2010 BCSECCOM 163

Solara Technologies Inc. and William Dorn Beattie

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	Bradley Doney	Commissioner
	Shelley C. Williams	Commissioner
Hearing Dates	November 23, 24, 27 and December 4, 2009	
Submissions Completed	January 14, 2010	
Date of Findings	March 26, 2010	

Appearing

Shawn R. McColm	For the Executive Director
Patricia A.A. Taylor	For Solara Technologies Inc. and William Dorn Beattie

Findings

I Introduction

¶ 1 This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

¶ 2 In a notice of hearing issued March 11, 2009 (2009 BCSECCOM 149) the executive director alleges that, between August 2004 and August 2007, Solara Technologies Inc. and William Dorn Beattie contravened the Act by:

- trading and distributing securities without being registered and without filing a prospectus,
- making misrepresentations, and
- filing false or misleading information with the Commission.

¶ 3 The executive director also alleges that, in August and October 2007, Solara and Beattie contravened the executive director's June 27, 2007 order that all trading in Solara securities cease.

¶ 4 On May 13, 2008, Beattie attended a compelled interview with Commission staff. He was sworn and was represented by counsel. Beattie also attended the hearing and testified. He was represented by different counsel at the hearing.

¶ 5 On November 23, 2009, the first day of the hearing, the parties signed an agreed statement of facts.

II Analysis and Findings

A Respondents' submissions on evidence

¶ 6 In their submissions the respondents complain that the executive director did not enter as exhibits in the hearing several documents that they believe are relevant. All of these documents they received as part of the executive director's required disclosure.

¶ 7 This is an unusual submission. We wonder whether the respondents have confused the executive director's pre-hearing disclosure obligation with the process for entering evidence at the hearing itself.

¶ 8 The executive director must disclose all relevant information to respondents before a hearing. The executive director must also identify, before the hearing, the documents he intends to rely on as evidence at the hearing.

¶ 9 There is no obligation on the executive director, or indeed any other party, to enter as evidence any particular documents, or to call any particular witness. It is entirely within the executive director's discretion to enter the documents and call the witnesses he considers necessary to prove the allegations in the notice of hearing.

¶ 10 The respondents knew the relevant information that was disclosed to them by the executive director. That information included the documents they now say are relevant and should be before us. They knew what documents the executive director intended to rely on as evidence at the hearing. They were entitled to enter any other evidence at the hearing they considered relevant to their defence. They did so, both in presenting their own case and in cross-examining witnesses called by the executive director. They did not enter as evidence at the hearing the documents they now say are relevant.

¶ 11 These documents are therefore not part of the record before us and we did not consider them.

¶ 12 In reply to the respondents' submissions, the executive director said he would not object to an application by the respondents to reopen their case in order to enter the documents they say should be before us. The respondents have not done so.

B Solara's distributions of securities

¶ 13 Beattie incorporated Solara on March 5, 2004 to continue the business of a previous company that he controlled, coreGenesis Systems Inc. (His intention was to bring the coreGenesis shareholders into Solara, although this had not happened at the time of the hearing.)

¶ 14 Solara's business was the development of technology for the vending machine business. It appears from the evidence that Solara was operating as a legitimate business. Solara was carrying on business at the time of the hearing.

¶ 15 This hearing is about how Solara raised capital for its business.

¶ 16 Neither Solara nor Beattie have ever been registered, and Solara has never filed a prospectus. The executive director alleges that the respondents contravened sections 34(1) and 61(1).

¶ 17 That Solara and Beattie traded Solara securities in the course of a distribution is not seriously in issue (the respondents made no submissions on these points). The issue is whether Solara had exemptions available from the registration and prospectus requirements in making its distributions.

¶ 18 In the agreed statement of facts, the respondents agree that Solara received over $790,000 from 46 investors in 53 trades, and that the funds Solara received were all for the sale of Solara common shares, other than $25,000 for the sale of a Solara convertible debenture. They also agree that Solara filed exempt distribution reports for all but 6 of the 53 trades, and agree to the dates of the trades and the exemption Solara relied upon for each trade for which an exemption was claimed.

¶ 19 Tables 1 through 4 in the discussion below summarize this information. Several investors invested more than once; each investor's initial identifier is consistent among the four tables.

¶ 20 Beattie is Solara's president. During the relevant period he was its sole registered director and officer. He ran its affairs and made all of its significant business decisions.

¶ 21 Beattie was actively involved in Solara's capital raising. He:

- contributed to, and was responsible for, the content of Solara's "Confidential Business Plan" and its offering memorandum
- organized meetings for potential investors and made presentations to them about Solara's business to solicit investment in Solara
- received investors' funds and deposited them to Solara's bank account
- received investors' subscription documents and caused Solara to issue securities to investors.

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

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

¶ 24 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)".

¶ 25 Section 1(1) defines "distribution" as "a trade in a security of an issuer that has not been previously issued".

¶ 26 Solara's shares and the debenture are securities and Solara traded in them by receiving valuable consideration for them. Beattie's active participation in Solara's capital raising activities were acts in furtherance of Solara's trades. He therefore also traded Solara shares.

¶ 27 The shares and the debenture Solara sold to investors were not previously issued, so Solara's and Beattie's trades were distributions.

¶ 28 We find that Solara and Beattie, in the absence of available exemptions, contravened sections 34(1) and 61(1) of the Act when they distributed the Solara shares and debenture.

C Solara's purported use of the exemptions

1 General

¶ 29 Solara purported to rely on three exemptions: accredited investor; family, friends and business associates; and offering memorandum.

¶ 30 The three exemptions are in two rules: Multilateral Instrument 45-103 *Capital Raising Exemptions*, which was the applicable law until September 14, 2005, when National Instrument 45-106 *Prospectus and Registration Exemptions* came into force.

¶ 31 There are only a few small differences between MI45-103 and NI45-106 and their respective companion policies (MI45-103CP and NI45-106CP) in the language that describes the relevant exemptions, and in the requirements necessary to use them. None of these differences is material to our findings.

¶ 32 It is the responsibility of a person trading securities to ensure that the trade complies with the Act. This is so whether the person chooses to comply by filing a prospectus, or by using an available exemption.

¶ 33 When the person chooses to rely on an exemption, two considerations are relevant to the responsibility to ensure compliance with the Act. First, the person trading has the onus of proving that the exemption is available (see *Bilinski* 2002 BCSECCOM 102 and *Limelight Entertainment Inc.* 31 OSCB 1727). Second, it is unlikely an issuer will be able to prove that an exemption was available at the time of the trade if it does not have documentation to prove it made a proper determination to that effect.

