. In 2011, SunCentro and YDS entered into a business development agreement authorizing YDS to provide marketing and financing services to SunCentro.
6. Between 2011 and 2012, YDS referred nineteen B.C. investors to SunCentro, who invested a total of US\$165,500 in the company.
7. Helina was directly involved in these referrals to SunCentro. He made presentations to some of them, and sought to determine whether these investors qualified under a registration or prospectus exemption.
8. None of these investors qualified under a registration or prospectus exemption.
9. By distributing securities to investors without an exemption and without filing a prospectus, Helina contravened section 61 of the Act.
10. Helina, as a director of SunCentro, authorized, permitted or acquiesced in contraventions of the Act by SunCentro. Therefore, by operation of section 168.2 of the Act, he also contravened the Act.

Carswell

[13] The following is an excerpt from the Agreed Statement of Facts with John Leonard Carswell:

1. SunCentro Corporation (SunCentro) is a Nevada corporation with a head office located in Vancouver, British Columbia. Its business is solar energy.
2. John Leonard Carswell (Carswell) is a resident of British Columbia and has been a director of SunCentro since August 2010. He has been President and Chief Executive Officer of SunCentro since August 2012, Chief Financial Officer since April 2012, and Secretary and Treasurer since August 2010. He has never been registered under the Act.
3. YDS Energy, Resources and Humanitarian Relief Corporation (YDS) is a British Columbia corporation with its office in Delta, British Columbia.
4. SunCentro has never filed a prospectus under the Act. It has relied on prospectus exemptions to raise money from investors.

5. In 2011, SunCentro and Donald Weiss (Weiss) entered into an agreement authorizing Weiss to raise money for SunCentro.
6. Between 2011 and 2012, Weiss referred six B.C. investors, who invested a total of US\$78,025 in the company. Carswell signed each of their subscription agreements on behalf of SunCentro.
7. SunCentro paid commissions to Weiss for referring these investors.
8. None of these investors qualified under a registration or prospectus exemption.
9. In 2011, SunCentro and YDS entered into a business development agreement authorizing YDS to provide marketing and financing services to SunCentro.
10. Between 2011 and 2012, YDS referred nineteen B.C. investors to SunCentro, who invested a total of US\$165,500 in the company.
11. Carswell was directly involved in these referrals to SunCentro. Carswell made presentations to them at SunCentro's head office, and signed the subscription agreements for these investors on behalf of SunCentro.
12. None of these investors qualified under a registration or prospectus exemption.
13. In 2013, Carswell raised US\$6,000 for SunCentro from an investor. Carswell signed this investor's subscription agreement on behalf of SunCentro.
14. Carswell told this investor that, since she was not an accredited investor, she could qualify as a close personal friend of Carswell, even though she had only met him once.
15. This investor did not qualify under a registration or prospectus exemption.
16. By distributing securities to investors without an exemption and without filing a prospectus, Carswell contravened section 61 of the Act.
17. Carswell, as a director and officer of SunCentro, authorized, permitted or acquiesced in contraventions of the Act by SunCentro. Therefore, by operation of section 168.2 of the Act, he also contravened the Act.

YDS

[14] The following is an excerpt from the Agreed Statement of Facts of YDS Energy, Resources and Humanitarian Relief Corporation:

1. YDS is a British Columbia corporation with its office in Delta, British Columbia.

2. David Kenge Kato is a resident of British Columbia and has been a director and Vice President of YDS since 2010. He has never been registered under the Act.
3. Yawar Sattar Khan is a resident of British Columbia and has been a director and the President and Chief Executive Officer of YDS since 2010. He has never been registered under the Act.
4. SunCentro Corporation (SunCentro) is a Nevada corporation with a head office located in Vancouver, British Columbia. Its business is solar energy.
5. SunCentro has never filed a prospectus under the Act. It has relied on prospectus exemptions to raise money from investors.
6. In 2011, SunCentro and YDS entered into a business development agreement authorizing YDS to provide marketing and financing services for SunCentro.
7. As part of this agreement, YDS invested \$500,000 in SunCentro. SunCentro also agreed to pay YDS commissions for referring investors.
8. Between 2011 and 2012, YDS referred nineteen B.C. investors to SunCentro, who invested a total of US\$165,500 in the company.
9. None of these investors qualified under a registration or prospectus exemption.
10. By distributing securities to investors without an exemption and without filing a prospectus, YDS contravened section 61 of the Act.

Kato

[15] The following is an excerpt from the Agreed Statement of Facts of David Kenge Kato:

1. SunCentro Corporation (SunCentro) is a Nevada corporation with a head office located in Vancouver, British Columbia. Its business is solar energy.
2. YDS Energy, Resources and Humanitarian Relief Corporation (YDS) is a British Columbia corporation with its office in Delta, British Columbia.
3. Kato is a resident of British Columbia and has been a director and Vice President of YDS since 2010. He has never been registered under the Act.
4. SunCentro has never filed a prospectus under the Act. It has relied on prospectus exemptions to raise money from investors.
5. In 2011, SunCentro and YDS entered into a business development agreement authorizing YDS to provide marketing and financing services to SunCentro.

6. As part of this agreement, YDS invested \$500,000 in SunCentro. SunCentro also agreed to pay YDS commissions for referring investors. This gave Kato (as a major shareholder of YDS) a financial stake in SunCentro's success.
7. Kato had no prior securities market experience. The business development agreement required YDS to comply with the law when raising money for SunCentro. He made no effort to inform himself on the law, but relied instead on the advice of John Leonard Carswell, an officer and director of SunCentro.
8. Between 2011 and 2012, YDS referred nineteen B.C. investors to SunCentro, who invested a total of US\$165,500 in the company.
9. Kato was present when the investors met with SunCentro. Kato also provided subscription agreements to some of these investors.
10. None of these investors qualified under a registration or prospectus exemption.
11. By distributing securities to investors without an exemption and without filing a prospectus, Kato contravened section 61 of the Act.
12. Kato, as a director and officer of YDS, authorized, permitted or acquiesced in contraventions of the Act by YDS. Therefore, by operation of section 168.2 of the Act, he also contravened the Act.

Khan

[16] The following is an excerpt from the Agreed Statement of Facts of Yawar Sattar Khan:

1. SunCentro Corporation (SunCentro) is a Nevada corporation with a head office located in Vancouver, British Columbia. Its business is solar energy.
2. YDS Energy, Resources and Humanitarian Relief Corporation (YDS) is a British Columbia corporation with its office in Delta, British Columbia.
3. Khan is a resident of British Columbia and has been a director and the President and Chief Executive Officer of YDS since 2010. He has never been registered under the Act.
4. SunCentro has never filed a prospectus under the Act. It has relied on prospectus exemptions to raise money from investors.
5. In 2011, SunCentro and YDS entered into a business development agreement authorizing YDS to provide marketing and financing services to SunCentro.
6. As part of this agreement, SunCentro agreed to pay YDS commissions for referring investors. This gave Khan a financial stake in SunCentro's success.

