BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Wireless Wizard, 2015 BCSECCOM 443 Date: 20151209

Wireless Wizard Technologies Inc., Raymond Michael Roger Sasseville, Edith Marie Sasseville and Richard Keller

Panel	Judith Downes	Commissioner
	Nigel P. Cave	Vice Chair
	George C. Glover, Jr.	Commissioner
	Don Rowlatt	Commissioner

Hearing dates	November 9, 2015
Submissions Completed	November 20, 2015
Decision date	December 9, 2015

Appearances

Olubode Fagbamiye	For the Executive Director
Gregg Alfonso	For the Respondents

Decision

I. Introduction

[1] This is the sanctions portion of a hearing under sections 161(1), 162 and 174 of the *Securities Act*, RSBC 1996, c. 418. Our Findings on liability made on June 4, 2015 (2015 BCSECCOM 100) are part of this decision. These are the reasons of all panel members on all issues, except for the decision on orders under section 161(1)(g) of the Act. Vice Chair Cave's dissenting reasons on that issue are below.

[2] The panel found that:

- Wireless Wizard Technologies Inc. (WWTI) and Richard Keller contravened sections 34 and 61 of the Act by illegally distributing a WWTI convertible debenture in the amount of $10,000 to Investor A,

- WWTI, Raymond Michael Roger Sasseville (Ray) and Keller contravened sections 34 and 61 of the Act by illegally distributing a WWTI debenture in the amount of US$47,500 to Investor B, and

- Edith Marie Sasseville (Edith) and Ray, under section 168.2(1) of the Act, contravened sections 34 and 61 of the Act by authorizing, permitting and acquiescing in the illegal distributions of WWTI convertible debentures, in the case of Edith, to Investors A and B, and, in the case of Ray, to Investor A.

II. Positions of the Parties

[3] The executive director seeks:

- against WWTI, permanent trading and market prohibitions and a disgorgement order in the amount of $10,000,
- against Ray, an administrative penalty of $25,000, a disgorgement order in the amount of $10,000 and market prohibitions for a minimum of 12 years,
- against each of Edith and Keller, an administrative penalty of $10,000, a disgorgement order in the amount of $10,000 and market prohibitions for a minimum of eight years, and
- that all orders applicable to each individual respondent remain in place until the monetary sanctions imposed against that respondent are paid in full and that respondent has completed a course relating to the responsibilities of directors and officers.

[4] The respondents agree to the permanent trading and market prohibitions against WWTI proposed by the executive director.

[5] The respondents submit that the appropriate sanctions against the individual respondents are market prohibitions against Ray for five years and against each of Edith and Keller, for one year. They say that any prohibitions against the individual respondents acting as a director or officer should be limited to reporting issuers. They also submit that no administrative penalty or disgorgement should be ordered against any of the respondents.

III. Analysis

A. Factors

[6] Orders under sections 161(1) and 162 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.

[7] 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.

B. Application of Factors

Seriousness of conduct and damage to markets

[8] Contraventions of sections 34 and 61 of the Act are inherently serious. These sections are the Act's foundation requirements for protecting investors and preserving the integrity of the capital markets. They require those who wish to trade in securities to be registered and those who wish to distribute securities, to file a prospectus with the Commission. This is intended to ensure that investors are offered only securities that are suitable and that they receive the information necessary to make an informed investment decision.

[9] The legislation provides exemptions from sections 34 and 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.

[10] The respondents submit that they honestly believed that exemptions were available for the distributions of WWTI debentures in issue. However, they were not diligent in determining whether the requirements of the exemptions were met. As a result, certain investors in WWTI were denied the protections intended by the Act.

[11] The respondents' misconduct damaged the reputation and integrity of our securities markets. Investors become hesitant to invest in the market if they cannot trust those who sell securities to do so in compliance with securities rules and regulations.

Harm to investors

[12] Investor A and Investor B lost all of their investments in WWTI.

[13] Investor B and a related company commenced separate legal proceedings against the respondents and were paid US$40,000 pursuant to a settlement agreement entered into by the parties in connection with those proceedings.