¶ 34 The companion policies to MI45-103 and NI45-106 provide guidance as to the steps an issuer can take to determine whether an exemption is available. The two policies are similar in substance; this is the language from NI45-106:

> "1.10 Responsibility for compliance
> A person trading securities is responsible for determining when an exemption is available. In determining whether an exemption is available, a person may rely on factual representations by a purchaser, provided that the person has no reasonable grounds to believe that those representations are false. However, the person trading securities is responsible for determining whether, given the facts available, the exemption is available. Generally a person trading securities under an exemption should retain all necessary documents that show the person properly relied upon the exemption.
>
> For example, an issuer distributing securities to a close personal friend of a director could require that the purchaser provide a signed statement describing the purchaser's relationship with the director. On the basis of that factual information, the issuer could determine whether the purchaser is a close personal friend of the director for the purposes of the exemption. The issuer should not rely merely on a representation: 'I am a close personal friend of a director'. Likewise, under the accredited investor exemption, the seller must have a reasonable belief that the purchaser understands the meaning of the definition of "accredited investor". Prior to discussing the particulars of the investment with the purchaser, the seller should discuss with the purchaser the various criteria for qualifying as an accredited investor and whether the purchaser meets any of the criteria.
>
> It is not appropriate for a person to assume an exemption is available. For instance a seller should not accept a form of subscription agreement that only states that the purchaser is an

> accredited investor. Rather the seller should request that the purchaser provide the details on how they fit within the accredited investor definition."

¶ 35 The respondents say that the exempt distribution reports Solara filed are evidence that the exemptions were available and, in the absence of conflicting evidence, are "determinative of the issue of the exemption claimed by the investor, and therefore the exemptions available to Solara."

¶ 36 This submission is utterly incorrect. The exemptions are not claimed by the investor – the investor is not the one who requires an exemption to trade. It is the issuer who requires the exemption, and so must satisfy itself that the exemption it wishes to rely on is available.

¶ 37 The determination of whether an exemption applies is a question of mixed law and fact. Many of the exemptions are not available unless certain facts exist, often known only to the investor. To rely on those facts to ensure that the exemption is available, the issuer must have a reasonable belief that 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 that make it a "close personal friendship" within the meaning of the exemption. If the issuer wishes to rely on the accredited investor exemption, it will need evidence about the details of the investor's financial circumstances that make the investor an "accredited investor".

¶ 39 Accordingly, a representation that merely asserts, with nothing else, that the investor is a close personal friend, or an accredited investor, is not sufficient to determine whether the exemption is available.

¶ 40 A representation by a representative of the issuer may not be sufficient evidence of compliance, even if that representation is informed by knowledge of the requirements of the exemption (for example, the criteria for close personal friendship). A representative of the issuer is not necessarily a disinterested party – it is in the issuer's interest that the exemptions be available to as many trades as possible. Corroborating evidence may be necessary to confirm the representative's assessment of the relationship.

¶ 41 The companion policies note the value of the issuer's retaining all necessary documents that show that the exemption was available to the issuer. Here, Solara either never had documents of that nature, or failed to retain them. In any event, the respondents did not produce them.

2 Accredited investor exemption

¶ 42 Table 1 summarizes the trades for which Solara purported to rely on the accredited investor exemption:

TABLE 1 – ACCREDITED INVESTOR EXEMPTION

NO.	DATE	INVESTOR	AMOUNT
1	2005-Feb-08	AT&JT	$ 4,000
2	2005-Feb-08	AT&JT	$ 7,000
3	2005-Nov-17	BB&FB	$50,000
4	2005-Dec-01	RR	$10,000
5	2006-Feb-10	DK	$15,000
	Total		**$86,000**

¶ 43 Sections 5.1(1) and (2) of MI45-103 and sections 2.3(1) and (2) of NI45-106 remove the registration and prospectus requirements if the purchaser purchases the security as principal and is an accredited investor. Under the definition of "accredited investor" in the instruments, an individual qualifies as an accredited investor by meeting high net worth or high income thresholds.

¶ 44 In its exempt distribution report Solara identified the accredited investor exemption as the one it relied upon to make distributions to these investors. As noted earlier, this is merely an assertion of their status, not evidence of it.

¶ 45 There is no evidence that any of the investors listed in Table 1 qualified as accredited investors at the time of the trades.

¶ 46 The respondents say that Solara relied on the representations of BB, FB, RR, and DK that they qualified as accredited investors. There is no evidence of these representations: whether they were made and, if so, when or how they were made.

¶ 47 The evidence is that AT and JT did not qualify as accredited investors. In a telephone interview with AT a Commission staff investigator asked him questions about whether he and JT qualified as accredited investors. AT gave answers about their net worth and income showing clearly that they did not.

¶ 48 We find that the accredited investor exemption was not available for the trades listed in Table 1. We find that the respondents contravened sections 34(1) and 61(1) in making those trades.

3 Family, friends or business associates exemption

¶ 49 Table 2 summarizes the trades for which Solara purported to rely on the family, friends, or business associates exemption:

TABLE 2 – FAMILY, FRIENDS, OR BUSINESS ASSOCIATES EXEMPTION

NO.	DATE	INVESTOR	AMOUNT
1	2004-Aug-08	AT&JT	$30,000
2	2004-Sep-10	PS	$12,877
3	2004-Nov-29	PS	$14,997
4	2005-Mar-14	DM	$39,606
5	2005-Mar-28	GP	$ 5,973
6	2005-Apr-05	PM	$91,907
7	2005-May-18	DM	$ 7,703
8	2005-Jun-17	EP&LP#1	$ 6,080
9	2005-Jun-25	EB	$ 5,000
10	2005-Aug-16	PS	$14,118
11	2005-Sep-27	TS#1	$ 5,000
12	2005-Dec-19	GH	$10,000
13	2006-Feb-01	BA&TA	$ 5,000
14	2006-Feb-01	KW (debenture)	$25,000
15	2006-Feb-02	PS	$11,208
16	2006-Aug-02	LP#2	$17,700
	Total		**$297,169**

¶ 50 Sections 3.1(1) and (2) of MI45-103 and sections 2.5(1) and (2) of NI45-106 remove the registration and prospectus requirements if the purchaser is a family member, close personal friend, or close business associate of a director, executive officer (in MI45-103, senior officer), or founder of the issuer.

Meaning of "close personal friend" and "close business associate"

¶ 51 The companion policies to MI45-103 and NI45-106 state the regulators' views of the meaning of "close personal friend" and "close business associate" of a person who is a director, officer or founder. These policies say that the relationship must, at the time of the trade, be of a nature that the investor can assess the person's capabilities and trustworthiness. An investor purportedly a close personal friend must have known that person well enough, and have known them for a sufficient period of time, to make that assessment. An investor purportedly a close business associate must have had sufficient prior business dealings with the person to make the assessment.

¶ 52 The companion policies say "the relationship . . . must be direct. For example, the exemption is not available to a close personal friend of a close personal friend of a director of the issuer."

¶ 53 In our opinion, these are correct guidelines for the availability of the exemptions.