7. Khan had no prior securities market experience. The business development agreement required YDS to comply with the law when raising money for SunCentro. He made no effort to inform himself on the law, but relied instead on the advice of John Leonard Carswell, an officer and director of SunCentro.
8. Between 2011 and 2012, YDS referred nineteen B.C. investors to SunCentro, who invested a total of US\$165,500 in the company.
9. Khan was present when the investors met with SunCentro.
10. None of these investors qualified under a registration or prospectus exemption.
11. By distributing securities to investors without an exemption and without filing a prospectus, Khan contravened section 61 of the Act.
12. Khan, as a director and officer of YDS, authorized, permitted or acquiesced in contraventions of the Act by YDS. Therefore, by operation of section 168.2 of the Act, he also contravened the Act.

Weiss

[17] The following is an excerpt from the Affidavit of Donald Weiss:

1. I have never held a director or officer position with SunCentro Corporation (SunCentro). I have never been registered under the Act.
2. Between 2011 and 2012, I referred six B.C. investors to SunCentro, who invested a total of US\$78,025 in the company.
3. SunCentro paid commissions of US\$5,000 to me for referring these investors.
4. None of these investors qualified under a registration or prospectus exemption.
5. By referring to SunCentro investors who did not qualify under a registration or prospectus exemption, when SunCentro had not filed a prospectus, I contravened section 61 of the Act.

Other Facts

[18] During 2011 and throughout the early part of 2012, Weiss' son was a director and senior officer of SunCentro.

[19] Subscription agreements were entered into in respect of each of the investments made by the 26 investors that are alleged to be contraventions of section 61 of the Act. Carswell signed each of the subscription agreements on behalf of SunCentro.

- [20] Helina's role with SunCentro was to lead its business operations. However, he did meet with a number of prospective and actual investors. Carswell's role with SunCentro was focused on administrative and financial affairs.
- [21] The parties agree that, of the 26 investors who made investments allegedly in contravention of section 61 of the Act, 19 were introduced to SunCentro by YDS (which was effectively Kato and/or Khan), six were introduced to SunCentro by Weiss and one was introduced by Carswell.
- [22] In each of the subscription agreements for the six investors introduced to SunCentro by Weiss, the subscriber indicated that they were a close personal friend or business associate of Weiss' son.
- [23] Commission investigators contacted each of those six investors who indicated that they were not, in fact, close personal friends or business associates of Weiss' son, but rather they were close personal friends of Weiss. Most knew Weiss' son, but their relationship with him was not of the same nature as with Weiss himself. This evidence was consistent with evidence provided by Weiss in a compelled interview with Commission staff.
- [24] All of YDS, Khan and Kato invested in SunCentro. YDS invested \$500,000 in SunCentro. Two of the individual investors introduced to SunCentro by YDS were Khan and Kato. The remaining 17 investors introduced to SunCentro by YDS indicated in their subscription agreements that they were family members, close personal friends or business associates of one of Khan or Kato (and named them in the subscription agreement).
- [25] Banking records of SunCentro indicate that SunCentro made a number of payments to YDS during the time period that YDS was introducing investors to SunCentro. However, YDS and SunCentro had business arrangements which may have triggered the need for these payments in addition to that of YDS' role as a finder. The executive director conceded that only three payments, totaling US\$4,020 and \$11,755, on their face, appeared to be finders' fees for introducing investors to SunCentro. The executive director also conceded that there is no evidence that YDS ever forwarded any of these funds to either Khan or Kato personally.
- [26] As noted in his affidavit, Weiss acknowledges having received US\$5,000 from SunCentro as a payment of finders' fees in connection with the investors that he introduced to SunCentro.
- [27] Helina testified that, because of his long period of registration in various categories under the Act, he was very aware of the requirements of section 61 of the Act (i.e. that if SunCentro did not file a prospectus, it needed an exemption from the prospectus requirements in order to issue its securities to subscribers).
- [28] Helina says that SunCentro sought the advice of a securities lawyer with respect to the preparation of a subscription agreement to be used to raise money in private placements

from accredited investors and family members, close personal friends and business associates of the officers and directors of SunCentro and its affiliates.

- [29] This testimony was confirmed by evidence of invoices from a Vancouver law firm as well as a letter from the law firm confirming the nature of the advice provided to SunCentro.
- [30] Helina testified that SunCentro received advice that an exemption was available if the investor was a family member, close personal friend or close business associate of a director or officer of the issuer or an affiliate of the issuer. However, Helina also testified that SunCentro did not seek legal advice as to the definition of “affiliate” under the Act but merely relied upon his own research as to the meaning of that term. He testified that he mistakenly formed the view that YDS was an “affiliate” of SunCentro and that SunCentro and its directors believed that family members, close personal friends and close business associates of Khan and Kato (who were directors of YDS) qualified for this prospectus exemption.
- [31] The evidence suggests that YDS, Khan and Kato all relied upon SunCentro, Helina and Carswell with respect to the availability of prospectus exemptions for investors that they introduced to SunCentro. In other words, there was no evidence that they took any steps, independent of those taken by SunCentro, Helina and Carswell, to ascertain the availability of any prospectus exemptions for any investor they introduced to SunCentro.
- [32] There is no dispute among the parties that, in fact, YDS is not an affiliate of SunCentro under the Act.
- [33] Helina testified that the SunCentro board adopted a policy with respect to private placements. That board policy required that each investor properly complete a subscription agreement prior to investing. He also testified that the subscription agreements, dealing with investors and handling other paperwork relating to a purchase of securities were all the responsibility of Carswell. He testified that all of the board members discussed the legal advice that they received and were briefed on the requirements for an investor to qualify for a prospectus exemption.
- [34] Helina testified that board members were to vouch for the accuracy of the information contained in each completed subscription agreement from an investor introduced to the company by that director and that the directors of the company did so.
- [35] Finally, Helina testified that the subscription agreements relating to the investors introduced to SunCentro by Weiss were completed by the investors themselves with the assistance of Weiss and his son. In his view, Weiss’s son, as a director of SunCentro, confirmed, either explicitly or implicitly, the accuracy of the subscription agreements and that the investors were his close personal friends or business associates. He further testified that the other directors of SunCentro relied on Weiss’s son to ensure these investors met the exemption criteria and believed that they did.

- [36] In an interview with Commission staff, Weiss disputed that he had any role in completing the subscription agreements with the six investors he introduced to SunCentro. He indicated that they were referred to Carswell who then dealt with those investors.
- [37] Carswell, in his interview with Commission staff, said that his normal practice was to personally meet with an investor, go through the subscription agreement and describe to the investor his understanding of the various prospectus exemptions and have the investors confirm the information related to the exemption being relied on. He said he, on behalf of SunCentro, turned down a number of potential investors who did not qualify for a prospectus exemption.
- [38] In his interview, Carswell described the process that was followed with the Weiss investors. These investors did not reside in Vancouver. Carswell said that while he dealt with these investors, Weiss or Weiss's son would have had initial discussions with them and the investors completed the subscription agreements themselves which were then sent on to him.
- [39] Both Helina and Carswell say that the SunCentro board told Weiss' son that it was his responsibility to review these subscription agreements and confirm their accuracy. They say that the board told Weiss's son that the other directors did not know these investors and that he needed to vet them. Helina and Carswell say they relied on Weiss' son to confirm the information in the subscription agreements. They say that they made no other attempts to confirm the information in the subscription agreements.
- [40] With respect to the one investor that was introduced to SunCentro by Carswell, Carswell said, in his compelled interview with staff, that he was a good friend of the investor's brother. He said that, while he did know the investor through this connection, he did not have the same relationship with the investor as with her brother.
- [41] Helina also testified as to the current financial status of SunCentro. He indicated that the company did not currently have any cash or other tangible assets. However, the company might have a contingent asset in the nature of a legal claim against a third party.

