BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Wireless Wizard, 2015 BCSECCOM 100 Date: 20150604

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	October 29, 30, 31, November 3, 2014 and February 2, 2015
Submissions Completed	February 2, 2015
Decision date	June 4, 2015

Appearances

Olubode Fagbamiye	For the Executive Director
Gregg Alfonso	For the Respondents

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 on December 18, 2013 (2013 BCSECCOM 545), the executive director alleged that:

- Wireless Wizard Technologies Inc.(WWTI), Raymond Michael Roger Sasseville (Ray), Edith Marie Sasseville (Edith) and Richard Keller contravened sections 34 and 61 of the Act by trading and distributing convertible debentures issued by WWTI to eight investors for a total of $162,500 without being registered or filing a prospectus, and

- The individual respondents, as directors and officers or as de facto directors and officers, employees or agents of WWTI, authorized, permitted or acquiesced in WWTI's contraventions of sections 34 and 61 and therefore contravened the same provisions under section 168.2 of the Act.

[3] The notice of hearing was amended on September 30, 2014 (2014 BCSECCOM 402) to include an allegation that the respondents' conduct described in the notice of hearing was contrary to the public interest.

[4] At the hearing the executive director called five witnesses: a Commission investigator and four investors, including John Duresky. Duresky was president and chief executive officer of WWTI during some of the relevant period. The respondents called two witnesses: Edith and Keller.

II Background

The Respondents

[5] WWTI is a British Columbia company. Its business was developing and marketing a global positioning system (GPS) for motorcycles and wireless technology for conducting sales via text messaging.

[6] Ray is a British Columbia resident. Ray sometimes represented himself as president and chief executive officer of WWTI. He was marketing manager for WWTI and active in marketing the securities and products of WWTI. He also carried out negotiations of key agreements on WWTI's behalf, including the proposed joint venture agreement between WWTI and Investor B's company described below.

[7] Edith is a British Columbia resident and was a director and, from time to time, the president of WWTI.

[8] Ray and Edith were the sole shareholders of WWTI during the relevant period, each holding 50% of the issued and outstanding shares.

[9] Keller is a British Columbia resident and was the chief financial officer of WWTI during the relevant period.

[10] WWTI has never been registered under the Act nor has it filed a prospectus.

[11] None of the individual respondents has been registered in any capacity under the Act.

The Distributions

[12] From January 2007 to April 2008, WWTI distributed convertible debentures to 23 investors for total proceeds of $577,500. The provisions of all of the debentures were the same except for the principal amount, term and conversion price.

[13] The executive director alleges that the respondents illegally distributed these debentures to eight of the 23 investors for total proceeds of $162,500. One of these investors invested twice so that there are nine illegal distributions in issue. Of these distributions , the first was made on May 24, 2007 and the last two were made on December 18, 2007 and January 1, 2008 respectively.

[14] Our preliminary analysis of the issues will focus on these last two distributions. The December 18, 2007 distribution comprised the issuance by WWTI of a convertible debenture in the principal amount of $10,000 to Investor A. We refer to this as the December 18 distribution.

[15] The January 1, 2008 distribution comprised the issuance by WWTI of a convertible debenture in the principal amount of US$75,000 to Investor B. This debenture was subsequently cancelled and replaced by a debenture in the principal amount of US$47,500 to reflect the actual amount paid by Investor B. We refer to this as the January 1 distribution. Investor B also held a US$10,000 convertible debenture issued by WWTI on October 13, 2007.

III Analysis and Findings

Law

Standard of Proof

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

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

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

Registration and Prospectus Requirements

[18] The relevant provisions of the Act at the time of the distributions in issue were as follows.

[19] Section 34(1) said "A person must not… trade in a security …unless the person is registered in accordance with the regulations…"

[20] Section 1(1) defined "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)".

[21] Section 1(1) defined "security" to include "a document, instrument or writing commonly known as a security" and "a bond, debenture, note or other evidence of indebtedness".

[22] Section 61(1) said "Unless exempted under this Act, a person must not distribute a security unless…a preliminary prospectus and a prospectus respecting the security have been filed with the executive director" and the executive director has issued receipts for them.

[23] Section 1(1) defined "distribution" as "a trade in a security of an issuer that has not been previously issued".

Illegal Distribution and Unregistered Trading
The Issues

[24] It is not contested that WWTI sold its convertible debentures to investors, that the debentures were securities, that the sales of debentures were distributions under the Act, that none of the respondents was registered under the Act and that no prospectus was ever filed in connection with the distributions.