¶ 54 For Solara to be able to rely on this exemption for the trades in Table 2, those investors would have to be family, close personal friends, or close business

associates of Beattie, or of another director, officer, or founder of Solara. The respondents say that person is Gaele McErvel, who they say was a *de facto* officer and director of Solara, and one of its founders. We consider that submission below.

Relationships with Beattie

¶ 55 Only two of the investors in Table 2 had a relationship with Beattie at the time of the trade. One, GH, Beattie describes as a sister of a close friend. That does not establish a close personal friendship between her and Beattie.

¶ 56 The other, LP#2, Beattie says he met as a friend of a friend. He says he met LP#2 about two years before the interview. The interview was in May 2008 and LP#2's trade was in August 2006, which means that the two would have met about the time of the trade. His evidence does not establish that he and LP#2 were close personal friends. There is no other evidence about the relationship.

¶ 57 Neither of GH nor LP#2 had a relationship with McErvel.

¶ 58 We find that the family, friends, and business associates exemption was not available for the trades to GH and LP#2. We find that the respondents contravened sections 34(1) and 61(1) in making those trades.

Relationships with McErvel

¶ 59 For Solara to be able to rely on this exemption for the remaining trades in Table 2, those investors would have to be family, close personal friends, or close business associates of McErvel, who would also have to be a director, executive (or senior) officer, or founder of Solara.

¶ 60 In our opinion, whether McErvel was a director, officer, or founder of Solara, is relevant to only two investors in Table 2: DM, who is McErvel's son, and PM, her husband. This is because there is insufficient evidence to establish that any of the remaining investors were close personal friends or close business associates of McErvel.

¶ 61 The companion policies say that for a relationship to be a close personal friendship, the relationship must put the investor in a position to "assess the capabilities and trustworthiness" of the individual. We agree. The rationale behind the exemption is that the trust inherent in the investor's close relationship with the director, officer or founder, and the information available to the investor about the investment as a result of that relationship, substitute for the protections afforded by the registration and prospectus requirements.

¶ 62 We have no direct evidence from any investors, even those who said they knew McErvel, sufficient to determine whether their relationship was a "close personal" friendship. In the absence of that evidence we cannot find that they knew her long enough and well enough to determine her capabilities and trustworthiness.

¶ 63 McErvel testified that AT and JT were "good friends". In a telephone interview with Commission staff, AT described McErvel as "a mutual friend" of his and his wife's and said they had known her for 25 years. This description speaks to the duration of the friendship, but not its nature. Was it a close personal friendship for the purposes of the exemption? We do not know – there is no evidence on the point before us and there is no other evidence about the relationship.

¶ 64 McErvel testified that investor PS is a close personal friend, but there is no evidence about her understanding of that term, or from PS or any other source about the relationship.

¶ 65 McErvel testified that she did not know GP, EP, or LP#1. She said GP was a friend of investors JM#1 and KZ (listed in Table 3 below) and EP and LP#1 are his parents. There is no other evidence about these relationships.

¶ 66 McErvel testified that she did not know EB. She said he responded to a newspaper advertisement. There is no other evidence about the relationship.

¶ 67 McErvel testified she did not know TS#1. There is no other evidence about the relationship.

¶ 68 McErvel described BA and TA as "casual acquaintances". In a telephone interview with Commission staff, BA confirmed this, saying, "Our relationship was casual and businesslike."

¶ 69 McErvel described KW as a former teaching colleague. There is no other evidence about the relationship.

¶ 70 We find that the family, friends, and business associates exemption was not available for the trades listed in Table 2, except those to DM and PM (McErvel's son and husband), because there is no evidence that any of the investors in those trades were close personal friends or close business associates of McErvel. We find that the respondents contravened sections 34(1) and 61(1) in making those trades.

McErvel's role at Solara

¶ 71 Whether McErvel was a director, officer or founder of Solara is relevant to whether the exemption was available for the trades to DM and PM. It is also

relevant to the respondents' submissions that some of those for whom Solara relied on the offering memorandum exemption were also family, close personal friends or close business associates of McErvel's.

¶ 72 We considered the documentary evidence as well as testimony about McErvel's role at Solara from her, from Beattie, and from others who worked at Solara.

¶ 73 McErvel was a resident of Golden, British Columbia. Her association with Beattie and Solara began with her son's investment in coreGenesis. She, her husband, and other family members also invested in coreGenesis. Others from Golden also became coreGenesis investors.

¶ 74 Throughout 2002 and 2003 she had what she describes as "sporadic" contact with Beattie to keep current with the company's business.

¶ 75 In April 2004 Beattie approached McErvel and her husband to loan Solara about five or six thousand dollars for a kiosk at a trade show in Las Vegas. They decided to do so because they thought "it might be the only way, kind of an insurance policy, as far as getting a return on our previous investment." Solara repaid the loan, although not for several months. During the period that the McErvels were awaiting payment, McErvel was in more frequent contact with Beattie as she was concerned about being repaid.

¶ 76 In the early fall of 2004, Beattie organized a series of meetings of coreGenesis investors about his plan for coreGenesis to transfer its business and technology to Solara, and for the coreGenesis shareholders to become shareholders in Solara. Beattie asked McErvel to organize a similar meeting in Golden, which she did.

¶ 77 At Beattie's request, McErvel set up about another five or six meetings in November 2004 at her home in Golden where Beattie made presentations to potential Solara investors. At these meetings McErvel introduced Beattie, who described Solara's proposed business and technology and distributed a "Confidential Business Plan", subscription agreements and investor risk acknowledgement forms.

¶ 78 After the November meetings, McErvel became more involved with Solara. She had just retired from her career as a school teacher. Beattie says she told him she had been registered to sell securities (she had been registered to sell mutual funds for a couple of years in the mid-1980s) and "would be happy to take on the job, so I handed her the job, it was pretty much as simple as that."

¶ 79 McErvel says her role was not clearly defined. In his interview, Beattie described her role as being responsible for investor relations, and this is how he described her to others working at Solara. He says he left the money raising to her.

¶ 80 Whatever arrangement there was between McErvel and Solara, there was no contract and she was not paid. There appears to have been some sort of understanding that at some time in the future she would receive commissions or finder's fees, payable in shares, and possibly be paid a salary if Solara became profitable. McErvel in fact received no compensation during her involvement with Solara.

¶ 81 McErvel worked mostly out of her home, organizing investor meetings when Beattie asked her to do so. She booked conference rooms and contacted existing investors to invite them to meetings, and to ask them to bring others they thought might be interested. Sometimes she ran newspaper advertisements about the meetings.

¶ 82 McErvel handled the paperwork for many who became investors. She sent all documents and cheques to Beattie. Many of the investors were people she knew from the Golden area. She was the main point of contact for many of these investors. When they asked her questions, McErvel would get the answers from Beattie or from others working for Solara.