III. Applicable Law

a) Standard of Proof

- [42] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada held:

49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

- [43] The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

[44] This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, para. 35.

b) Prospectus Requirements

[45] The relevant provisions of the Act are as follows:

- a) Section 1(1) defines “trade” to include “(a) a disposition of a security for valuable consideration” and “(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e)”.
- b) Section 1(1) defines “security” to include “(a) a document, instrument or writing commonly known as a security”, “(b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person”, “(d) a...share, stock...” and “(i) an investment contract.”
- c) Section 1(1) defines “distribution” as “a trade in a security of an issuer that has not been previously issued”.
- d) Section 61(1) states “Unless exempted under this Act, 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.

[46] Section 1.10 of the companion policy to *National Instrument 45-106 – Prospectus Exemptions* (NI 45-106) states that the person distributing securities is responsible for determining, given the facts available, whether an exemption from the prospectus requirement, set out in section 61(1), is available.

[47] In *Solara Technologies Inc. and William Dorn Beattie*, 2010 BCSECCOM 163, the Commission confirmed that it is the responsibility of a person trading in securities to ensure that the trade complies with the Act. The Commission also said that a person relying on an exemption has the onus of proving that the exemption is available. The Commission said:

37 The determination of whether an exemption applies is a mixed question of law and fact. Many exemptions are not available unless certain facts exist, often known only to the investor. To rely on those facts to ensure the exemption is available, the issuer must have a reasonable belief the facts are true.

38 To form that reasonable belief, the issuer must have evidence. For example, if the issuer wishes to rely on the friends exemption, it will need representations from the investor about the nature of the relationship...

c) Liability under 168.2(1)

[48] Section 168.2(1) of the Act states that if a corporate respondent contravenes a provision of the Act, an individual who is an employee, officer, director or agent of the company

also contravenes the same provision of the Act, if the individual “authorizes, permits, or acquiesces in the contravention”.

- [49] There have been many decisions which have considered the meaning of the terms “authorizes, permits or acquiesces”. In sum, those decisions require that the respondent have the requisite knowledge of the corporate contraventions and have the ability to influence the actions of the corporate entity (through action or inaction).

IV. Analysis and Findings

a) Direct contraventions of section 61

- [50] There is no dispute that the shares of SunCentro that were purchased by all 26 of the investors in question in this case are “securities” under the Act, that the issuances of these securities to the 26 investors were all “distributions” under the Act and that SunCentro never filed a prospectus in connection with those distributions. It is also not disputed that none of the 26 investors qualified for an exemption from the prospectus requirements of the Act. Those facts constitute a contravention of section 61 of the Act.
- [51] Therefore, the only issue is whether there is a due diligence defence available to one or more of the respondents in respect of any or all of the issuances of securities to the 26 investors and, if available, whether in the facts and circumstances of this case such a defence is made out.

Admissions

- [52] We must address the purported admissions of liability by each of the respondents in their Agreed Statement of Fact or Affidavit, as the case may be.
- [53] Firstly, we note that none of the respondents was represented by counsel during the proceedings.
- [54] Secondly, we note that while the Agreed Statements of Fact and Affidavit were tendered as evidence in the proceedings, they were not the only evidence tendered by the parties. Other evidence tendered by the respondents suggested the possibility of there being a due diligence defence available to one or more of the respondents with respect to some or all of the impugned distributions.
- [55] Finally, we note that the admissions by the respondents of direct contraventions of section 61 and indirect contraventions of section 61 (by virtue of the operation of section 168.2) are, in fact, legal conclusions and not merely factual in nature.
- [56] Given all of the above, we did not find these admissions to be conclusive on the issue of the liability of the respondents in the facts and circumstances of the case before us.

Availability of a Due Diligence Defence

- [57] Section 1.9 of the Companion Policy (CP) to NI 45-106 suggests the possibility of there being a due diligence defence to allegations of contraventions of section 61. That section of the CP sets out that it is the responsibility of the person attempting to rely upon an exemption under NI 45-106 to determine whether, in fact, such an exemption is available.

The section goes on further, and in extensive detail, to detail what securities regulators view as reasonable steps for a seller to undertake in order for it to reasonably confirm that a purchaser meets the conditions for a particular exemption. We will discuss a number of these steps in greater detail below.

- [58] However, section 1.9 of the CP does not create, in and of itself, a legal basis for establishing a due diligence defence to an allegation of a contravention of section 61. There is no provision in the Act establishing such a due diligence defence. The framework under the Act and NI 45-106 is that there is either (factually and legally) an exemption from the prospectus requirements under section 61 with respect to a distribution of securities or there is not. The provisions of the CP do not have the force of law and are merely a collection of policy views of the securities regulators on various topics related to NI 45-106.
- [59] Therefore, the availability of a due diligence defence to an alleged contravention of section 61 of the Act is dependent on whether there is such a defence in the common law.
- [60] In *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.), 1978 CanLII 11 (SCC), (CanLII), pg. 1325, the Supreme Court of Canada recognized three categories of offences: offences for which *mens rea* must be proved; strict liability offences for which there is no necessity to prove the existence of *mens rea*, leaving it open to an accused to avoid liability by proving that they took all reasonable care; and absolute liability offences, which assign guilt without having to prove the subjective intent of the accused.
- [61] The question is whether a contravention of section 61, which proceeds in an administrative process before a Commission panel, is an absolute liability offence or a strict liability offence.
- [62] The executive director submits that there have been inconsistent findings from previous Commission panels on this issue. In particular, the executive director submits that the decisions in *Re Bilinski*, 2002 BCSECCOM 102, *Re Savage*, 2007 BCSECCOM 737 and *Re Alexander*, 2007 BCSECCOM 645 support the proposition that contraventions of the Act that proceed under an administrative process are strict liability offences to which a due diligence defence would apply. In contrast, the executive director submits that the decision in *Avaiwest Resorts Inc. (Re)*, 2013 BCSECCOM 319 supports the proposition that contraventions of the Act that proceed in this manner are absolute liability offences to which there can be no due diligence defence.
- [63] The executive director submits that there is a similar discrepancy in decisions from securities regulatory authorities across the country.
- [64] We agree that previous Commission decisions and decisions of securities regulatory authorities across the country do not provide clear guidance on this issue.
- [65] The executive director submits that the British Columbia Court of Appeal decision in *Whistler Mountain Ski Corp. v. British Columbia (General Manager Liquor Control and*

Licensing Branch), 2002 BCCA 426 provides precedential guidance for the proposition that contraventions of the Act that are pursued in the administrative context should be strict, and not absolute, liability offences. We agree.

