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

Citation: Re Flexfi Inc., 2018 BCSECCOM 166 Date: 20180524

Flexfi Inc. (formerly known as CC Cornerstone Credit Ltd.) and Afshin Ardalan

Panel	Nigel P. Cave	Vice Chair
	Audrey T. Ho	Commissioner
	Gordon Holloway	Commissioner

Hearing dates	April 3, 2018
Submissions Completed	April 10, 2018
Decision date	May 24, 2018

Appearing

Derek Chapman Laesha Smith	For the Executive Director
Robert Cooper Heather Doi	For Flexfi Inc. and Afshin Ardalan

Findings and Decision

I. Introduction

[1] These are the liability and sanctions portions of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

[2] On February 6, 2017, the executive director issued a temporary order and notice of hearing against the respondents, among others (2017 BCSECCOM 33). The temporary order was extended with the consent of all parties.

[3] On June 14, 2017, the respondents applied to the Commission for a determination of whether loans that they had previously issued to investors were "securities" as defined under the Act.

[4] On July 21, 2017, the Commission (in the context of this initial notice of hearing) made a ruling that the loans issued to investors by the respondents were "securities" as defined under the Act (2017 BCSECCOM 238).

[5] On February 6, 2018, the executive director issued a new notice of hearing against the respondents (2018 BCSECCOM 45) alleging:

a) that Flexfi Inc. (formerly known as CC Cornerstone Credit Ltd.) distributed approximately $2.2 million of its securities to investors without filing a prospectus and without an exemption from the requirement to do so, thereby contravening section 61 of the Act; and

b) Afshin Ardalan, as a director and officer of Flexfi, authorized, permitted or acquiesced to Flexfi's contraventions of section 61 of the Act and thereby, pursuant to section 168.2 of the Act, also contravened section 61 of the Act.

[6] This hearing relates to this second notice of hearing.

[7] The parties proceeded on the basis that the respondents admitted liability for the allegations in the notice of hearing and that we should therefore combine the liability and sanction phases of this hearing. We determined that that was appropriate in the circumstances.

[8] The executive director tendered documentary evidence and made written and oral submissions on liability and sanction. Ardalan testified during the hearing and, among other evidence, admitted liability on behalf of himself and Flexfi. The respondents also tendered documentary evidence and made written and oral submissions on sanction.

[9] During the oral hearing, we asked the parties to discuss providing the panelwith agreed wording on an exception (relating to possible future financing activities of the respondents related to Flexfi and/or its business) to the market prohibitions that we might impose upon the respondents. The parties did so following the oral hearing and that exception is discussed in further detail as set out below.

[10] These are our findings on liability and our decision on sanctions in this hearing.

II. Background

Flexfi and Ardalan

[11] Flexfi is in the business of providing microloans to clients who have little or no access to bank loans.

[12] Flexfi was established in 2013 and is owned 40% by Ardalan, through a family trust. The remaining shares are owned by third parties. Ardalan testified that he has not, to date, invested significant financial resources in Flexfi.

[13] Ardalan is the sole director and President of Flexfi and has been the President of Flexfi since its inception.

Flexfi's capital raising structure

[14] The affidavit evidence is that Ardalan made a conscious choice, upon forming Flexfi, to capitalize his new business with loans rather than through equity as he considered equity to be a more expensive source of capital.

[15] Ardalan's evidence is that, at that time, he was aware that Flexfi's capital raising might fall within the jurisdiction of the Act. He says that he did not wish to issue "securities" and, as such, contacted the Commission. He does not remember with whom he spoke, but says that he learned that certain types of debt would be classified as a "security" as defined under the Act and some would not. In particular, he says he was told that a term loan is not normally considered a security but that a promissory note would normally be considered a security. Ardalan also says that he consulted (on an informal basis) several lawyers that he knew and he understood their view to be that term loans are generally not securities. He did not formally engage these lawyers to provide him a legal opinion on the subject.

[16] Flexfi commenced raising capital in late 2013 and early 2014 using a document called an "Agreement" which contained three paragraphs. Those agreements included a statement of the amount loaned to Flexfi, the term of the loan, the maturity date and the amount (and timing of payment) of interest payable on the loan. All of these loans have either been repaid or exchanged for a subsequent form of loan agreement (described below).

[17] All of Flexfi's capital raising is now governed by a more extensive, but still simple, loan agreement which contains the following terms:

- the loan amount;
- the borrower's interest obligations (i.e. the interest rate and manner and timing of payment of that interest);
- the maturity date and a pre-payment right; and
- basic events of default, an acceleration clause in the event of default and a default rate of interest.