Past misconduct

[14] Ray has a history of regulatory misconduct. In a 2003 settlement agreement with the executive director involving a different issuer, Ray admitted that he participated in illegal distributions of securities to 75 investors for total proceeds of approximately $775,000.

[15] Ray undertook to pay $10,000 to the Commission and he was prohibited from acting as a director or officer and from engaging in investor relations activities on behalf of any issuer for a minimum of three years.

[16] Edith and Keller have no history of regulatory misconduct.

Market risk/Fitness to be a registrant or director, officer or adviser to issuers

[17] Recklessness or carelessness with respect to compliance with securities laws in the context of illegal distributions represents a significant risk to our capital markets. In *Solara Technologies Inc. and William Dorn Beattie* 2010 BCSECCOM 357 (para 23), the panel said:

> Although we did not find that Solara or Beattie knowingly contravened the Act, they were sloppy about ensuring that the exemptions were available. Their carelessness and demonstrated failure to ensure compliance with requirements when raising capital suggests the potential for significant risk to our capital markets were they to continue to participate in them unrestricted.

[18] We agree with these comments as they apply to the respondents.

[19] The respondents submit that *Solara* is distinguishable from the present case on the basis that, in *Solara*, the panel also found that the respondents made a misrepresentation and filed false and misleading reports with the Commission. As the *Solara* panel's comments cited above relate specifically to the availability of exemptions, we find no reason to make a distinction on the basis suggested by the respondents.

Specific and general deterrence

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

[21] The respondents acknowledge the role of deterrence in sanctions but submit that the resulting embarrassment, cost and damage to their reputations are the most significant factors in deterring the respondents from engaging in future misconduct.

[22] Embarrassment and reputational damage are reasonably foreseeable consequences of regulatory misconduct. As such potential consequences were not sufficient to deter the respondents from engaging in misconduct in the present case, they are unlikely to act as a deterrent against future misconduct. We note that any embarrassment and reputational damage suffered by Ray in connection with regulatory proceedings related to his past misconduct were not sufficient to deter him from engaging in similar misconduct in the present case.

Enrichment

[23] There is no evidence that the individual respondents were enriched by their misconduct.

Aggravating factors

[24] Ray's history of regulatory misconduct is an aggravating factor.

[25] The executive director submits that it is an aggravating factor that Commission staff conducted two prior investigations involving Ray and WWTI which resulted in the issuance of two caution letters. The first letter, issued in April 2009, related to a possible breach by Ray of the 2003 settlement agreement. The other letter, issued in June 2013, related to a prior review by Commission staff of WWTI's capital raising activities.

[26] The April 2009 letter did not result in any formal action by Commission staff. The June 2013 letter related to the distributions which ultimately formed the subject matter of these proceedings. In the circumstances, we do not consider either of these prior investigations and the resulting letters to be an aggravating factor.

[27] The executive director also submits that it is an aggravating factor that Keller initially claimed that an exemption was available for the distribution to Investor A as his close personal friend when, in fact, he had never met her. Keller's false claim forms part of the misconduct that is the subject of these proceedings and cannot separately be considered as an aggravating factor.

[28] The respondents submit that the $US40,000 payment to Investor B and a related company under a settlement agreement is a mitigating factor. This payment is not a mitigating factor but it may be relevant to consideration of the appropriate amount of any order to be made under section 161(1)(g) of the Act.

Previous orders

[29] The executive director referred us to *John Arthur Roche McLoughlin, MCL Ventures Inc., Blue Lighthouse Ltd. and Robert Douglas Collins,* 2011 BCSECCOM 299. In *McLoughlin*, the respondents illegally distributed securities to 22 investors for total proceeds of $317,636, purporting to rely on exemptions that were not available. In doing so, McLoughlin breached a prior order of the Commission, to which he had consented, arising from a previous illegal distribution. He also continued the misconduct in the face of two warnings from Commission staff.

[30] In *McLoughlin*, the Commission permanently cease traded the corporate respondents and imposed on McLoughlin a 15-year market ban and a $50,000 administrative penalty. The other individual respondent, Robert Douglas Collins, received a five-year market ban, a disgorgement order in the amount of $14,607 (commission received) and a $20,000 administrative penalty.