- [66] In *Whistler Mountain*, our Court of Appeal looked at a regulatory regime under which enforcement proceedings could be pursued under both criminal or quasi-criminal proceedings and under administrative or regulatory proceedings. Administrative proceedings under that regime could result in significant sanctions being imposed for contraventions. The Court of Appeal expressly rejected the notion that these types of offences that are dealt with in administrative/regulatory proceedings should be absolute liability offences. The Court of Appeal stated (para. 29):

A public welfare offence should be interpreted as a strict liability offence for which the defence of due diligence is available, unless there is clear legislative language that indicates an offence is one of absolute liability: *R. v. Martin* (1991) 63 C.C.C. (3d) 71 (Ont. C.A.), aff'd [1992] 1 S.C.R. 838

- [67] The enforcement regime under the Act is analogous to that considered by the Court of Appeal in *Whistler Mountain* in that our administrative/regulatory proceedings may lead to significant financial sanctions being imposed on respondents. We also do not see language in the Act that provides clear legislative language that such contraventions are to be absolute liability offences. In fact, section 1.9 of the CP suggests an interpretation of securities regulatory statutes by securities regulators that is not consistent with absolute liability offences in this context. We do not see a reason to deviate from the reasoning in *Whistler Mountain* as it applies to administrative/regulatory proceedings under the Act.

Consideration of a Due Diligence Defence in this case

- [68] Having found that a due diligence defence is available in the context of alleged contraventions of section 61, the question becomes whether such a defence was made out in the facts and circumstances of this case.
- [69] A due diligence defence will be made out if the respondent reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if the person took all reasonable steps to avoid the particular event. *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.), 1978 CanLII 11 (SCC), (CanLII) pg. 1327.
- [70] The onus is on the respondent to establish a due diligence defence, on a balance of probabilities, *R. v. Sault Ste. Marie (City)*, pg. 1325. Therefore, the onus is on the respondents, in this case, to establish the factual basis for the defence.
- [71] This assessment gives some life to the discussion of reasonable steps for a seller of securities to undertake as set out in section 1.9 of the CP. That policy suggests a number of key factors:
- a) that the steps that are reasonable will vary depending upon the facts and circumstances of the purchaser, the offering and the exemption being relied upon;

- b) that while sellers should obtain and retain documentation of certain key facts, including obtaining representations and warranties and/or confirmation of a purchaser's financial or other personal status, that those steps will not be sufficient in and of themselves;
- c) that sellers should understand the terms and conditions of the exemption that they intend to rely upon;
- d) that sellers should adopt appropriate policies and procedures to ensure that person's acting on their behalf understand the terms and conditions of the exemptions being relied upon; and
- e) that sellers take steps to verify the factual basis of the information being relied upon including asking questions of purchasers.

[72] While we are generally guided by the above description of reasonable steps we think the first point is most important – what are reasonable steps will vary depending on the facts and circumstances. However, we think that what are reasonable steps will vary not only depending on the facts and circumstances of the purchaser, the offering and the exemption being relied upon but also on the respondent and their role in the offering.

[73] Applying the above factors to the facts and circumstances of this case, there were really three “groups” of investors for the purposes of considering the due diligence defence – the 19 investors introduced to SunCentro through YDS, the six investors introduced through Weiss and the one investor introduced through Carswell.

[74] There was evidence indicating potential due diligence defences with respect to each of these groups of investors and we will look at each of them separately.

YDS Investors

[75] With respect to the investors introduced to SunCentro through YDS, the relevant facts are these:

- a) there is agreement that the investors who were introduced to SunCentro through YDS were close personal friends, family members or close business associates of directors of YDS and not of directors of SunCentro;
- b) subscription agreements were obtained from each of the investors that confirmed the investors' association with one of either Khan or Kato explicitly by name, rather than just a ticked box next to an exemption;
- c) SunCentro and its directors sought legal advice on the available prospectus exemptions;
- d) the legal advice obtained was not complete and SunCentro and its directors chose to reach their own conclusions about the definition of “affiliate” for the purposes of the available exemption;
- e) the SunCentro board discussed the criteria (as they understood them) for the prospectus exemptions that they intended to rely on and adopted a board policy for guiding their capital raising activities;
- f) other than the definition of “affiliate”, the board members appear to have had a clear understanding of the requirements for a prospectus exemption;

- g) neither Helina nor Carswell undertook any investigations other than those they undertook on behalf of the SunCentro board with respect to understanding the available prospectus exemptions; and
- h) none of YDS, Kato or Khan undertook any investigations of their own with respect to understanding the available prospectus exemptions.

[76] The analysis of a due diligence defence in respect of issuances of securities to these investors must be carried out for each respondent separately. Each of SunCentro, Carswell, Helina, YDS, Khan and Kato are alleged to have directly contravened section 61 with respect to these distributions.

SunCentro, Carswell and Helina

- [77] The availability of a due diligence defence for a corporation will depend on whether reasonable steps were taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.), 1978 CanLII 11 (SCC), (CanLII) pg. 1331.
- [78] The Supreme Court of Canada in *Sault Ste. Marie* introduced the concept that a company could demonstrate that it has exercised all reasonable care by establishing a proper system to prevent the commission of an offence and by taking reasonable steps to ensure the effective operation of that system.
- [79] This approach is similar to the guidance in the CP about the procedures a seller could implement in order to reasonably confirm that a purchaser meets the conditions for a particular exemption. The guidance states that a seller should have policies and procedures in place to confirm that parties acting on its behalf understand the exemption being relied on, are able to describe the terms of the exemption to purchasers and know what information and documentation must be obtained from purchasers to confirm the conditions of the exemption have been satisfied. The guidance suggests this would include procedures to ensure parties acting on sellers' behalf take reasonable steps to verify that the purchaser meets the criteria set out in the exemption, including asking questions to confirm the nature and length of a relationship if relying on an exemption based on relationships.
- [80] Many of the reasonable steps suggested by section 1.9 of the CP were followed by the SunCentro board, which was the directing mind and will of SunCentro. However, the board's efforts at obtaining a full understanding of the prospectus exemption it was attempting to use for the distributions to the YDS investors were incomplete. Helina testified that, at the time, the board was aware there was a question as to the meaning of the word "affiliate". Helina testified as to some of the online sources of definitions that he consulted and upon which the board relied.
- [81] Having sought legal advice on the availability of an exemption, having determined that there remained an open legal question arising from that advice and having chosen to reach its own conclusion about the question, it is hard to view the SunCentro board as

having taken reasonable steps to avoid a contravention of section 61 with respect to the distributions to the YDS investors. This aspect of the case is, in essence, a mistake of law. A mistake of law is not a sufficient basis for establishing a due diligence defence for a contravention of section 61.

[82] There is no evidence that Carswell or Helina took any steps, other than those they took as directors on behalf of SunCentro, to avoid a contravention of section 61 with respect to the YDS investors.