¶ 83 Jeffery Clark, Solara's technical project manager, testified that the technical aspects of Solara's business were "over her head". He said Solara's staff kept her updated "in a general way"; they would "try to explain to her in a reasonably non-technical way what they were trying to achieve".

¶ 84 Richard Pitt, Solara's chief technology officer, said,

> "She might ask some questions of, you know, for clarification from the point of view of trying to understand what it was we were doing. Why there might be something that was delaying, for instance, or why we were going off in a particular direction. But they weren't technical or major, they weren't something that was contributing to the design of anything, just simply informational questions."

¶ 85 From time to time McErvel assisted Solara's office staff with bookkeeping and other administrative tasks.

¶ 86 McErvel says she was not involved in Solara's day-to-day business decisions nor did she participate in any of its strategic decisions. She says that her time spent on

Solara's affairs was uneven; days and months would go by with nothing to do. She estimates the time she spent on Solara would average out to about three hours a week over the period she was involved.

¶ 87 Solara had weekly staff meetings at its office in Port Moody. They were primarily to address technical issues, although Beattie would sometimes attend to discuss existing and potential projects. McErvel did not attend all of the meetings. The evidence is consistent that she attended somewhere between 8 and 12 of them. Usually, she said, she did not make a special trip from Golden to attend the meetings, but would come if she were in the office for other reasons.

¶ 88 Beattie says she, along with all of Solara's staff, was involved in discussions about what projects to take on, and how to do so. She would, he says, "contribute to the general discussion". He said McErvel "was a prominent voice".

¶ 89 Others who attended the meetings testified that McErvel did "not have much of a role" in the weekly meetings, did not make much of a contribution, and "did not really participate" in the meetings.

¶ 90 Asked about his understanding of her role, Pitt said, "Well, she was an investor, she was interested in what was going on, and from the point of view of attending meetings it was mostly just curiosity more than anything else."

¶ 91 McErvel had no signing authority at Solara. Beattie says she did not negotiate or sign any contracts for Solara.

¶ 92 In his interview, Beattie says she was not responsible for any business decisions at Solara. McErvel and three others who worked at Solara testified that it was Beattie who made all of Solara's significant business decisions and controlled all of Solara's funds, which is consistent with Beattie's testimony.

¶ 93 McErvel attended four trade shows with Beattie. She says her role was to attract people to the Solara booth so that Beattie or another senior Solara representative could describe Solara's technology to them. She says the trade shows were both to sell the technology and to attract investors. She says she was not part of the presentation team because she did not understand the technology.

¶ 94 Sometimes the trade shows would lead to meetings with potential customers. McErvel usually attended those meetings. Sometimes, Solara would have to decide whether or not to take pursue a new project, either in addition to its existing projects, or instead of an existing project. Beattie sometimes discussed these decisions with McErvel and would ask her advice.

¶ 95 McErvel was never formally appointed as a director or officer nor did she consider herself to be one. Although in the respondents' submissions they argue that she was a *de facto* director or officer, Beattie testified in his interview that he did not consider her to be one, and that no one other than him had been a director or officer of Solara from its incorporation to the end of the relevant period.

¶ 96 A note to Solara's February 28, 2006 annual financial statements lists her and Clark under the heading "Advances from officers". Upon becoming aware of this in the summer of 2006, McErvel contacted Solara's corporate counsel and asked that the reference be corrected. She repeated the request at the Solara annual general meeting in September and the auditors acknowledged that she was not an officer. In his interview, Beattie said that neither McErvel nor Clark should have been shown as officers, because he was the only officer.

¶ 97 The others who worked at Solara and testified all said that Beattie never introduced McErvel as a director or officer, or as a person of authority.

¶ 98 Although Beattie testified in his interview that he did not regard McErvel as an officer or director of Solara, he said he regarded her as a founder because she "was very much involved in the management of [*sic*] and her job . . . description was to be investor relations, based on her being registered as a securities person to do so."

¶ 99 Some of the representative and acknowledgement forms signed by investors name McErvel as a founder. McErvel says that she entered her name in the appropriate space on the form as a founder only on Beattie's instructions, which Beattie denies.

¶ 100 McErvel ended her involvement with Solara in mid-2006.

¶ 101 Beattie describes a more comprehensive role for McErvel than we have set out above. However, the rest of the evidence does not support that description. We found McErvel's testimony on this point believable and consistent with the evidence of other witnesses and with the documentary evidence.

¶ 102 A determination of whether an individual is a *de facto* director or officer requires an analysis of the arrangement with the issuer, including the individual's apparent and actual authority, and the individual's actual activities and conduct in connection with the issuer's business and affairs.

¶ 103 McErvel's role in Solara's affairs fell well short of that of an officer or director. She had no formal arrangement, written or unwritten, governing her role. She had no title and was not paid. She spent very little time on Solara's affairs. She had

no authority to, and did not, negotiate agreements on behalf of Solara. She had no decision-making authority. Her knowledge of Solara's business affairs arose not from the exercise of duty or office – anything she knew she picked up incidentally from conversations with Beattie or others who worked at Solara.

¶ 104 Her role is consistent with how Beattie described it: investor relations. Although Beattie said he left the money raising to her, her role was primarily administrative. It was Beattie who attended investor presentations and who was responsible for the content of Solara's promotional materials. McErvel organized and advertised meeting locations, invited existing and potential new investors, handled investor paperwork (then passing the forms and cheques to Beattie), and served as a point of contact for some investors.

¶ 105 We find that McErvel was not a director or officer (executive, senior or otherwise) of Solara.

¶ 106 Was she a founder?

¶ 107 Instruments MI45-103 and NI45-106 define "founder" as follows (the quote is from NI45-106):

> "founder" means, in respect of an issuer, a person who
>
> (a) acting alone, in conjunction, or in concert with one or more persons, directly or indirectly, takes the initiative in founding, organizing or substantially reorganizing the business of the issuer, and
> (b) at the time of the trade is actively involved in the business of the issuer.

¶ 108 To be a founder, McErvel would, under paragraph (a) of the definition, have to have taken the initiative, along with Beattie, in founding Solara, or organizing or substantially reorganizing its business. Based on the evidence, that would be a gross over-statement of her involvement. In his interview, Beattie said, "I founded Solara as my company, a hundred per cent my company . . . ." McErvel's evidence, which we accept, is that her involvement in Solara began in late 2004, long after Beattie set it up, and her role was primarily limited to investor relations on a part-time basis.

¶ 109 The evidence also shows that McErvel was not, under paragraph (b) of the definition, "actively involved" in Solara's business. Her role was mostly limited to the administrative aspects of investor relations.

¶ 110 Beattie's characterization of McErvel as a founder is inconsistent with what Solara was saying publicly at the time. Its own news releases describe Beattie as its "founder, president and chief executive officer". There is no mention of McErvel.