[31] The executive director also cited a settlement agreement, *Beercroft (Re)*, 2010 BCSECCOM 603. As has been stated in other Commission decisions, we do not generally consider settlement agreements in our reasoning as they occur in a completely different context.

[32] The respondents directed us to *Adis Golic (aka Ady Golic)*, 2014 BCSECCOM 265. This was an application under sections 161(1) and 161(6)(a) of the Act. Section 161(6)(a) permits the Commission to make a reciprocal order under section 161(1) with respect to a person who has been convicted of an offence respecting trading in securities. Golic had been convicted in the

Provincial Court of British Columbia of breaches of sections 34(1) and 61 of the Act in connection with illegal distributions of securities to three investors for a total of $42,000. The judge found it to be an aggravating factor that the distributions occurred in the context of a call centre operated by Golic where a number of salespeople were attempting to solicit purchases of securities. It was also found that Golic purposefully set out to avoid securities regulatory requirements. Golic was separately convicted of obstruction of justice and of uttering threats after he threatened a witness in the Provincial Court proceedings. Golic had a previous conviction for similar securities-related offences for which he received a $5,000 fine. The Commission imposed on Golic a seven-year market ban.

[33] The respondents also directed us to *Pacific Ocean Resources Corporation and Donald Verne Dyer*, 2012 BCSECCOM 104 and *Saafnet Canada Inc. et al.*, 2014 BCSECCOM 96. In *Pacific Ocean*, the respondents illegally distributed securities to 93 investors for a total of US$836,658. It was found, as an aggravating factor, that the transactions were specifically structured to avoid securities regulatory requirements. The Commission imposed a $60,000 administrative penalty and a 10-year market ban against the individual respondent. The panel declined to make a section 161(1)(g) order for disgorgement of the funds raised. The panel said that such an order would normally be made in illegal distribution cases but, in this instance, it was not appropriate as none of the proceeds went to either of the respondents but to an issuer over which neither of them had any control.

[34] In *Saafnet*, the respondents illegally distributed securities to 14 investors for a total of approximately US$610,000. The Commission imposed a one-year market ban and an administrative penalty of $10,000 against each of the individual respondents. A section 161(1)(g) disgorgement order in the amount of the funds raised was made against the corporate respondent but the panel declined to make a disgorgement order against the individual respondents. The panel found that the individual respondents had not been enriched by the contraventions nor had they misused investor funds. The panel said that the respondents' entire efforts in association with Saafnet were to strive to make it a commercial success. The panel further found, as mitigating factors, that the respondents were remorseful and had diligently sought legal advice to ensure compliance with the Act.

IV. Appropriate Orders

A. Market and Trading Bans

[35] The executive director seeks market bans of 12 years against Ray and eight years against each of Edith and Keller. He submits that Ray's conduct is similar to McLoughlin's in that both cases involve similar illegal distributions under similar circumstances. He says that Ray, like McLoughlin, was aware of the rules due to proceedings related to his previous misconduct and chose to ignore the rules yet again. He also says that Ray poses a risk to the capital markets that is comparable to McLoughlin.

[36] The respondents propose market bans of five years for Ray and one year for each of Edith and Keller. The respondents submit that *McLoughlin* is distinguishable from the present case on the basis that McLoughlin's misconduct was more egregious than Ray's. We agree. Misconduct carried out in breach of existing orders and in face of warnings from the Commission staff is more serious than the case before us.

[37] The respondents submit that, in light of *Golic*, the greatest sanction that should be imposed on Ray is a seven-year market ban. They also point out that the conduct of Edith and Keller is in no way similar to the conduct in *Golic*.

[38] The executive director argues that the aggravating factors in this case should result in sanctions in excess of those imposed in *Golic*. As noted above, the only aggravating factor we have found in this case is Ray's regulatory history which is, in no way, comparable to the egregious conduct of Golic.