[83] We do not find that a due diligence defence has been made out by any of SunCentro, Helina or Carswell with respect to the distributions to the 19 investors introduced to SunCentro by YDS.

YDS, Khan and Kato

[84] YDS, Khan and Kato did not undertake any separate enquiries from those undertaken by SunCentro. Therefore, the question is whether it was reasonable for them to have so relied on the investigations of another. Generally, those who wish to raise capital for others and receive payment for that activity must do more than simply rely on the efforts of others in order to say that they have taken reasonable steps to avoid a contravention of section 61. There will be exceptions to this general rule; however, this is not one of them. While Helina was a long time registrant, he was not a lawyer. Khan and Kato both said they relied on Carswell who was also not a lawyer. There is no evidence that YDS, Khan or Kato asked questions of the legal counsel retained by SunCentro.

[85] We do not find that a due diligence defence has been made out by any of YDS, Khan or Kato with respect to the distributions to the 19 investors introduced to SunCentro by YDS.

Weiss Investors

[86] The issues with respect to the investors introduced to SunCentro by Weiss are more complicated. The relevant facts are as follows:

- a) as noted above, the board of SunCentro did discuss the criteria for the prospectus exemptions that it intended to utilize and adopted a board policy for guiding its capital raising activities;
- b) the board policy required that each investor properly complete a subscription agreement prior to investing. Board members were to vouch for the accuracy of the information contained in a completed subscription agreement for investors they introduced to the company.
- c) The board delegated to Carswell the responsibility for subscription agreements, dealing with investors and handling the other paperwork relating to the purchase of securities of SunCentro;
- d) each investor completed a subscription agreement which listed Weiss' son as the subscriber's close personal friend, family member or close business associate;
- e) Helina says that Weiss' son confirmed to the board that the investors introduced by Weiss did qualify for the exemption – although Helina's evidence was not

specific as to whether Weiss' son confirmed this orally, in writing or by virtue of forwarding on completed subscription agreements;

- f) Carswell acknowledges having dealt with all of the investors introduced by Weiss but he and Helina stated that the subscription agreements were completed with the assistance of Weiss and/or his son;
- g) Weiss says that he simply forwarded investors' names on to Carswell who then dealt with the investors to complete subscription agreements; and
- h) Helina was not directly involved in completing the subscription agreements or otherwise in dealing with the paperwork associated with subscriptions – this was delegated to Carswell.

[87] Taking all of the above into consideration, there was conflicting evidence about whether the Weiss' assisted the subscribers in completing the subscription agreements. We do not think that we need to resolve this conflict as there was evidence, that was not conflicted, that Weiss' son vouched for the accuracy of the information contained in the subscription agreements (i.e. that the subscribers were his close personal friends or business associates). We find that he did so.

[88] The analysis of whether a due diligence defence has been made out for the distributions to the Weiss investors must be carried out with respect to each respondent separately. Each of SunCentro, Carswell and Weiss are alleged to have directly contravened section 61 with respect to these distributions.

SunCentro

[89] As noted in paragraph 80 above, the question is whether SunCentro exercised all reasonable care by establishing a proper system to prevent the commission of an offence and then took reasonable steps to ensure that system's operation. The SunCentro board took some of the reasonable steps suggested by section 1.9 of the CP with respect to the distributions to the Weiss investors. It obtained and retained documents from those investors. It made efforts to understand the exemptions it intended to rely on. It had a board policy around capital raising. Board members understood the nature of the requirements for the exemptions.

[90] The guidance in the CP suggests reasonable steps for a seller would also include having procedures to ensure parties acting on the seller's behalf take reasonable steps to verify that each purchaser meets the criteria set out in the exemption, including asking questions to confirm the nature and length of a relationship if relying on an exemption based on relationships. For the family, close personal friends and business associates exemption, this would include asking the investor questions about the relationship and confirming that information with the person identified by the investor. In this case, that person was Weiss' son.

[91] We have found that Weiss' son explicitly or implicitly vouched for the accuracy of the information in the subscription agreements to the board. Getting this confirmation was a reasonable step for the board to take towards verifying the factual basis for the

availability of the family, friends and business associates exemption that SunCentro intended to rely on.

[92] In the absence of any facts or circumstances that should have caused the company to question whether Weiss' son's confirmations were accurate, we do not think it necessary for the company to have asked further questions, directly of the investors, regarding their relationship with Weiss' son.

[93] In this case, SunCentro

- established a board policy for the private placements
- educated the board members on the applicable exemptions that were being used by the company
- obtained properly executed subscription agreements
- delegated responsibility for completion of the administrative tasks necessary to complete the financing to a member of senior management of the company
- received express or implied assurances from a board member that the information contained in the subscription agreements was accurate

[94] We find the totality of the above to be reasonable steps for the company to have taken and those steps establish a due diligence defence for SunCentro with respect to the distributions to these six investors.

Carswell

[95] Carswell was the member of the management team of SunCentro responsible for carrying out the "day-to-day" aspects of the financings. He was responsible for ensuring that there were completed subscription agreements and handling all of the other paperwork associated with the distributions. He dealt directly with the subscribers. There is no evidence that, with respect to these six investors he did not fulfill these responsibilities or take any steps that were inconsistent with the board policy.

[96] For all of the reasons set out above with respect to SunCentro we find that a due diligence defence has been made out for Carswell for the distributions to the six investors introduced by Weiss.

Weiss

[97] With respect to Weiss, although he is a US resident, all of the investors that are the subject of the allegations against Weiss are residents of British Columbia. The residency of the investors establishes a sufficient jurisdictional nexus for us to find that there was a trade of securities in the Province of British Columbia with respect to each of those investors and that Weiss' activities in connection therewith are acts in furtherance of those trades. Hence, his actions are governed by the provisions of the Act.

[98] There is no evidence that Weiss took reasonable steps to avoid a contravention of section 61. His own evidence is that he found possible investors and forwarded them on to the

company. He was compensated for those activities. We do not find there to be any basis for a due diligence defence with respect to Weiss.

Carswell Investor

- [99] Each of SunCentro and Carswell are alleged to have directly contravened section 61 with respect to the distribution to the one investor that Carswell introduced.
- [100] SunCentro took the steps as set out in paragraph 93. Again we find the totality of those steps to be reasonable steps for the company to have taken. Carswell was responsible for vouching for the accuracy of the information regarding the one investor that he introduced to SunCentro. We find that SunCentro has established a due diligence defence for that one investor.
- [101] There is no evidence that Carswell took reasonable steps to avoid a contravention of section 61 with respect to this one investor. Carswell has no due diligence defence with respect to this investor.