[25] The respondents say that exemptions from the prospectus and registration requirements of the Act were available for the nine distributions in issue and, in any event, the allegations relating to all but the January 1 distribution are statute-barred by the limitation period in section 159 of the Act.

[26] The executive director says that no exemptions were available for the distributions in issue, that the January 1 distribution and the December 18 distribution fall within the limitation period and that none of the allegations is statute-barred as these distributions form a continuing course of conduct that started in May 2007 and ended in January 2008 with the January 1 distribution.

[27] Based on the above, the preliminary issues are as follows:

- Did the December 18 distribution take place within the limitation period?

- Were prospectus and registration exemptions available for the distribution(s) that took place within the limitation period?

- Are the allegations relating to the distributions that took place outside the limitation period statute-barred under section 159 of the Act?

Did the December 18 distribution take place within the limitation period?

[28] Section 159 of the Act says:

> "Proceedings under this Act…must not be commenced more than 6 years after the date of the events that give rise to the proceedings."

[29] Subsection 25(4) of the *Interpretation Act*, RSBC 1996, c. 238, which deals with the calculation of time in British Columbia legislation, states:

> "In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last day must be excluded."

[30] Subsection 25(5) of the *Interpretation Act* states:

> "In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included."

[31] The notice of hearing was issued on December 18, 2013. As noted above, the December 18 distribution took place on December 18, 2007. The executive director argues that because the reference to "years" in section 159 of the Act is not expressed as "clear years" or as "at least" or "not less than" a number of years, subsection 25(5) of the *Interpretation Act* applies. He says that this means that, in calculating the limitation period, the first day, December 18, 2007 is excluded and the last day, December 18, 2013, is included with the result that the December 18 distribution falls within the limitation period.

[32] The respondents argue that the legislative purpose of subsection 25(5) must be intended to apply to situations where there is some ambiguity as to the real deadline. They submit that the words "more than" in section 159 mean exactly the same thing as "not less than" or "at least" and therefore subsection 25(4) of the *Interpretation Act* applies to make the December 18 distribution fall outside the limitation period. The respondents were unable to direct the panel to any authorities to support their submission.

[33] We find that the wording of subsections 25(4) and (5) to be unambiguous. As the calculation of time in section 159 of the Act is not expressed as clear years nor by using the phrases specified in subsection 25(4), we find that subsection 25(4) does not apply and that the limitation period must be calculated in accordance with subsection 25(5). We find that December 18, 2013 is the last day of the limitation period and is included therein. As a result, we find that the December 18 distribution took place within the limitation period.

Were prospectus and registration exemptions available for the December 18 and January 1 distributions*?*

Prospectus and registration exemptions

[34] The respondents purport to rely on what are referred to as the "close personal friend" and/or "close business associate" prospectus and registration exemptions for the December 18 and January 1 distributions.

[35] *National Instrument 45-106 – Prospectus and Registration Exemptions* in effect at the time of these distributions ("Former NI 45-106") set out a series of specific registration exemptions which, in the case of the close personal friend and close business associate exemptions, paralleled the terms of the prospectus exemptions. As a result, if we find that these prospectus exemptions were not available for a distribution in issue, the parallel registration exemptions will not be available.

[36] Subsections 2.5(1)(d) and (e) of Former NI 45-106 removed the registration requirement if the investor was a close personal friend or close business associate of a director, executive officer or control person of the issuer. Subsection 2.5(2) provided a parallel exemption from the prospectus requirement.

[37] Sections 2.7 and 2.8 of the companion policy to Former NI 45-106 set out guidelines regarding the meaning of "close personal friend" and "close business associate". These guidelines said that the relationship with the director, executive officer or control person must, at the time of the trade, be of a nature that the investor can assess the person's capabilities and trustworthiness. For an investor to be a "close personal friend", the investor must know the person well enough and for a sufficient period of time to be in a position to make that assessment. For an investor to be a "close business associate", the investor must have had sufficient prior business dealings with the person to make that assessment. The Commission approved these guidelines in *Solara Technologies Inc. and William Dorn Beattie* 2010 BCSECCOM 163.

[38] Section 1.10 of the companion policy to Former NI 45-106 stated that the person distributing securities is responsible for determining, given the facts available, whether an exemption is available.

[39] In *Solara*, the Commission confirmed that it is the responsibility of a person trading in securities to ensure that the trade complies with the Act. The Commission also said that a person relying on an exemption has the onus of proving that the exemption is available. The Commission said:

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

December 18 distribution

[40] The respondents submit that the December 18 distribution was exempt based on the close personal friendship between Investor A's mother and Keller, the chief financial officer of WWTI.