[39] In *Golic*, the panel noted that previous decisions involving breaches of sections 34 and 61 with a small number of investors and small total investments (as in the present case) have generally resulted in market prohibitions from less than one year on the lower end, to three to five years on the higher end.

[40] Ray's misconduct warrants a market ban on the higher end of the scale. While his misconduct was less egregious than that in *McLoughlin* and *Golic*, his past regulatory history for the similar misconduct means that he poses a material future risk to our capital markets. We agree with the respondents that a market ban of five years is appropriate in the circumstances.

[41] Edith's and Keller's misconduct warrants market bans on the lower end of the scale. There are no aggravating factors relating to their misconduct and their activities in connection with the illegal distributions were far less egregious than those of McLoughlin and Golic. We agree with the respondents that a market ban of one year against each of Edith and Keller is appropriate in the circumstances.

[42] The respondents have asked that any ban against the individual respondents from acting as directors or officers be limited to reporting issuers. They submit that, without such an exception, the ban would pose a hardship on the individual respondents. They say that the individual respondents are involved in business endeavors which are structured through corporate entities. They provided general descriptions of the affected entities which include a holding company owned by Keller which owns the building in which he has offices and a corporation utilized by Ray and Edith for running a small business.

[43] The executive director opposes this limitation. He points out that WWTI is not a reporting issuer and the misconduct in issue relates to the individual respondents' activities with respect to WWTI.

[44] We agree with the executive director that the exception proposed by the respondents is not appropriate in the circumstances. However, most business ventures require a corporate entity. Generally, it is not the role of the Commission to deny a respondent the ability to earn a living in a business venture that is not involved in the capital markets.

[45] In the circumstances, we do not consider it prejudicial to the public interest to provide for an exception, in keeping with exceptions previously granted in similar cases, which would permit the individual respondents to act as directors or officers of an issuer all the securities of which

are owned by her or him, as the case may be, or by members of her or his respective immediate family.

B. Section 161(1)(g) Orders

[46] Orders under section 161(1)(g) are meant to encompass those amounts obtained, directly or indirectly, as a result of the respondents' contraventions of the Act.

[47] In this case, WWTI, with the complicity of the individual respondents, obtained $10,000 as a result of their breach of sections 34 and 61 relating to the illegal distribution of the convertible debenture to Investor A.

[48] WWTI issued a convertible debenture in the principal amount of US$47,500 to Investor B in January 2008. However, that principal amount included US$10,000 previously received from Investor B in connection with the purchase of a separate debenture prior to the limitation date. Consequently, for the purposes of making a section 161(1)(g) order, the amount we may take into account as having been obtained by the respondents as a result of their breach of sections 34 and 61 relating to the illegal distribution to Investor B is limited to US$37,500.

[49] The executive director submits that a section 161(1)(g) order in the amount of $10,000 should be made against the respondents.

[50] The respondents submit that no section 161(1)(g) order should be made against the individual respondents. They say that the circumstances of this case are similar to *Saafnet* in that the respondents were simply trying to raise capital to operate their business and there was no evidence that investor funds were misused in any way or that the individual respondents were enriched.

[51] However, in *Saafnet*, unlike the present case, the panel found that the individual respondents were diligent in obtaining legal advice in an attempt to ensure compliance with the Act. In fact, they engaged three different law firms over the course of the distributions as their need for specialist securities law advice grew. Additionally, unlike Ray, neither of the individual respondents in *Saafnet* had a history of regulatory misconduct.

[52] The respondents also say that the circumstance of this case are similar to *Pacific Ocean* in that Keller, in particular, had no control over WWTI. We disagree. Keller, as chief financial officer, had authority with respect to the management of WWTI's affairs. During the period in issue, he assisted in raising capital for WWTI and signed convertible debenture agreements. We found that all of the individual respondents directed the affairs of WWTI during the period in issue.

[53] As noted above, Investor B and a related company were paid $US40,000 pursuant to a settlement agreement entered into in connection with separate legal proceedings. Although the purpose of section 161(1)(g) is not focused on compensating victims and the purpose of our sanctions is different from claims made in civil proceedings, the fact is that the amount paid under the settlement agreement is, in essence, a disgorgement of that amount from the respondents to investors. This is relevant to our decision on the amount to be paid under section 161(1)(g) in this proceeding.