b) Contraventions of section 61 by virtue of section 168.2

- [102] Having found that YDS, with respect to 19 investors, and SunCentro, with respect to 19 investors, contravened section 61, we must now determine if Khan and Kato, with respect to YDS, and Helina and Carswell, with respect to SunCentro, should be liable under section 61 by virtue of the operation of section 168.2. That section provides that a director or officer of a company may be held liable for a contravention of the Act where that director or officer has “authorized, permitted or acquiesced” in the contraventions of the Act committed by the corporation.
- [103] In this case, there is no evidence to contradict the Statements of Fact signed by Kato and Khan that they authorized, permitted or acquiesced in YDS’ contraventions of section 61.
- [104] We find that Khan and Kato are liable under section 168.2 for YDS’ contraventions of section 61. In this case, this finding is not material as Khan and Kato have also admitted, and we have found no due diligence defence to these admissions, to directly contravening section 61 with respect to those same distributions.
- [105] We also find that Helina and Carswell authorized, permitted or acquiesced in 19 of SunCentro’s contraventions of section 61 (i.e. the investors introduced to SunCentro through YDS). The evidence was clear that Helina and Carswell were responsible for much of the capital raising activities of SunCentro. Again, this finding is not material in this case as Helina and Carswell have admitted, and we have found no due diligence defence to these admissions, to directly contravening section 61 with respect to those same distributions.

c) Summary

- [106] In summary, we find the respondents liable as follows:
- a) SunCentro contravened section 61 of the Act with respect to the issuance of securities to 19 investors in the amount of US\$ 165,500;

- b) Carswell directly contravened section 61 of the Act with respect to the issuance of securities to 20 investors in the amount of US\$ 171,500;
- c) Helina directly contravened section 61 of the Act with respect to the issuance of securities to 19 investors in the amount of US\$ 165,500;
- d) YDS contravened section 61 of the Act with respect to the issuance of securities to 19 investors in the amount of US\$ 165,500;
- e) Kato directly contravened section 61 of the Act with respect to the issuance of securities to 19 investors in the amount of US\$ 165,500;
- f) Khan directly contravened section 61 of the Act with respect to the issuance of securities to 19 investors in the amount of US\$ 165,500;
- g) Weiss contravened section 61 of the Act with respect to the issuance of securities to 6 investors in the amount of US\$78,025;
- h) Carswell is liable under section 168.2 of the Act for all 19 of SunCentro's contraventions of section 61 in the amount of US\$165,500;
- i) Helina is liable under section 168.2 for all 19 of SunCentro's contraventions of section 61 in the amount of US\$165,500; and
- j) Kato and Khan are liable under section 168.2 of the Act for all 19 of YDS' contraventions of section 61 in the amount of US\$165,500.

V. Sanctions

a) Positions of the parties

[107] The executive director seeks the following sanctions against the respondents (based on the executive director's liability submissions made prior to our determination of the number of actual contraventions of section 61 of the Act against each of the respondents):

SunCentro

- a) permanent cease trade orders; and
- b) under section 161(1)(g), to pay to the Commission US\$249,525.

Carswell

- a) market prohibitions lasting for five years; and
- b) under section 162, to pay to the Commission \$10,000.

Helina

- a) market prohibitions lasting for three years; and
- b) under section 162, to pay to the Commission \$5,000.

YDS

- a) a cease trade order lasting for two years; and
- b) under section 161(1)(g), to pay to the Commission US\$4,020 and \$11,755.

Kato

- a) market prohibitions lasting for two years; and
- b) under section 162, to pay to the Commission \$2,000.

Khan

- a) market prohibitions lasting for two years; and
- b) under section 162, to pay to the Commission \$2,000.

Weiss

- a) market prohibitions lasting for two years;
- b) under section 161(1)(g), to pay to the Commission US\$5,000; and
- c) under section 162, to pay to the Commission \$2,000.

[108] The respondents' submit that we consider the unique circumstances of this case in consideration of the appropriate sanctions and that, in particular, we consider whether financial sanctions of the size requested by the executive director are necessary and in the public interest.

b) Factors

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

[110] In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, the Commission identified 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:

- 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

[111] Contraventions of section 61 of the Act are inherently serious. This section is one of the Act's foundational requirements for protecting investors and preserving the integrity of the capital markets. It requires that those who wish to distribute securities file a prospectus with the Commission. This is intended to ensure that investors receive the information necessary to make an informed investment decision.

[112] The legislation provides exemptions from section 61 if the issuer and those who trade in securities follow certain specified requirements. These requirements are designed to protect investors and markets, so persons who intend to rely on the exemptions must ensure that they are met.

[113] In this case, all of the investors did sign subscription agreements that confirmed the factual basis for the availability of an exemption from the prospectus requirements. However, it is clear that the respondents, with respect to varying numbers of the investors, did not ensure that the requirements of the exemptions were met with the result that those investors were denied the protections intended by the Act.

Harm to investors

[114] SunCentro raised approximately US\$250,525 from the 26 investors and those investors have all lost their investments.

Enrichment

[115] SunCentro obviously benefitted from the funds raised from the investors.

[116] The evidence is that YDS received payments from the funds raised by SunCentro. Those funds were received by YDS for a variety of business reasons; however, the evidence is clear that YDS received US\$4,020 and \$11,755 as finders fees for referring the 19 investors to SunCentro.

[117] Weiss received at least US\$5,000 as finders fees in connection with referring the six investors to SunCentro.

[118] There is no evidence that any of Helina, Carswell, Kato or Khan were in any way enriched by the illegal distributions. In fact, the evidence suggests that YDS, Kato and Khan were all investors in SunCentro and that those investments have been lost.

Aggravating or mitigating factors; past misconduct

[119] None of the respondents has a history of securities regulatory misconduct.

- [120] There are no aggravating factors in this case.
- [121] There are significant mitigating circumstances in this case.
- [122] All of the respondents admitted the facts associated with the contraventions of section 61 prior to the commencement of the liability hearing.
- [123] Although we have found that the efforts of SunCentro and its directors were insufficient, with respect to certain of the distributions, to establish a defence of due diligence, we do find that those efforts represent a significant mitigating circumstance.

Specific and general deterrence

- [124] The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

Previous Orders

- [125] The executive director directed us to two previous decisions of this Commission: *Re Wireless Wizard*, 2015 BCSECCOM443 and *Re Waters*, 2014 BCSECCOM 369.
- [126] In *Wireless*, a number of respondents were found liable, with respect to a varying number of distributions, for contraventions of sections 34 and 61 of the Act with respect to issuances of securities totalling \$57,500 to two investors. The respondents were found to have been careless with respect to determining the factual basis for the prospectus and registration exemptions that they were relying upon for the issuances of securities. The panel in that case issued a permanent cease trade order on the corporate issuer and market prohibitions of between one and five years on the individual respondents. The respondent that received a five year market prohibition had a significant aggravating factor in that he had a previous history of securities regulatory misconduct. The panel also ordered administrative penalties of between \$5,000 and \$10,000 against the individual respondents. Again, the administrative penalty of \$10,000 was ordered against the individual respondent with the history of securities regulatory misconduct.
- [127] There are a number of similarities between the circumstances in *Wireless* and in the case before us. The number of investors and the amounts raised are higher in the case before us. However, there is a lack of any aggravating factors in this case and there are significant mitigating factors in this case with the early admissions and the evidence of due diligence efforts (even if incomplete) which were not found in *Wireless*.
- [128] In *Waters*, a respondent was found to have contravened sections 34 and 61 of the Act by conducting acts in furtherance of trades to 45 investors for proceeds of \$312,977. The evidence was that there was no direct harm to the investors nor did the respondent enrich himself through these trades. However, there were a number of significant aggravating factors in that the respondent had a history of securities regulatory misconduct and was not remorseful for his actions and, in fact, was abusive of Commission staff. Further, the respondent conducted preliminary due diligence investigations on the availability of prospectus and registration exemptions for the issuances of securities and learned that

there were issues with the availability of exemptions. Notwithstanding, the respondent chose not to conduct any further investigations. The Commission panel ordered that Waters be subject to market prohibitions of six years and that he pay an administrative penalty of \$20,000.