[41] Both Investor A and Keller testified at the hearing regarding the December 18 distribution. Over the course of staff's investigation, Investor A and Keller provided contradictory information. However, at the hearing, it was not contested that: a WWTI convertible debenture was issued in the name of Investor A, Investor A did not know Keller at the time the debenture was issued, Investor A had no contact with anyone at WWTI at the time of her investment and Investor A's mother was a close friend/long-time client of Keller.

[42] At the hearing, Investor A testified that she invested $10,000 in a WWTI convertible debenture with funds sourced from her own investments. She also said that she gave these funds to her mother to make the investment on her behalf. We find this testimony credible. Based on this and the fact that the convertible debenture was issued in Investor A's name, we find that Investor A was the purchaser of the convertible debenture.

[43] Keller testified that Investor A's mother had purchased a WWTI convertible debenture in October 2007 and subsequently she contacted him to purchase another debenture in the name of her daughter. He testified that Investor A's mother gave him a cheque issued on her personal account in payment for the debenture and that he believed that these funds were the mother's. Keller said that Investor A's mother was elderly and had already put some of her assets in joint names with her children. He said that he thought that, as Investor A's

mother already held one debenture, she wanted to "spread this one out" and put it in her daughter's name.

[44] Keller's testimony regarding the circumstances of the issuance of the convertible debenture was not inconsistent with Investor A's testimony. However, we have found that Investor A was the purchaser of the debenture and that Investor A was not a close personal friend of Keller or any other director, officer or control person of WWTI at the time of her investment.

[45] Regardless of the identity of the purchaser of the convertible debenture, Keller played a role in its sale. He received instructions for the purchase, accepted delivery of the purchase funds and signed the debenture on behalf of WWTI. We find that Keller engaged in acts or conduct, directly or indirectly, in furtherance of the December 18 distribution.

[46] We find that the respondents have not discharged the onus of establishing that the close personal friend prospectus and registration exemptions were available for the December 18 distribution or Keller's conduct in furtherance of that distribution.

[47] In the circumstances, we find that WWTI and Keller contravened sections 34 and 61 of the Act in connection with the December 18 distribution.

January 1 distribution

[48] The respondents submit that the January 1 distribution was exempt from the prospectus and registration requirements based on Investor B's relationship as a close business associate/friend of Edith, as a director of WWTI, and Ray, as a founder of WWTI. We note that, in British Columbia, under subsections 2.5 (1)(d) and (e) of Former NI 45-106, the relationship must be with a director, executive officer or control person of an issuer. However, given our findings below, this distinction is not relevant.

[49] To support the respondents' submission, they rely on:

- extensive email correspondence between Investor B, Ray and others associated with WWTI between November 2006, (shortly after Investor B first met Ray and Edith) and January 2008, and

- the testimony of Edith and Keller.

[50] Most of the correspondence was emails from Ray to Investor B with very few responses from Investor B. The principal subjects were a potential joint venture between WWTI and Investor B's company and an investment by Investor B in WWTI, including an email from Ray to Investor B referencing an agreement they reached in Las Vegas regarding the terms of payment and issuance of the January 1, 2008 convertible debenture. A great deal of information about WWTI's products and business plans was provided to Investor B over the course of the correspondence along with a letter of intent outlining the proposed terms of the joint venture. The provision of such information is not inconsistent with the exploration by Investor B of the merits of an investment and/or joint venture and negotiation of their terms. It is not, in and of itself, evidence of prior business dealings between Investor B and Ray or Edith sufficient to form the basis of a relationship that would allow Investor B to assess their capabilities or trustworthiness.

[51] Edith's testimony did not establish that Investor B was a close business associate or close personal friend of hers or of Ray. She said that she did not meet with Investor B often. Most of her testimony consisted of reading extracts from the email correspondence referred to above which she said was consistent with a close business association between Investor B's company and WWTI. A proposed business association between two companies is quite different than the nature of the relationship between individuals required under Former NI 45-106 to establish that they are close business associates.

[52] Keller testified that Investor B was a business associate of WWTI from 2006. He said Investor B had "insider" information regarding WWTI. He stated Investor B was involved with all of WWTI's products and that, from an operational standpoint, Investor B had a better understanding of WWTI's business than he did. The possession of confidential information about WWTI or involvement in its business is not, in and of itself, evidence of the relationship required to establish a close business associate relationship.

[53] Ray and Keller played a role in the January 1 distribution. In the case of Ray, it is clear from the email referenced above that he entered into an agreement with Investor B regarding the terms of payment for, and issuance of, the January 1, 2008 convertible debenture. Keller signed this convertible debenture on behalf of WWTI. We find that Ray and Keller engaged in acts or conduct, directly or indirectly, in furtherance of the January 1 distribution.