All of these loans are unsecured.

[18] We previously determined that all of these loans are "securities" under the Act.

Summary of Flexfi's capital raising efforts

[19] Flexfi has raised a total of $6,920,000 in the form of loans from 66 individuals (in 84 transactions) without filing a prospectus.

[20] To date, Flexfi has met its obligations under the loans it entered into in its capital raising activities.

[21] Of these transactions, the respondents now admit that distributions to 47 investors, who made 52 investments in loans to Flexfi for a total amount of $2.2 million, were in contravention of section 61 of the Act.

[22] Of the original $2.2 million loaned to Flexfi by these investors, approximately $850,000 remains outstanding.

[23] Of this $850,000 in loans, $300,000 of these arrangements had their maturity date extended by the parties (the respondents and the investors) during January and February of 2018.

Flexfi's current financial situation

[24] Evidence in the hearing included Flexfi's annual financial statements for the year ended August 31, 2017 and monthly financial statements for each month ended after August 31, 2017 through January 31, 2018.

[25] Those financial statement show:

- Flexfi has had significant operating losses since inception;
- monthly operating losses continue;
- Flexfi has had significant cash reserves throughout this period, but less than $850,000 at any reporting date; and
- Flexfi has approximately $4.6 million in loan obligations outstanding which is in excess of its total assets (as reported on these financial statements).

[26] Ardalan testified that Flexfi's financial statements do not include an amount for goodwill and that it was his belief, based on several market examples, that Flexfi's total assets would be worth more than its total liabilities if they were sold today.

[27] Ardalan also testified as to his responsibility for having made mistakes (i.e. contravening the Act) in raising capital for Flexfi and his intention and belief that all investors would ultimately be repaid on their investments.

III. Analysis and Findings

A. Applicable Law

Standard of Proof

[28] 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.

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

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

Prospectus Requirement

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

a) Section 1(1) defines "trade" to include "(a) a disposition of a security for valuable consideration" and "(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e)".

b) Section 1(1) defines "security" to include "(a) a document, instrument or writing commonly known as a security", "(b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person", "(d) a bond, debenture, note or other evidence of indebtedness, share, stock..." and "(l) an investment contract."

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

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

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

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

> 37 The determination of whether an exemption applies is a 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 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…

Liability under section 168.2

[34] Section 168.2(1) of the Act states that if a corporate respondent contravenes a provision of the Act, an individual who is an employee, officer, director or agent of the company also contravenes the same provision of the Act, if the individual "authorizes, permits, or acquiesces in the contravention".

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

B. Findings

[36] The respondents have admitted their liability for the allegations in the notice of hearing.

[37] We have no reason to reject the respondents' admissions. The respondents were represented by counsel. There was evidence during the hearing of the subset of the total distributions of securities by the respondents that the executive director alleges were carried out in contravention of section 61 of the Act and in the amounts alleged. There was no evidence of any possible exemptions, available to the respondents in connection therewith, to the requirement to deliver a prospectus in connection with these distributions. Ardalan admitted to being the controlling mind and management of Flexfi in connection with these distributions of securities.

[38] Therefore, we find that Flexfi contravened section 61 of the Act with respect to the distributions of 52 securities to investors for total proceeds of $2.2 million. We also find that, pursuant to section 168.2 of the Act, Ardalan is also liable for these contraventions of section 61 of the Act.

IV. Sanctions

A. Positions of the Parties

[39] The executive director submitted that the following sanctions against the respondents are appropriate in the circumstances:

a) with respect to Flexfi:
   i) broad market prohibitions lasting until the later of seven years and the date it pays its financial sanctions;
   ii) an order against it under section 161(1)(g) of the Act, in the amount of $850,000; and

b) with respect to Ardalan:
   i) broad market prohibitions lasting until the later of seven years and the date he pays his financial sanctions; and
   ii) an order against him under section 162 of the Act, in the amount of $75,000.

[40] The respondents submitted that the following sanctions were appropriate in the circumstances:

a) with respect to Flexfi, broad market prohibitions lasting for three years (subject to certain exceptions, as described below); and

b) with respect to Ardalan:

i) broad market prohibitions lasting for three years (subject to certain exceptions, as described below); and
ii) an order against him under section 162 of the Act, in the amount of $15,000.