¶ 111 Furthermore, the circumstances are not consistent with McErvel's being a founder. A founder is the driving force behind the establishment of a business enterprise, and expects to be compensated in some form for the effort, usually through equity participation in the issuer. McErvel had no shares in Solara, no right to get any, nor any other form of compensation.

¶ 112 We find that McErvel was not a founder of Solara.

Finding

¶ 113 We find that the family, friends, and business associates exemption was not available for any of the trades listed in Table 2 because McErvel was not a director, executive (or senior) officer, or a founder of Solara. We find that the respondents contravened sections 34(1) and 61(1) in making those trades.

4 Offering memorandum exemption

¶ 114 Table 3 summarizes the trades for which Solara purported to rely on the offering memorandum exemption:

TABLE 3 – OFFERING MEMORANDUM EXEMPTION

NO.	DATE	INVESTOR	AMOUNT
1	2004-Oct-18	DH#1&GH	$100,000
2	2004-Oct-28	WG	$ 11,212
3	2004-Oct-28	VP&KP	$ 25,000
4	2004-Oct-28	RD	$ 9,000
5	2004-Nov-03	BT	$ 5,928
6	2004-Nov-09	KW	$ 10,672
7	2004-Nov-19	KM	$ 20,000
8	2004-Dec-23	WG	$ 11,212
9	2004-Dec-31	JM#1	$ 4,000
10	2004-Dec-31	GP	$ 5,000
11	2004-Dec-31	KZ	$ 3,000
12	2005-Jan-25	BC	$ 5,000
13	2005-Jan-25	CC	$ 5,000
14	2005-Jan-25	TS#2	$ 15,000
15	2005-Jan-25	PT	$ 6,089
16	2005-Feb-10	WD	$ 6,117
17	2005-Feb-15	AS	$ 59,387
18	2005-Mar-01	DS	$ 18,504
19	2005-Mar-22	JB#1	$ 5,000
20	2005-Mar-29	HD	$ 5,000
21	2005-May-03	BD	$ 7,146

NO.	DATE	INVESTOR	AMOUNT
22	2005-May-07	HF	$ 5,010
23	2005-May-20	JM#2	$ 5,000
24	2005-May-27	AT	$ 9,674
25	2005-Jun-10	DS	$ 1,303
26	2005-Jun-22	IT	$ 4,000
	Total		**$367,254**

¶ 115 The trades in line 1 to investors DH and GH are included in the table because they are among the 46 investors the parties agreed bought shares from Solara. However, we have not analyzed them because the executive director says the trades to these investors are not included in the allegation that the respondents contravened sections 34(1) and 61(1).

¶ 116 Sections 4.1(1) and (2) of MI45-103 remove the registration and prospectus requirements "if the purchaser purchases the security as principal" and "at the same time or before the purchaser signs the agreement to purchase the security, the issuer . . . delivers an offering memorandum" in the required form. (All of the trades in Table 3 occurred before NI45-106 came into force in September 2005.)

¶ 117 In the agreed statement of facts, the respondents agree that the only offering memorandum Solara relies on for the purpose of the trades described in Table 3 is dated December 11, 2004. They agree that Solara did not prepare an amended offering memorandum.

¶ 118 Beattie approved Solara's offering memorandum in his capacity as Solara's sole director, and signed the required certificate that it did not contain a misrepresentation as Solara's director and chief executive officer.

Exemption not available for some trades

Trades made before the date of the offering memorandum

¶ 119 The trades in lines 2 through 7 to WG, VP, KP, RD, BT, KW, and KM occurred before the date of the offering memorandum. It is therefore impossible that the offering memorandum exemption was available to Solara for those trades, because for the exemption to be available, the issuer must deliver the offering memorandum to the purchaser at or before the time of sale.

Trades with deficient documentation

¶ 120 The evidence includes no documents that relate to the offering memorandum exemption for the trades in line 8 to WG, in line 21 to BD, in line 22 to HF, in line 25 to DS, and in line 26 to IT. There is a subscription agreement with WG's name on it, but it is unsigned. There is no other evidence that the offering memorandum exemption was available to Solara for these trades.

¶ 121 One form of subscription agreement Solara used had a blank for filling in the date of the offering memorandum relied on for the purpose of the exemption. For Solara to be able to rely on the exemption, the date in this blank must be December 11, 2004 – the date of Solara's only offering memorandum, or there must be other evidence to show that it delivered its offering memorandum to the investor at or before the time of the trade.

¶ 122 The subscription agreement for the trade in line 12 to BC refers to an offering memorandum dated November 18, 2004. The subscription agreement related to the trade in line 16 to WD had "N/A" filled in the blank. The subscription agreements for the trades in lines 19 and 20 to JB#1 and HD refer to an offering memorandum dated March 21, 2005. The subscription agreements for the trades in lines 23 and 24 to JM#2 and AT refer to an offering memorandum dated May 18, 2005. There is no other evidence that the offering memorandum exemption was available to Solara for these trades.

Availability of other exemptions

¶ 123 The respondents in their submissions appear to claim that Solara relied on other exemptions for several trades.

¶ 124 The respondents signed the agreed statement of facts on the opening day of the hearing. Although it states that Solara relied on the offering memorandum for the trades in Table 3, in their submissions the respondents appear to suggest that other exemptions were available for some of the trades in Table 3.

¶ 125 In principle, this is a valid defence. If an issuer cannot show that the exemption it claimed at the time of the trade was available, but can prove that another exemption was available, the distribution would not be illegal. However, the issuer must still have the evidence showing that the requirements of the other exemption were met at the time of the trade. Here, as we find below, that evidence is absent.

¶ 126 The respondents say that RD and KM were accredited investors. There is no evidence of that.

¶ 127 The respondents say that WG, BT, KW, JM#1, BC, CC, TS#2, PT, WD, AS, DS, JB#1, BD, HF, and AT had some sort of friendship with McErvel that is relevant. To be relevant, these relationships would have to be close personal friendships or close business associations. McErvel would also have to be a director, officer or founder of Solara. We have found that she was not.

¶ 128 Even if she were, the evidence does not establish any relationship between those investors and McErvel relevant to the exemption.

¶ 129 In her testimony, McErvel said she did not know JM#1. She described KW, BC, and CC as former teaching colleagues. She described TS#2, WD, and JB#1 as casual acquaintances. She described WG, AS, and HF as "friends", and BT, PT and DS as "good friends. This is consistent with how some of these investors described the relationship, but there is no evidence that these friendships were at the level of close personal friendship required for the purposes of the exemption.

¶ 130 McErvel described BD as a "close personal friend", but in an interview with Commission staff, BD said he had known McErvel for 30 years because her husband was one of his best friends. That does not establish a close personal friendship between BD and McErvel for the purposes of the exemption, and there is no other evidence about the relationship.