- [129] While there is a similarity between *Waters* and the case before us in the number of investors and the size of the total amounts invested, there are not a lot of other comparisons between the respondent in *Waters* and those before us.

VI. Orders

Market prohibitions

- [130] We agree with the executive director that SunCentro should be subject to a permanent cease trade order. There have been a significant number of investors who have invested in the securities of that entity in a manner that is not consistent with securities laws. We do not think it to be in the public interest for the securities of SunCentro to continue to trade.
- [131] The executive director submits that there are significant mitigating factors in this case and that that is reflective of the sanctions that he is seeking. However, the executive director suggests that the misconduct of Carswell is the most serious in that he behaved in a manner that was the most reckless with respect to contraventions of securities laws. Further, the executive director suggests that the misconduct of Helina, while less significant than that of Carswell, is more significant than that of YDS, Khan and Kato. We presume this position arises as a consequence of executive director's submission that Helina be liable, pursuant to section 168.2, for all of the illegal distributions conducted by SunCentro – this would have made the number and size of the illegal distributions for which he was liable greater than that of YDS, Khan and Kato.
- [132] The executive director seeks market prohibitions of five years for Carswell, three years for Helina, and two years for each of YDS, Khan, Kato and Weiss.
- [133] We agree that the misconduct of Carswell is the most serious of all of the respondents. He introduced an investor to SunCentro and attempted to use the close friends, family or close business associate exemption for that investor when there was no good basis for doing so. Helina, as a director of SunCentro, had a significant role to play in its distributions of securities. This role was more significant than that of any of the finders.
- [134] We order that Carswell be subject to market prohibitions of four years, that Helina be subject to market prohibitions for three years and that each of YDS, Khan, Kato and Weiss be subject to market prohibitions of two years. The roles of all of the finders were similar in terms of the severity of the misconduct.
- [135] We note that the executive director asked only for an order that YDS not trade in securities. YDS' role in the misconduct was no different than that of any other finder. Therefore, the market prohibition orders against it should mirror, to the extent possible

those of the other finders. However, we will not make orders that will prohibit YDS from dealing with its own security holders.

Section 161(1)(g) orders

- [136] Under section 161(1)(g) of the Act, where a person has not complied with a provision of the Act, the Commission may order that person to pay to the Commission “any amount obtained..., directly or indirectly, as a result of the failure to comply or the contravention”.
- [137] The executive director has asked for orders under section 161(1)(g) against SunCentro in the amount of US\$249,525, Weiss in the amount of US \$5,000 and YDS in the amounts of US\$4,020 and \$11,755. The executive director has not asked for orders under section 161(1)(g) against any of the other respondents.

SunCentro

- [138] Consistent with the principles summarized in *Re Michaels*, 2014 BCSECCOM 457 at paragraph 42 and the analysis set out in the majority decision in *Streamline Properties Inc (Re)*, 2015 BCSECCOM 66 with regard to the interpretation and breadth of section 161(1)(g), we agree with the executive director that it is in the public interest to make an order against SunCentro under section 161(1)(g) for the full amount SunCentro obtained in contravention of the Act. That amount is the US\$165,500 obtained by SunCentro from the 19 YDS investors for which SunCentro has no due diligence defence.
- [139] We do not find payment of the full amount raised by SunCentro in contravention of section 61 of the Act to be inequitable or punitive. None of the YDS investors have been reimbursed. Even accepting that the full amount raised was used for the stated purpose, the YDS investors were denied the protections afforded by section 61 of the Act and were harmed as a result of SunCentro’s contraventions of that provision of the Act. There are no factors that would justify ordering less than the full amount obtained as result of the illegal distributions to the YDS investors.
- [140] We therefore make an order under section 161(1)(g) against SunCentro in the amount of US\$165,500.

Weiss and YDS

- [141] We agree with the executive director that orders under section 161(1)(g) should be made against Weiss and YDS for the amounts that they received as finders fees on the illegal distributions that they participated in. This is consistent with the findings of a Commission panel in *Michaels* where the respondent was ordered under section 161(1)(g) to pay to the Commission the gross amount of the commissions that he received for contraventions of section 34 of the Act. It is not in the public interest for those who assist issuers in capital raising efforts to profit from those activities when the capital raising is not done in compliance with securities laws.
- [142] We therefore make orders under section 161(1)(g) against Weiss in the amount of US\$5,000 and against YDS in the amounts of US\$4,020 and \$11,755.

Administrative penalties

- [143] The executive director has asked us to make orders under section 162 of the Act against the respondents in the following amounts: Carswell - \$10,000; Helina - \$5,000; Kato - \$2,000; Khan - \$2,000 and Weiss - \$2,000.
- [144] The executive director has not asked us to make any orders under section 162 against either of SunCentro or YDS.
- [145] The size of the illegal distributions in this case are more similar to that found in *Waters* but the conduct of the respondents (including the absence of aggravating factors and the presence of significant mitigating factors) is much more similar to that of the respondents in *Wireless*.
- [146] Having regard to all of the mitigating factors in this case and all of the other facts and circumstances, we make the following orders under section 162 of the Act: Carswell - \$5,000; Helina - \$3,000; Kato - \$2,000; Khan - \$2,000 and Weiss \$2,000.

VII. Summary

- [147] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

SunCentro

- (a) under section 161(1)(b) of the Act, that all persons cease trading permanently, and be permanently prohibited from purchasing any SunCentro securities;
- (b) under section 161(1)(b) of the Act, that SunCentro permanently cease trading in and be permanently prohibited from purchasing any securities or exchange contracts; and
- (c) under section 161(1)(c) of the Act, that the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to SunCentro;
- (d) under section 161(1)(g) of the Act, that SunCentro pay to the Commission US\$165,500, being the amount obtained, directly or indirectly, as a result of its contravention of the Act.

Carswell

- (e) under section 161(1)(d)(i) and (ii) of the Act, that Carswell resign any position that he holds as a director or officer of any issuer and is prohibited from becoming or acting as a director or officer of any issuer, other than an issuer all the securities of which are owned beneficially by him or members of his immediate family, until the latter of four years from the date of the decision or the date the amount in the paragraph below has been paid;

- (f) under sections 161(1)(b), (c) and (d)(iii) to (v):
- i. that Carswell cease trading in, and is prohibited from purchasing, any securities, except through his own account at one registered dealer or one registered adviser, provided that a copy of this order is provided to the registered dealer or advisor.
 - ii. the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Carswell except for those exemptions necessary to enable Carswell to trade or purchase securities in his own account;
 - iii. Carswell be prohibited from becoming or acting as a registrant or promoter;
 - iv. Carswell is prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and
 - v. Carswell is prohibited from engaging in investor relations activities;
- until the latter of four years from the date of the decision or the date the amount in the paragraph below has been paid; and
- (g) under section 162, Carswell pay an administrative penalty of \$5,000.