[54] In the circumstances, we agree with the executive director that it is appropriate to make an order on a joint and several basis against each of the respondents under section 161(1)(g) in the amount of $10,000.

C. Administrative Penalties

[55] The executive director submits that an administrative penalty of $25,000 against Ray is appropriate. He refers to *McLoughlin* and says that the penalty should be less than that imposed on McLoughlin to reflect the smaller magnitude of the distribution in this case and the fact that no breach of an existing order is alleged. The executive director says that a penalty similar to that imposed on Collins is warranted. However, this submission does not take into account the fact that Collins was personally enriched by his misconduct.

[56] The executive director seeks an administrative penalty against each Edith and Keller of $10,000. He does not refer to any previous decisions in support of this submission but says that the penalties are warranted based on their central role in the illegal distributions.

[57] The respondents say that no administrative penalties should be imposed. They point out that in *Golic*, no administrative penalty was ordered. The circumstances in *Golic* were different from the present case. *Golic* proceeded as an application under section 161(6) and the executive director did not seek additional monetary penalties.

[58] The misconduct in this case arose from carelessness in ensuring that exemptions were available for the distributions in issue. While that is not acceptable conduct from directors and officers of issuers involved in capital raising activities, given the circumstances of the relationships between each of Investors A and B and the principals of WWTI, the misconduct in this case is at the lower end of the scale.

[59] WWTI had a legitimate business and there is no evidence that the investment proceeds were not applied to that business. The individual respondents were not enriched by their misconduct. Other than Ray, the individual respondents have no history of regulatory misconduct

[60] In the circumstances, administrative penalties of $10,000 against Ray and $5,000 against each of Edith and Keller are appropriate. These penalties reflect the seriousness of the misconduct in each case and, in particular, the aggravating factors relating to Ray's misconduct, as well as the other factors relevant to sanction, making them appropriate both as specific and general deterrents.

V. Orders

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

Wireless Wizard Technologies Inc.

1. under section 161(1)(b), all persons permanently cease trading in, and be permanently prohibited from purchasing any securities of WWTI,

2. under section 161(1)(b), WWTI permanently cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts, and

3. under section 161(1)(g), WWTI pay to the Commission $10,000, being the amount obtained, directly or indirectly, as a result of its contravention of the Act.

Ray

4. under section 161(1)(d)(i), Ray resign any position he holds 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,

5. under sections 161(1)(b), (c) and (d)(ii) to (v):

    i. Ray be prohibited from trading in or purchasing securities, except he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision,

    ii. the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Ray except for those exemptions necessary to enable Ray to trade or purchase securities in his own account,

    iii. Ray be 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,

    iv. Ray be prohibited from becoming or acting as a registrant or promoter,

    v. Ray be prohibited from acting in a management or consultative capacity in connection with activities in the securities market, and

    vi. Ray be prohibited from engaging in investor relations activities,

until the latest of: (a) December 9, 2020, (b) the date that Ray completes a course of studies satisfactory to the executive director concerning duties and responsibilities of directors and officers, and (c) the date the amounts in paragraphs 6 and 7 below have been paid.

6. under section 161(1)(g), Ray pay to the Commission $10,000, being the amount obtained, directly or indirectly, as a result of his contravention of the Act, and

7. under section 162, Ray pay an administrative penalty of $10,000.

Edith

8. under section 161(1)(d)(i), Edith resign any position she holds as a director or officer of any issuer other than an issuer all the securities of which are owned

beneficially by her or members of her immediate family,

9. under sections 161(1)(b), (c) and (d)(ii) to (v):

    i. Edith be prohibited from trading in or purchasing securities, except she may trade and purchase securities for her own account through a registrant, if she gives the registrant a copy of this decision,

    ii. the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Edith except for those exemptions necessary to enable Edith to trade or purchase securities in her own account,

    iii. Edith be 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 her or members of her immediate family,

    iv. Edith be prohibited from becoming or acting as a registrant or promoter,

    v. Edith be prohibited from acting in a management or consultative capacity in connection with activities in the securities market, and

    vi. Edith be prohibited from engaging in investor relations activities,

until the latest of: (a) December 9, 2016, (b) the date Edith successfully completes a course of studies satisfactory to the executive director concerning the duties and responsibilities of directors and officers, and (c) the date the amounts set out in subparagraphs 10 and 11 below have been paid.