¶ 131 Above we considered AT's relationship with McErvel and did not find that he was a close personal friend of McErvel.

¶ 132 Beattie says KP is his sister. Beattie was an officer of Solara, so the family member exemption was available to Solara for the trade to her.

¶ 133 Beattie says RD was a "close friend" at the time of the trade, but there is no other evidence about the relationship.

¶ 134 We do not find any other exemptions to have been available, with the exception of the trade to KP.

Exemptions not available for 16 trades in Table 3

¶ 135 We have found that the offering memorandum exemption was not available for 16 of the respondents' trades listed in Table 3. The trades to DH and GH are not included in the allegations. The family member exemption was available for the trade to KP.

Adequacy of offering memorandum

¶ 136 For each of the remaining eight trades, the evidence includes a subscription agreement signed by the investor that refers to Solara's December 11, 2004 offering memorandum. This is also true for EB, who is listed in Table 2.

¶ 137 The executive director says that Solara cannot rely on its offering memorandum for any of the trades listed in Table 3 because it was not in the required form: it did not include financial statements, and contained misrepresentations. The

respondents say the omission of financial statements was not material, and deny that it contained misrepresentations.

Financial statements

¶ 138 As noted earlier, the offering memorandum exemption requires that the issuer deliver, at the same time or before the purchaser signs the agreement to purchase securities, an offering memorandum in the required form.

¶ 139 The form specified for the offering memorandum requirement in MI45-103 requires financial statements. The instructions for completing the form describe the financial statements required for issuers that have not completed a financial year. They require the issuer to include statements of income, retained earnings and cash flows from the date of inception to a date not more than 60 days before the date of the offering memorandum, and a balance as of the same date. That date, in Solara's case, was October 11, 2004.

¶ 140 Solara's offering memorandum did not contain financial statements. Instead, it contains this statement: "Since the Company was formed on March 5, 2004, it has not conducted any significant business operations and therefore no meaningful financial statements are able to be prepared."

Misrepresentations

¶ 141 The executive director alleges two misrepresentations in the offering memorandum. We consider these allegations below. We have found that the offering memorandum contained one misrepresentation – the statement that Solara did not anticipate paying Beattie compensation in the current financial year.

Availability of exemption based on adequacy of offering memorandum

¶ 142 An offering memorandum must be in the required form, and the form required financial statements. Solara's offering memorandum did not include financial statements, so it was not in the required form.

¶ 143 That would not be the end of the analysis, however. The offering memorandum form has many requirements, and an issuer's failure to comply with any one of them would not necessarily lead to the conclusion that the offering memorandum, taken as a whole, was not in the required form. Where to draw the line is not clear, although we suggest that before an offering memorandum's deficiencies ought to result in the exemption being unavailable, their cumulative effect ought to render the offering memorandum misleading in a material respect.

¶ 144 The analysis in this case, insofar as Solara's failure to include financial statements is concerned, would involve a consideration of the transactions that would have been reflected in a set of financial statements dated as of a date no earlier than

October 11, 2004, and whether the omission of that information would have been materially misleading to potential investors.

¶ 145 However, it is unnecessary to undertake that analysis. In our opinion, the offering memorandum exemption was not available to Solara for any trades, because it contained a misrepresentation at the time it was delivered to investors.

¶ 146 Section 4.4(1) of MI45-103 requires an offering memorandum to contain a certificate stating, "This offering memorandum does not contain a misrepresentation." Solara's offering memorandum contained that certificate, signed by Beattie.

¶ 147 Section 4.4(3) says that the certificate must be true at the date it is signed and at the date it is delivered to the purchaser.

¶ 148 Section 4.4(4) says:

> (4) If a certificate under subsection (1) ceases to be true after it is delivered to the purchaser, the issuer cannot accept an agreement to purchase the security from the purchaser unless
> (a) the purchaser receives an update of the offering memorandum
> (b) the update of the offering memorandum contains a newly dated certificate signed in compliance with subsection (2), and
> (c) the purchaser re-signs the agreement to repurchase the security.

¶ 149 These provisions make it clear that an issuer cannot rely on the offering memorandum exemption to trade its securities if at the time of the trade the offering memorandum contains a misrepresentation. Excluding trades that we found predate the offering memorandum, the first trades Solara purportedly made under this exemption were on December 31, 2004. As we have found below, as of that date, the offering memorandum contained the misrepresentation that it did not anticipate compensating Beattie in the current financial year.

Finding

¶ 150 We find that the offering memorandum exemption was not available to Solara for any of the trades listed in Table 3, nor for the trade to EB listed in Table 2. We do not find that any other exemption was available for these trades, except the trade to KP. We find that the respondents contravened sections 34(1) and 61(1) in making those trades.

5 Trades for which Solara identified no exemption

¶ 151 Table 4 summarizes the six trades for which Solara filed no exempt distribution reports:

TABLE 4 – NO EXEMPTION IDENTIFIED

NO.	DATE	INVESTOR	AMOUNT
1	2004-Nov-03	AT	$10,000
2	2005-May-06	ML	$10,642
3	2006-Aug-14	SR	$ 5,000
4	2006-Aug-14	CB	$ 5,000
5	2006-Aug-14	JB#2	$ 5,000
6	2007-Apr-23	CB	$ 5,000
	Total		**$40,642**

¶ 152 The respondents say that there were exemptions available for Solara's trade to AT because he is an accredited investor and a close personal friend of McErvel. We have found him not to be an accredited investor and have not found him to be a close personal friend of McErvel.

¶ 153 The respondents say there was an exemption available for ML because he is an accredited investor. In fact, his investor questionnaire establishes the contrary – he states that the criteria for being an accredited investor do not apply to him.

¶ 154 In his interview Beattie described ML as a business associate. He said that at the time of his interview – May 2008 – he had known ML "almost two years". ML's investment was two years' earlier, in May 2006. In later testimony, Beattie said he knew ML long enough "to just get to know him". This evidence does not establish that ML was a close business associate of Beattie. There is no other evidence about the relationship.

¶ 155 We do not find that any exemptions were available for the trades listed in Table 4. We find that the respondents contravened sections 34(1) and 61(1) in making those trades.

D Alleged misrepresentations

¶ 156 The executive director alleges that Solara contravened section 50(1)(d) by making two misrepresentations in its offering memorandum:

- its omission to state that its ownership of computer hardware and software that was integral to the technology at the core of its business was the subject of litigation, and
- its statement that it did not anticipate paying Beattie compensation for the current financial year when in fact Solara paid Beattie a salary of $70,000.

¶ 157 The executive director also alleges that Beattie also contravened section 50(1)(d) by authorizing, permitting, or acquiescing to Solara's misrepresentations.

¶ 158 Section 50 says a "person . . . with the intention of effecting a trade in a security, must not make a statement that the person knows, or ought reasonably to know, is a misrepresentation."