[54] We find that the respondents have not provided evidence of prior dealings between Investor B and Edith or Ray sufficient to establish the relationship required to make Investor B a close business associate or close personal friend and that they have not discharged the onus of establishing that exemptions were available for the January 1 distribution or Ray's conduct in furtherance of that distribution .

[55] In the circumstances, we find that WWTI, Ray and Keller contravened sections 34 and 61 of the Act in connection with the January 1 distribution.

Are the allegations relating to the distributions that took place outside the limitation period statute-barred?

[56] The executive director argues that the distributions that took place before December 18, 2007 are not statute-barred by section 159 of the Act. He submits that there is no limitation issue where there is a series of contraventions of the same character which make up a continuing course of conduct and the date of the last event in the series is within the limitation period.

[57] He argues that all nine distributions were part of a continuing course of conduct and, as the last two illegal distributions were within the limitation period, none of the nine is statute-barred.

[58] The respondents argue that the distributions which took place outside the limitation period are statute-barred.

[59] In *Carey Brian Dennis*, 2005 BCSECCOM 65, the panel found that Dennis had perpetrated fraud based on his earlier criminal convictions on eight counts of fraud and theft. The fraud affected four couples. The counts involving three of the couples related to misconduct by Dennis that occurred before the limitation date. Those couples gave Dennis money both before and after the limitation date.

[60] The panel found that all of the funds were the subject of Dennis' ongoing deceit which consisted of issuing purported interest payments, tax receipts and portfolio reviews. The panel found as follows:

> "37 Section 159 ties the limitation period to the "date of the events". The ordinary meaning of "the events" encompasses all events (or one event) constituting a course of conduct that may be one or more breaches of the legislation or conduct contrary to the public interest. . . .

> 38 Therefore, we find that "date of the events" in section 159 means the date of the last event and so has the same meaning as "the date of the occurrence of the last event in. . . [*the wording of the analogous provision of the* Securities Act (*Ontario*)]."

[61] In *Ronald Stephen Barker and Double Eagle Investments Inc.*, 2005 BCSECCOM 146, the panel found, among other things, that the respondents had perpetrated fraud and made misrepresentations to investors in the course of an illegal distribution of Double Eagle shares without being registered.

[62] The respondents raised approximately $2.3 million by the sale of Double Eagle shares to 58 investors between November 1996 and August 2002. Barker made misrepresentations to investors regarding the business of Double Eagle and the nature of the investment. He also misapplied some of the proceeds of the distributions to the same purposes.

[63] Of the $2.3 million raised, $875,000 was raised from 12 of the 58 investors before the limitation date which was January 15, 1998.

[64] Following the reasoning in *Dennis*, the panel found that the pre-limitation conduct in 1996 and 1997 was part of continuing conduct ending in events within the limitation period:

> "86 In this case, the events in issue constitute one course of conduct involving distributions of Double Eagle shares, Barker's misrepresentations made in connection with those distributions, and the purposes to which Barker put the funds raised from those distributions. These events form a continuous pattern of conduct that began in 1996 and continued until August 2002. Under the reasoning in *Dennis*, we may therefore take into account all of this conduct in determining whether Barker and Double Eagle contravened the legislation . . . ."

[65] In *Saafnet Canada Inc., Nizam Dean and Vikash Sami*, 2013 BCSECCOM 442, it was alleged that 34 of 65 distributions of Saafnet shares made by the respondents between September 2000 and July 2007 were illegal. The limitation date was August 6, 2006. Of the alleged illegal distributions that took place before the limitation date, 18 were made in 2000 and 2001, two in 2003 and four in February and May 2006. The 10 remaining alleged illegal distributions took place between the limitation date and July 2007.

[66] The panel found that the distributions in 2000-2001 were statute-barred. In making this finding, the panel distinguished *Dennis* and *Barker* on the basis that the continuity of the misconduct in those cases was obvious. The panel said that a gap of more than four years between Saafnet's financing activities in 2000-2001 and 2006-2007 was too great to be considered a "continuing course of conduct". The panel also found that the financings made in 2000-2001 and 2006-2007 were distinct as to purpose. The first funded Saafnet's start-up and the second funded Saafnet's research, development and commercialization of a new product. The distributions in 2003 were distinguished as isolated transactions.

[67] The panel found that the four distributions in 2006 were part of a continuing course of conduct, being Saafnet's 2006-2007 financing, and the allegations relating to those distributions were not statute-barred.