10. under section 161(1)(g), Edith pay to the Commission $10,000, being the amount obtained, directly or indirectly, as a result of her contravention of the Act, and

11. under section 162, Edith pay an administrative penalty of $5,000.

Keller

12. under section 161(1)(d)(i), Keller resign any position he holds 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,

13. under sections 161(1)(b), (c) and (d)(ii) to (v):

    i. Keller be prohibited from trading in or purchasing securities, except he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision,

ii. the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Keller except for those exemptions necessary to enable Keller to trade or purchase securities in his own account,

iii. Keller be 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,

iv. Keller be prohibited from becoming or acting as a registrant or promoter,

v. Keller be prohibited from acting in a management or consultative capacity in connection with activities in the securities market, and

vi. Keller be prohibited from engaging in investor relations activities,

until the latest of: (a) December 9, 2016, (b) the date Keller successfully completes a course of studies satisfactory to the executive director concerning the duties and responsibilities of directors and officers, and (c) the date the amounts set out in subparagraphs 14 and 15 below have been paid.

14. under section 161(1)(g), Keller pay to the Commission $10,000, being the amount obtained, directly or indirectly, as a result of his contravention of the Act, and

15. under section 162, Keller pay an administrative penalty of $5,000.

Maximum Amounts

16. WWTI, Ray, Edith and Keller be jointly and severally liable for the $10,000 ordered under section 161(1)(g) and that no amount in excess of $10,000 should be paid by them under those section 161(1)(g) orders.

December 9, 2015

For the Commission

Judith Downes
Commissioner

George C. Glover, Jr.
Commissioner

Don Rowlatt
Commissioner

Reasons for Decision of Nigel P. Cave, Vice Chair

VI Introduction

[62] I concur with the majority decision in all respects other than the reasoning and decision associated with the disgorgement orders against the respondents under section 161(1)(g).

[63] For the reasons below, I would not make any disgorgement orders pursuant to section 161(1)(g).

VII Analysis

A Two Step approach to disgorgement orders

[64] 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.

[65] 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.

[66] 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).

[67] An interpretation of this provision that allows an order for an amount greater than the amount a person obtained from his or her misconduct, directly or indirectly, is inconsistent with the disgorgement purpose of the provision – it would no longer be depriving a person of his or her ill-gotten financial benefits, it would be requiring them to pay amounts he or she never obtained. That would be a penalty, which section 162 deals with exclusively. An order made under section 161(1)(g) that is a penalty is invalid.

[68] 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. As set out in *Streamline*, in my view, one important consideration in assessing the public interest of such an order is whether the funds were utilized by the respondents in the manner that investors anticipated. However, this is not the only relevant consideration for making a determination of whether to make a disgorgement order in the public interest. Other factors could include the personal circumstances of the respondent.

B Application of two step approach

i) Corporate Respondent

[69] In this case, the evidence is clear that WWTI obtained CDN $10,000 and US $37,500 arising from its misconduct. Therefore, a disgorgement order could be made against WWTI.

[70] However, I would not make a disgorgement order against it. There is no evidence to suggest that Wireless Wizard used the funds raised from the illegal distributions in any manner that is

inconsistent with investor expectations. In this case, it is not in the public interest to make a disgorgement order against Wireless Wizard.

ii) Individual Respondents

[71] There was no evidence that the individual respondents obtained, directly or indirectly, any amounts from *their* contraventions of the Act. Therefore, in my view, there are no amounts that could be subject to disgorgement orders against any of the individual respondents. Therefore, I would dismiss the executive director's application for disgorgement orders against the individual respondents.

December 9, 2015

Nigel P. Cave
Vice Chair