¶ 159 Section 1 defines "misrepresentation" as "an untrue statement of a material fact" or "an omission to state a material fact that is . . . necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made."

¶ 160 Section 1 defines "material fact" as a fact about a security "that significantly affects, or could reasonably be expected to significantly affect, the market price or value" of a security.

1 Technology litigation

¶ 161 The technology that Solara developed for the vending machine industry included a device called a motor control board. Its function was to ensure that when a vending machine user entered commands on the machine's touch screens, the machine would vend the appropriate product. Beattie designed it in 2003 and contracted a Doug Beard to build it. The device worked fine for a while, but then stopped. According to Beattie, the cause of the problem was a disabling timer that Beard had built into the device. Beattie says Beard was willing to repair the device only if Beattie would agree to a substantial renegotiation of their original deal.

¶ 162 Litigation ensued, and remained unresolved at the date of the hearing.

¶ 163 The offering memorandum contains no information about that motor control board or the related litigation.

¶ 164 Meanwhile, Solara's business had to go on. Beattie retained another firm, Velocity Software Systems Limited, to build a motor control board. They produced a prototype in October 2004, based on a different design from Beattie's original one, which Solara accepted as the production design on December 9, 2004.

¶ 165 Beattie's evidence on this point is consistent with that of Pitt and of Leslie Mulder, the principal of Velocity Software. They both testified that the motor control board Velocity produced was a design completely different from the design built by Beard.

¶ 166 We find that the motor control board built by Beard that was the subject of the litigation was not the one Solara intended to use in its business as described in the offering memorandum. Accordingly, the omission in the offering memorandum of information about the litigation relating to the earlier design did not amount to an untrue statement and was therefore not a misrepresentation, and we so find.

2 Beattie's salary

¶ 167 Section 3.1 of Solara's offering memorandum purports to disclose the compensation of its directors and officers. In a table, Beattie is identified as its "President, CEO and Secretary". The entry in a column headed "Compensation paid by the Company in the most recently completed financial year and the compensation anticipated to be paid in the current financial year" is "None".

¶ 168 When Beattie started Solara, he developed the practice of paying Solara's expenses with his own funds by way of a shareholder's loan. Beattie also made periodic withdrawals from Solara. Solara's bookkeeper, Vera Morgan, would account for all of Beattie's transactions through a shareholder loan account in the general ledger. Morgan would review Beattie's receipts and credit the account for expenses he paid on Solara's behalf. She would debit the account for any reimbursements he received or withdrawals he made from Solara's funds.

¶ 169 Solara's general ledger shows that on November 30, 2004, the balance in Beattie's shareholder loan account showed that Beattie owed Solara about $38,000. The balance fluctuated slightly between then and December 31, when it was again about $38,000.

¶ 170 The general ledger contains an entry on December 31, 2004 for $70,000 crediting Beattie's loan balance with the notation "Mgt. salary – 2004 earnings". The effect was that Solara then owed Beattie about $32,000. Solara prepared a T4 for Beattie showing the $70,000 as earnings from employment.

¶ 171 Beattie testified that he did not receive a salary, and resented the suggestion he did. Morgan testified that Beattie was never paid a salary. Morgan said that it was her decision to book the $70,000 as salary expense. She said that Solara's accountant had instructed her to issue a T4 to Beattie for that amount so Beattie would have an income to support his credit rating, and to create pensionable earnings for purposes of the Canada Pension Plan. The only way she could think of to account for the $70,000 transaction represented by the T4, she said, was to book it as salary to Beattie.

¶ 172 It appears that Morgan did not err in accounting for the T4 by booking it as salary to Beattie. She testified that the same entry was made each year for three consecutive years. The "Related Party Transactions" note to Solara's February

28, 2006 audited financial statements said "Included in expenses for the current year are $70,000 of management wages paid to the majority shareholder of the Company. These wages were allocated equally between research and salary, wages and benefits." In his interview, Beattie said, "On the books I take a $70,000 a year salary."

¶ 173 These financial statements also show Beattie's shareholder loan account at zero.

¶ 174 Despite the evidence of Beattie and Morgan that Beattie did not receive a salary, we cannot ignore Solara's own accounting entries for the years ended February 28, 2005 and 2006 – entries that its auditors found acceptable for the later year. These entries also reflect the economic substance of the transactions. Morgan testified that had these entries not been credited to the shareholder account, Beattie would have owed these amounts to Solara. We find that Solara paid Beattie a salary of $70,000 in each of those two years.

¶ 175 In the offering memorandum Solara said that the compensation it paid Beattie in its most recently completed financial year was none. That was true, because Solara had only been in existence since March of 2004 and at the date of the offering memorandum in December had not yet completed a financial year. However, its statement that it anticipated paying Beattie no compensation in the current financial year, being the year ended February 28, 2005, was not true at least as of December 31, 2004, when it paid Beattie $70,000 in salary.

¶ 176 As we noted earlier, the offering memorandum speaks not only as of its date, but as of every date the issuer uses it to sell securities in reliance on the offering memorandum exemption. All of the trades for which we have found Solara could have relied on the offering memorandum exemption occurred on or after December 31, 2004.

¶ 177 Was Beattie's salary a "material fact" – that is, a fact about Solara's securities "that significantly affects, or could reasonably be expected to significantly affect, [their] market price or value"? In our opinion, it was.

¶ 178 Solara was a start-up company. It had no revenue from operations. It had expenses of about $512,000 in fiscal 2005 and about $969,000 in fiscal 2006. In this context, a salary of $70,000 is significant, and could reasonably be expected to affect the market price or value of Solara's securities.

¶ 179 We have found that Solara's statement that it did not anticipate paying Beattie compensation in its current financial year was untrue, and that the fact of Beattie's compensation was material. We find that Solara's statement was a misrepresentation.

¶ 180 At the time of the misrepresentation, Solara and Beattie were intending to, and did, effect trades in Solara's securities. They ought reasonably to have known that a statement that Solara was not compensating Beattie when in fact it booked a salary for him of $70,000 at the same time or before effecting all of those trades, was a misrepresentation.

¶ 181 We find that Solara contravened section 50(1)(d).

¶ 182 Section 168.2(1) says, "If a person, other than an individual, contravenes a provision of this Act . . . an . . . officer [or] director . . . of the person who authorizes, permits or acquiesces in the contravention also contravenes the provision . . . ."

¶ 183 Beattie approved the offering memorandum. He signed the required certificate in the offering memorandum that it did not contain a misrepresentation. He distributed the offering memorandum to investors. He knew that he was drawing funds from his shareholder account and that Solara was booking it as an annual salary to him of $70,000. We find that Beattie also contravened section 50(1)(d).