[68] In *British Columbia (Securities Commission) v. Bapty*, 2006 BCSC 638, the Supreme Court of British Columbia considered the application of section 159 in the context of a continuing course of conduct. The Court said:

> "36 . . . A "continuing contravention", a "continuing violation", a "continuing offence", or a "continuing course of conduct" results in the commission of such an offence not being complete until the conduct has run its course. These terms are most often used to describe a succession of separate illegal acts of the same character which, in their entirety, make up a single continuing transaction . . . . Where there is a finding that there is a continuing contravention, the limitation period does not begin until the entire "transaction" is complete and discrete activities that occur outside of the limitation period are not statute-barred if they form part of the same transaction as events falling within the limitation period: *Re Dennis* 2005 BCSECCOM 65 . . . .
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> 40 The concept of a "continuing contravention" must be contrasted with the concept of "continuing ill-effects" of a past illegal act. The latter cannot extend a limitation period indefinitely as the limitation period is triggered by the completion of the offence, even though the ongoing effects arising from the original breach may continue . . . ."

[69] The Court also said that in a section 159 application, the Commission has the burden of showing that the proceeding was commenced prior to expiration of the limitation period.

[70] We are of the view that a series of separate distributions, whether legal and/or illegal, could constitute a continuing course of conduct that would span a limitation period if the evidence established that there were continuing elements of the offence within the limitation period. For instance, evidence of acts in furtherance of the distributions throughout the period in issue, such as advertisements of the offering, marketing presentations to potential investors or other ongoing efforts to solicit investors could form the basis of a finding of a continuing course of conduct that would include distributions that took place outside the limitation period.

[71] In this case, however, the executive director has not met the burden of establishing that the proceeding was commenced prior to expiration of the limitation period.

[72] The executive director submits that the facts that the same individual respondents were selling the same WWTI securities to investors establishes a continuing course of conduct spanning the limitation period. No evidence was introduced as to continuing elements of the misconduct such as the ongoing misrepresentations and misapplication of proceeds in *Barker* or the purpose of the financings as in *Saafnet*. We do not find the evidence submitted by the executive director sufficient to establish a continuing course of conduct.

[73] Additionally, the executive director did not plead the allegations relating to the illegal distributions and unregistered trading as a continuing course of conduct. The notice of hearing sets out separate allegations of this misconduct relating to nine distributions of WWTI convertible debentures, not a single violation comprising multiple acts of misconduct,

[74] We find that the allegations relating to the distributions and unregistered trading which took place before December 18, 2007 are statute-barred by section 159 of the Act.

Section 168.2 Contravention

[75] The executive director alleges that the individual respondents, as directors and officers or as de facto directors and officers, employees or agents of WWTI authorized, permitted or acquiesced in WWTI's contraventions of sections 34 and 61 of the Act and thereby contravened the same provisions under section 168.2 of the Act

[76] Section 168.2(1) said:

> "If a person, other than an individual, contravenes a provision of the Act…an officer, director…of the person who authorizes, permits or acquiesces in the contravention…also contravenes the provision…"

[77] "Director" and "officer" were defined in section 1 of the Act to include an individual performing a similar function to a director or officer, as the case may be.

[78] We have previously noted that Ray sometimes represented himself as the president and chief executive officer of WWTI and carried out negotiations of key agreements on WWTI's behalf. As such, we find that he was a de facto director and/or officer of WWTI.

[79] Edith was the president and a director and Keller was the chief financial officer of WWTI. The evidence is clear that they and Ray directed the affairs of WWTI during the period in issue.

[80] As a result, we find that Edith authorized, permitted and acquiesced in WWTI's contraventions of sections 34 and 61 of the Act in connection with the December 18 and January 1 distributions. We find that thereby she contravened those same provisions of the Act under section 168.2(1).

[81] We also find that Ray authorized, permitted and acquiesced in WWTI's contraventions of sections 34 and 61 of the Act in connection with the December 18 distribution. We find that thereby he contravened those same provisions of the Act under section 168.2(1).

[82] We have already found that WWTI and Keller contravened sections 34 and 61 of the Act in connection with the December 18 and January 1 distributions and that Ray contravened those same provisions in connection with the January 1 distribution. As a result, it is not necessary to consider whether they also contravened these same provisions pursuant to section 168.2(1).

Public Interest Allegation

[83] The notice of hearing alleges that the respondents' conduct described in the notice of hearing was contrary to the public interest. As we have already found that the respondents committed two of the most serious breaches of the Act by contravening sections 34 and 61, we do not find it necessary to make a separate finding regarding the public interest allegation with respect to this conduct.