Helina

- (h) under section 161(1)(d)(i) and (ii) of the Act, that Helina resign any position that he holds as a director or officer of any issuer and is prohibited from becoming or acting as a director or officer of any issuer, other than an issuer all the securities of which are owned beneficially by him or members of his immediate family, until the latter of three years from the date of the decision or the date the amount in the paragraph below has been paid;
- (i) under sections 161(1)(b), (c) and (d)(iii) to (v):
- i. that Helina cease trading in, and is prohibited from purchasing, any securities, except through his own account at one registered dealer or one registered adviser, provided that a copy of this order is provided to the registered dealer or advisor;
 - ii. the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Helina except for those exemptions necessary to enable Helina to trade or purchase securities in his own account;
 - iii. Helina be prohibited from becoming or acting as a registrant or promoter;
 - iv. Helina is prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and
 - v. Helina is prohibited from engaging in investor relations activities;

until the latter of three years from the date of the decision or the date the amount in the paragraph below has been paid; and

- (j) under section 162, Helina pay an administrative penalty of \$3,000.

YDS

- (k) under sections 161(1)(b) and (d)(iii) to (iv):

- i. that YDS cease trading in and be prohibited from purchasing any securities or exchange contracts;
- ii. YDS be prohibited from becoming or acting as a registrant or promoter; and,
- iii. YDS is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

until the latter of two years from the date of the decision or the date the amounts in the paragraph below have been paid; and

- (l) under section 161(1)(g) of the Act that YDS pay to the Commission US\$4,020 and \$11,755, being the amounts obtained, directly or indirectly, as a result of its contravention of the Act.

Kato

- (m) under section 161(1)(d)(i) and (ii) of the Act, that Kato resign any position that he holds as a director or officer of any issuer and is prohibited from becoming or acting as a director or officer of any issuer, other than an issuer all the securities of which are owned beneficially by him or members of his immediate family, until the latter of two years from the date of the decision or the date the amount in the paragraph below has been paid;

- (n) under sections 161(1)(b), (c) and (d)(iii) to (v):

- i. that Kato cease trading in, and is prohibited from purchasing, any securities, except through his own account at one registered dealer or one registered adviser, provided that a copy of this order is provided to the registered dealer or adviser.
- ii. the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Kato except for those exemptions necessary to enable Kato to trade or purchase securities in his own account;
- iii. Kato be prohibited from becoming or acting as a registrant or promoter;
- iv. Kato is prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and
- v. Kato is prohibited from engaging in investor relations activities;

until the latter of two years from the date of the decision or the date the amount in the paragraph below has been paid; and

- (o) under section 162, Kato pay an administrative penalty of \$2,000.

Khan

- (p) under section 161(1)(d)(i) and (ii) of the Act, that Khan resign any position that he holds as a director or officer of any issuer and is prohibited from becoming or acting as a director or officer of any issuer, other than an issuer all the securities of which are owned beneficially by him or members of his immediate family, until the latter of two years from the date of the decision or the date the amount in the paragraph below has been paid;

- (q) under sections 161(1)(b), (c) and (d)(iii) to (v):

- i. that Khan cease trading in, and is prohibited from purchasing, any securities, except through his own account at one registered dealer or one registered adviser, provided that a copy of this order is provided to the registered dealer or advisor;
- ii. the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Khan except for those exemptions necessary to enable Khan to trade or purchase securities in his own account.
- iii. Khan be prohibited from becoming or acting as a registrant or promoter;
- iv. Khan is prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and
- v. Khan is prohibited from engaging in investor relations activities;

until the latter of two years from the date of the decision or the date the amount in the paragraph below has been paid; and

- (r) under section 162, Khan pay an administrative penalty of \$2,000.

Weiss

- (s) under section 161(1)(d)(i) and (ii) of the Act, that Weiss resign any position that he holds as a director or officer of any issuer and is prohibited from becoming or acting as a director or officer of any issuer, other than an issuer all the securities of which are owned beneficially by him or members of his immediate family, until the latter of two years from the date of the decision or the date the amounts in the paragraphs below have been paid;

- (t) under sections 161(1)(b), (c) and (d)(iii) to (v):

- i. that Weiss cease trading in, and is prohibited from purchasing, any securities, except through his own account at one registered dealer or

- one registered adviser, provided that a copy of this order is provided to the registered dealer or adviser;
- ii. the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Weiss except for those exemptions necessary to enable Weiss to trade or purchase securities in his own account;
 - iii. Weiss be prohibited from becoming or acting as a registrant or promoter;
 - iv. Weiss is prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and
 - v. Weiss is prohibited from engaging in investor relations activities;

until the latter of two years from the date of the decision or the date the amounts in the paragraphs below have been paid;

- (u) under section 161(1)(g), Weiss pay to the Commission US \$5,000, being the amount obtained, directly or indirectly, as a result of his contravention of the Act; and
- (v) under section 162, Weiss pay an administrative penalty of \$2,000.

Joint and Several Liability

[148] With respect to the various amounts ordered under section 161(1)(g), the various respondents shall be obligated to make payments as follows:

- a) with respect to US\$5,000, Weiss shall be severally liable for this amount;
- b) with respect to \$US4,020 and \$11,755, YDS and SunCentro shall be jointly and severally liable for this amount;
- c) with respect to the remainder of US\$165,500 owing after payment of the \$US4,020 and \$11,755, SunCentro shall be severally liable.

February 20, 2017

For the Commission

Gordon L. Holloway
Commissioner

Suzanne K. Wiltshire
Commissioner

Reasons for Decision of Nigel P. Cave, Vice Chair

- [149] I concur with the findings and decision of the majority in all respects other than the disgorgement order against SunCentro under section 161(1)(g).
- [150] I would not make any disgorgement order pursuant to section 161(1)(g) against SunCentro.
- [151] In considering whether disgorgement orders are appropriate against the respective respondents. I approach the question in the manner set out in my dissent in *Streamline Properties Inc. (Re)*, 2015 BCSECCOM 66.
- [152] The key tenet of that analysis is to view section 161(1)(g) as a disgorgement provision and not a compensation provision – the intent of a disgorgement order is to take away ill-gotten financial benefits from a wrongdoer, not compensate victims.
- [153] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).
- [154] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.
- [155] In this case, the evidence is clear that SunCentro obtained US\$165,500 arising from its misconduct. Therefore, a disgorgement order could be made against SunCentro.
- [156] I would not make a disgorgement order against SunCentro. There is no evidence to suggest that SunCentro used the funds raised from the illegal distributions in any manner that is inconsistent with investor expectations. Therefore, it is not in the public interest to make a disgorgement order against SunCentro.

February 20, 2017

Nigel P. Cave
Vice Chair