E Solara's filings

¶ 184 The executive director alleges that Solara contravened section 168.1(1)(b) when, in filing the exempt distribution reports required to be filed under the Act, it filed reports that contained false and misleading statements. The executive director says the reports:

- claimed to rely on the offering memorandum exemption for distributions that occurred before the offering memorandum existed
- provided false distribution dates for distributions that occurred significantly before those dates
- failed to disclose compensation paid for finders' fees.

¶ 185 The executive director also alleges that Beattie also contravened section 168.1(1)(b) by authorizing, permitting, or acquiescing to Solara's false filings.

¶ 186 Section 168.1(1)(b) says that a person must not:

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

¶ 187 MI45-103 and NI45-103 required Solara to file exempt distribution reports within 10 days of the date of each distribution.

¶ 188 Between March 1, 2005 and October 16, 2006, Solara filed eight exempt distribution reports. In those reports, Solara:

- purported to rely on the offering memorandum exemption for the first seven trades in Table 3
- disclosed distribution dates for 55 trades that were significantly later than the date Solara deposited the investors' funds into its bank account from those trades; for 11 trades, the discrepancy was about a month; for the rest, the discrepancies were several months, seven being a year or more

¶ 189 We found that the offering memorandum exemption was not available to Solara, and could not have been, for the first seven trades in Table 3 because they occurred before the date of the offering memorandum. We find that this information in Solara's exempt distribution reports was false and misleading.

¶ 190 We find the discrepancy in Solara's disclosure of the distribution dates, compared to the actual dates of the distributions (which the respondents agreed are accurate in the agreed statement of facts) was false and misleading.

¶ 191 The exempt distribution reports required by MI45-103 and NI45-106 required disclosure of any finder's fees associated with the distribution being reported.

¶ 192 Solara paid a finder's fee of $10,000 to a Vincent Yen in connection with a distribution on October 5, 2006. In its exempt distribution report filed on October 16, 2006, Solara did not disclose the finder's fee.

¶ 193 The respondents say there is no evidence that the fee was paid, but Beattie admitted in his interview that the fee was paid as a finder's fee, and it is so recorded in Solara's general ledger.

¶ 194 We find that Solara's failure to disclose this finder's fee was false and misleading.

¶ 195 We find that Solara contravened section 168.1(b) when it purported to rely on the offering memorandum exemption for the first seven trades listed in Table 3, disclosed dates of distributions that were false, and failed to disclose the finder's fee it paid to Yen.

¶ 196 Beattie was Solara's sole officer and director. He signed the certificates in the reports that the statements in the reports were true. We find that Beattie, under section 168.2(1), also contravened section 168.1(1)(b) by authorizing, permitting, or acquiescing to Solara's false filings.

F Solara's trades after the executive director's cease-trade order

¶ 197 On June 27, 2007 the executive director, after finding that Solara's offering memorandum was not in the required form, ordered that all trading cease in Solara's securities (see 2007 BCSECCOM 360). The executive director alleges that Solara and Beattie contravened that order.

¶ 198 In the agreed statement of facts the respondents acknowledge that

- they received notice of the cease trade order on the day it was made
- on August 8, 2007 Solara received US$30,000 from DL, an individual
- on October 2, 2007 Beattie caused Solara to issue a promissory note to a company owned or controlled by investor RD (see Table 3) for proceeds of $100,000.

¶ 199 Beattie says the investment by DL was a loan secured by a pledge of some of Beattie's Solara shares. Although there is no documentation in the evidence for this loan at its inception, Beattie entered a letter dated June 4, 2009 from him to DL purporting to confirm the loan.

¶ 200 He says the loan from RD's company was also secured by some of his Solara shares.

¶ 201 The respondents correctly point out that a pledge of securities for a bona fide debt is excluded from the definition of trade in section 1. However, the definition of security clearly includes loans, promissory notes, and other evidences of indebtedness, and the definition of trade does not exclude the issuance of debt. We find that Solara traded Solara securities when it borrowed money through these investments. We find that Beattie, under section 168.2(1), also contravened section 168.1(1)(b) by authorizing, permitting, or acquiescing to the loans.

¶ 202 That said, Beattie explained these transactions as isolated events intended to provide Solara with working capital, and that they were mindful of the cease trade order in structuring them. That is why, he says, that shares were not issued for the investment, but only used as security for the loans. He says Solara obtained legal advice in connection with the loans.

¶ 203 Although Solara and Beattie contravened the executive director's order as a matter of law, it does not appear to us that their conduct was deliberate or reckless, and there is no evidence that they have otherwise failed to respect the order.

III Summary of Findings

¶ 204 We find that Solara and Beattie:

1. traded in securities without being registered to do so, contrary to section 34(1) of the Act, and distributed those securities without filing a prospectus, contrary to section 61(1) of the Act when it purported to distribute securities under exemptions from the registration and prospectus requirements that were not available;

2. made misrepresentations, contrary to section 50(1)(d), by stating in the Solara offering memorandum that it did not anticipate paying Beattie any compensation for the current financial year;

3. filed false or misleading information with the Commission, contrary to section 168.1(b) by purporting to rely on the offering memorandum exemption for trades made before the date of its offering memorandum, disclosing false dates of distributions, and failing to disclose a finders fee; and

4. contravened the executive director's June 27, 2007 cease trade order when it traded securities to DL and an Alberta numbered company.

¶ 205 Whether an issuer chooses to raise capital by using exemptions or by filing a prospectus, it is still accessing the capital markets. When issuers access our capital markets by filing a prospectus, they must follow the requirements of the legislation designed to protect investors. Although the requirements associated with using the exemptions may be less onerous, the obligation to comply with them is not.

¶ 206 This means an issuer that wishes to use the exemptions must ensure that those exemptions are in fact available in the circumstances and, if it wishes to be in a position to demonstrate that it made a proper determination to establish that the exemptions were available, it must make the appropriate inquiries and keep proper records.

¶ 207 We have found that all but one of the 52 trades subject to the notice of hearing were illegal distributions. From the evidence it appears that Solara did not take sufficient care to ensure the requirements of the exemptions were met at the time of the trades, and did not keep appropriate records. We are left with the impression that Solara, not having taken sufficient care at the time of its trades, is now scrambling after the fact to find exemptions that may have been available. Beattie says he relied on McErvel, but that does not relieve him of his responsibility to ensure that Solara complied with the requirements of the legislation.

¶ 208 This is not the standard of conduct we expect from issuers, or their officers or directors, when raising funds from the public, be it by prospectus or exemption.

IV Submissions on sanction

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

By April 19	The executive director delivers submissions to Solara and Beattie and to the secretary to the Commission
By May 3	Solara and Beattie deliver response submissions to the executive director and to the secretary to the Commission. Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission
By May 10	The executive director delivers reply submissions (if any) to Solara and Beattie and to the secretary to the Commission

¶ 210 March 26, 2010

For the Commission

Brent W. Aitken
Vice Chair

Bradley Doney
Commissioner

Shelley C. Williams
Commissioner