V Summary of Findings

[84] We have found that:

- WWTI and Keller contravened sections 34 and 61 of the Act by distributing a WWTI convertible debenture to Investor A for total proceeds of $10,000 without being registered and without having filed a prospectus and for which no exemptions were available;

- WWTI, Ray and Keller contravened sections 34 and 61 of the Act by distributing a WWTI convertible debenture to Investor B for total proceeds of US$47,500 without being registered and without having filed a prospectus and for which no exemptions were available;

- under section 168.2(1) of the Act, Edith contravened sections 34 and 61 of the Act by authorizing, permitting and acquiescing in the distributions of the WWTI convertible debentures to Investor A and Investor B;

- under section 168.2(1), Ray contravened sections 34 and 61 of the Act by authorizing, permitting and acquiescing in the distribution of the WWTI convertible debenture to Investor A; and

- having found that the respondents contravened sections 34 and 61 of the Act, it is not necessary to make a separate findings regarding the allegations relating to conduct contrary to the public interest.

VII Submissions on Sanctions

[85] We direct the parties to make their submissions on sanctions as follows:

By June 26, 2015	The executive director delivers submissions to the respondents and to the secretary to the Commission
By July 10, 2015	The respondents deliver response submissions to the executive director, to each other, 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

July 17, 2015	The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

June 4, 2015

Judith Downes
Commissioner

George C. Glover, Jr.
Commissioner

Don Rowlatt
Commissioner

Reasons of Nigel P. Cave, Vice Chair

VIII Introduction

[86] I concur with the majority's decision however I do not concur with the majority's reasons for finding that the allegations regarding trades outside the limitation period are out of time.

[87] The majority suggests it is possible that illegal distributions that do not occur within a limitation period may still be found to contravene the Act relying on a legal concept called a continuous offence or contravention. This is not a legal concept that is unique to securities law; rather, it is a concept of general application that may, by effect, extend a limitation period.

[88] This Commission has applied this concept, most notably in the *Dennis* and *Saafnet* decisions. The *Saafnet* decision applies the concept in the context of illegal distributions. For the reasons set out below, I do not agree with the reasoning of that decision.

IV Continuous contraventions

[89] There are two different meanings of continuous contravention found in the common law dealing with limitation periods. I find that neither of these two meanings apply in this case, and therefore the limitation period could not be extended beyond six years in this case.

[90] The first meaning of continuous contravention is that a contravention continues over a period of time, and during that period of time the party continues to breach the law. In other words, the contravention is ongoing.

[91] The British Columbia Court of Appeal recently reviewed this meaning of continuous contravention, in the context of a regulatory contravention, in *R. v. Sadolims Enterprises Ltd.*, 2014 BCCA 389.

[92] In that case, a building owner was charged with failing to comply with a municipal order. A building inspector determined that an addition to a building had been constructed without the necessary development and building permits. The building owner was ordered by the municipality to obtain the necessary building permit or to remove the addition. The building owner refused to comply with the order and was eventually charged with failing to comply with the order.

[93] The building owner applied to have the charge dismissed on the basis that the municipality failed to lay the charge within the limitation period under the statute. The building owner's application was denied on the basis that the contravention was continuous and the charge was brought within the limitation period. He was convicted and appealed.

[94] The Court of Appeal denied the appeal, and provided the following summary of the continuous contravention concept:

> 7 In deciding whether the offence is single or continuing, we are confronted with two different approaches to the interpretation of the by-law. The appellant argues for a strict approach requiring clear language in the enactment and relies on the definition of "continuing offence" in *Bell v. The Queen*, [1983] 2 S.C.R. 471 at 488:
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> > A continuing offence is not simply an offence which takes or may take a long time to commit. It may be described as an offence where the conjunction of the *actus reus* and the *mens rea*, which makes the offence complete, does not, as well, terminate the offence. The conjunction of the two essential elements for the commission of the offence continues and the accused remains in what might be described as a state of criminality while the offence continues.
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> 8 On the other hand, the respondent submits that, in a regulatory context as distinct from the classical criminal law setting, the law has shifted to a more purposive approach in determining the nature of the offence, which focusses on the objects of the enactment rather than on a strict construction of the language. This line of reasoning can be found in two decisions of the Ontario Court of Appeal: *Ontario (Workplace Safety and Insurance Board) v. Hamilton Health Sciences Corp.* (2000), 51 O.R. (3d) 83 (C.A.); and Ontario (Attorney General) v. Newton-Thompson (2009), 97 O.R. (3d) 112 (C.A.).
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> 9 Both parties cite *R. v. Rutherford* (1990), 38 O.A.C. 41, which involves a regulatory offence; the appellant, for the result; the respondent, for the general analysis. In *Rutherford*, a contractor was charged with neglecting to comply with a regulation for electrical installations. *Rutherford* treats the failure to comply with a duty as a continuous breach of the law in language that fully supports the decision under appeal. Mr. Justice Grange said, for the majority:

> [16]It is perhaps not always easy to determine what is and what is not a continuing offence. A helpful definition is that of the Supreme Court of Victoria in *R. v. Industrial Appeals Court*, [1965] V.R. 615. There, O'Bryan and Gillard JJ, observed at p.620:
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> > "A continuous or continuing offence is a concept well-known in the criminal law and is often used to describe two different kinds of crime. There is the crime which is constituted by conduct which goes on from day to day and which constitutes a separate and distinct offence each day the conduct continues. There is, on the other hand, the kind of conduct, generally of a passive character, which consists of a failure to perform a duty imposed by law. Such passive conduct may constitute a crime when first indulged in but if the obligation is continuous the breach though constituting one crime only continues day by day to be a crime until the obligation is performed."
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> [17]… If he were obliged to remit money to a government authority (see *R. v. Sakellis*, [1970] 1 O.R. 720 (C.A.)), or failed to make payment of wages (as in *R. v. Industrial Appeals Court*, supra, and *Dressler v. Tallman Gravel and Sand Supply (No.2)*, [1963] 2 C.C.C. 25 (Man. C.A.)), or to file income tax returns (see *R. v. Donen*, [1925] 1 D.L.R. 1141 (Man. C.A.)) the offence might well be considered continuing because he continued to fail to do what was required of him. As Smith, J., put it in a concurring opinion in *R. v. Industrial Appeals Court*, supra, at p.623:
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> > "The distinction is between, on the one hand, an offence which, once committed, is complete and concluded and exists only in the past, and, on the other hand, an offence constituted by a continuing breach of a duty to take action to put an end to a forbidden state of affairs, …"
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> [18]It is considerably easier to find a continuing offence where the statute provides for a penalty for every day that the corrective work is not done or the offending activity continues to be done.

10 I find the passage cited from *R. v. Industrial Appeals Court* aptly describes the state of affairs between the City of Vancouver and the appellant on the day when the information was laid. At that point, the appellant was in default of an obligation imposed by the order. It cannot

> be said that the deadline date marked the occurrence of a single, discrete event. Rather, it was the commencement of a state of affairs wherein the appellant continued from day to day thereafter to neglect an obligation lawfully imposed on it.

[95] In *Sadolims,* the B.C. Court of Appeal took a purposive approach in interpreting the by-law. It determined that the purpose of a municipal order was to ensure compliance with that order, regardless of when. Interpreting the prohibitions under the by-law as continuous contraventions encouraged compliance, as the appellant had it within its power to comply with that order at any time and end the "state of breach" by obtaining the applicable permit or taking down the offending addition to the building.

[96] The Court of Appeal held that the continuous contravention continued during the limitation period, and therefore the allegations were not out of time and the Court dismissed the appeal.

[97] In contrast, applying a purposive interpretation to sections 34(a) and 61(1) of the Act, I find that these sections do not give rise to continuous contraventions in the sense described in *Sadolims*.

[98] The purpose of section 61(1) is to ensure that investors receive a prospectus at the time of the purchase of securities in order to assist them in making an informed investment decision. It is critical that the information be provided at the time of the purchase. The breach is the failure to provide an investor with information, before he or she invests. A respondent can do nothing after a contravention of section 61(1) to rectify the failure to provide the required prospectus at the time of the trade. It is a past event. Failure to provide a prospectus at the time of a trade is, in the words of *Sadolims*, a "single, discrete event". It does not give rise to a continuous breach of the law.

[99] Similarly, the purpose of section 34(a) is to ensure that trades in securities are carried out with the assistance of a person properly registered under the Act. Persons who are registered under the Act play important investor protection roles in the marketplace. Those protections can only apply when a registrant is involved with the investor at the time of the trade. Again, there is nothing that a respondent can do to rectify a breach of section 34(a) after the trade.

[100] The concept of a continuous contravention, as described in *Sadolims*, therefore cannot apply to extend the limitation period for allegations of a breach of sections 34(a) or 61(1).

[101] Trades that contravene those sections, but fall outside of the limitation period under section 159 of the Act, cannot be the subject of allegations by relying on the continuous contravention concept. Those illegal distributions are complete and are separate and distinct contraventions for the purposes of section 159 of the Act.

[102] The second meaning of continuous contravention is a single contravention which is comprised of a series of events, which may or may not be contraventions in and of themselves. In other words, there is a continuous course of conduct which gives rise to one contravention.

[103] The Manitoba Court of Appeal dealt with this meaning of continuous contravention in *Manitoba v. Manitoba (Human Rights Commission)*, [1983] M.J. No.223, which the British Columbia Supreme Court cited with approval in *Re: Roger F. Bapty et al*, 2006 BCSC 638, which the panel in Saafnet cited with approval.

[104] In the *Manitoba* case at paragraph 18, the Court set out the following (emphasis added):

> 18 As well, the notions of a "continuing offence" and of a "continuing cause of action" are well known to the law. Freedman, J.A. (as he then was) commented on the continuing offence in *Dressler v. Tallman Gravel & Sand Supply Ltd. (No. 2)* (1963), 40 W.W.R. 449 at p.459:
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> > "After all, it is not breaking new ground to say that **one charge may be laid** for a continuing offence which is **made up of** a succession of separate offences of the same character, where in their entirety, they may be said to make up a **single**, albeit continuing transaction."
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> In *Hole v. Chard Union (1894)*, 1 Ch.D. 293, the words "continuing cause of action" in the English rule (now Order 37 rule 6) respecting the assessment of damages were considered. Lindley, L.J. said at pp. 295 and 296:
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> > "What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is **a cause of action** which arises from the repetition of acts or omissions of the same kind **as that for which the action was brought**. In my opinion, that is a continuing cause of action within the meaning of the rule."

[105] In the *Manitoba* case, one instance of misconduct gave rise to one allegation. The court therefore dismissed the continuous contravention argument. This is clear from paragraphs 20 and 21 of the *Manitoba* case (emphasis added):

> 20 Galbraith and Lylyk were compulsorily retired pursuant to s. 54 of The Civil Service Superannuation Act when they reached the age of 65 years. Galbraith's complaint says: "I was terminated from my position of employment on May 31, 1981, in that I had reached the age of sixty-five (65) years." Lylak's complaint is similarly worded: "I was terminated (retired) from my position of employment on February 28, 1981, because I had reached my 65th birthday." **In each case, it is the termination of employment or the compulsory retirement that is complained of. Those are the acts of alleged discrimination which are the subject matter of the complaints. In each case, employment was terminated by a single act of compulsory retirement.** The **specific act** occurred on May 31, 1981, in the case of Galbraith, and on February 28, 1981, in the case of Lylyk. While the effects or consequences of the termination of employment were ongoing (and in the case of Galbraith are still ongoing) **they flowed in each case from a single act of alleged age discrimination**.
>
> 21 I have concluded that, in respect of the complaints filed by Galbraith and Lylyk, there have not been continuing contraventions pursuant to s. 19(1) of the Act.

[106] The statutory provision in issue in the *Manitoba* case effectively extended the limitation period, within which to file a complaint, if the alleged discrimination was a "continuing contravention". Since the court found the alleged discrimination was not a continuing contravention, it dismissed the complaint as being filed out of time.

[107] In the current case, in my view there is no allegation of a continuous contravention as described in the *Manitoba* case, and it is difficult to conceive how contraventions of sections 34(a) and 61(1) could be alleged as continuous contraventions in the sense described in the *Manitoba* case. However, in some cases, it may be possible to allege a course of conduct was contrary to the public interest, as in *Heidary (Re)* 2000 LNONOSC 79 (which the Commission cited in *Dennis*) and *Boyle (Re)* 2006 LNONOSC 359.

[108] As discussed above, the purposes of the prohibitions in sections 34(a) and 61 is to ensure that, at the time of a trade, investors have the assistance of a registrant or knowledge to make an informed investment decision. Accordingly, we assess contraventions of sections 34(a) and 61(1) on a trade by trade basis. In other words, we look at each trade separately to determine if the trade complied with the Act or whether an exemption from the prospectus requirements existed for that trade.

[109] This is clear in the present notice of hearing where there are, in my view, 18 allegations of unregistered trading and illegal distribution, not one allegation based on numerous acts. In other words, the pleading is not one allegation of "illegal distribution and unregistered trading" which is proven by 18 instances of misconduct. (If that were the case, then the ED would only be able argue one contravention at the sanction stage, which has not been his practice in the past). Instead, there are 18 separate "single acts", each of which form the basis for a separate allegation.

[110] Pursuant to section 159 of the Act, those acts that happened before the six year limitation period cannot be the basis of allegations, and the limitation period cannot be effectively extended by relying on the concept of a continuous contravention as described in the *Manitoba* case.

June 4, 2015

Nigel P. Cave
Vice Chair