[41] The respondents also submitted that the following exceptions or "carve outs" to our typical market prohibition orders were appropriate in the circumstances:

a) an exception to Ardalan's prohibition on trading to allow him to trade securities for his own account(s) provided that a copy of our orders are provided to the registrant operating such account(s);

b) an exception to allow Ardalan to remain as a director and officer of Flexfi; and

c) an exception to allow the respondents to carry on certain activities relating to potential future financings (directly or indirectly) of Flexfi or its business, provided that the respondents apply to the Commission for a variation order prior to the issuance of any securities arising from those activities.

[42] The executive director submitted that he did not object to the exceptions sought by the respondents in subparagraphs 41(a) and (b). He did object to the exception sought in paragraph 41(c) above but consented to certain wording provided by the respondents on the scope of the exception should the panel decide that it was appropriate to provide such an exception.

B. Factors

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

[44] 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:
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> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,

- the respondent’s fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

C. Application of the Factors

Seriousness of the conduct

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

[46] The respondents urged us to take into consideration that they did not intend to breach securities laws and that the contraventions of the Act arose through a mistaken belief that the loans that they were issuing were not securities. They point to their efforts to contact the Commission and their discussions with lawyers at the commencement of their fund raising efforts in support of these submissions.

[47] We agree that this evidence does distinguish the respondents’ behavior from those cases where respondents have had a demonstrated intent to skirt or subvert securities laws. There is no evidence of that in this case.

[48] However, we do not give the respondents much, if any, credit for the limited efforts that they made to determine if the loans that they were intending to issue were securities. By Ardalan’s own admission he was aware of the potential application of securities laws to his capital raising efforts. Ardalan had previously been involved with an issuer in circumstances where securities laws had been engaged. He had worked with sophisticated legal counsel on issues related to compliance with securities laws. The investigations that he made to determine the applicability of those laws to Flexfi’s financings were insufficient and suggest a recklessness or carelessness to compliance with securities laws.

Enrichment/harm to Investors

[49] Flexfi, the issuer of the loans, has been enriched by the principal amount of those transactions.

[50] Ardalan has received a salary as Flexfi’s President since its inception. The executive director submitted that this was a form of enrichment of Ardalan. Considering Ardalan’s salary to be a form of enrichment derived from the contraventions is, strictly speaking, speculative in that Flexfi also raised substantial funds from investors in a manner that was not in contravention of the Act and has generated revenues from its business activities. It

is not possible to draw a direct connection between Ardalan's salary and the funds derived from Flexfi's contravention of the Act.

[51] Unusual for cases before the Commission, there is no evidence of investor harm in the circumstances at hand. Interest and principal amounts have been repaid (or the loans have been extended) to investors.

[52] The executive director submits that Flexfi's financial circumstances are such that the remaining investors are at risk of loss through default on their loans. Ardalan's testimony suggests that this is speculative at this point in time.

Risk to investors and markets

[53] 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.

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

[55] The evidence also suggested that approximately $300,000 of the loans that were originally issued in contravention of section 61 were extended in January and February of 2018. These extensions were effected after our ruling that these loans were securities. The extensions could be viewed as a further distribution of securities in contravention of section 61 of the Act. Furthermore, Ardalan testified that in extending these loans, the investors were not provided with any further disclosure about Flexfi or its financial condition, thereby exacerbating the regulatory problem (i.e. a lack of information about the issuer to allow for an informed investment decision) created by the contravention of section 61 of the Act through the original issuance of these loans. This raises concerns that the respondents continue to represent a significant risk to our capital markets.

Aggravating/mitigating circumstances

[56] There are no aggravating factors in this case.

[57] Neither of the respondents has any history of securities regulatory misconduct.

[58] The respondents urged us to consider their efforts at the outset of their fundraising efforts to determine if the loans were securities as a mitigating factor. As noted above, we do not agree with these submissions.

[59] However, it is a significant mitigating factor that the respondents admitted liability in this case and allowed the Commission and investors to avoid a potentially lengthy hearing to determine liability. Our orders in this case must take this into account.

Specific and general deterrence

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

Previous orders

[61] The executive director directed the panel to five decisions of this Commission as guidance in determining the appropriate sanctions in this case: *Re Spyru*, 2015 BCSECCOM 452 (with respect to the respondents Cire and Harris in that decision); *Re Williams*, 2016 BCSECCOM 283 (with respect to the respondents Penko and Nemeth in that decision), *Re Verifysmart Corp.*, 2012 BCSECCOM 176 (with respect to the respondent Scammell in that decision), *Re HRG Healthcare*, 2016 BCSECCOM 5 (with respect to the respondent Mohan in that decision) and *Re Streamline Properties Inc.*, 2015 BCSECCOM 66.

[62] The respondents directed us to two decisions of this Commission as guidance in determining the appropriate sanctions in this case: *Photo Violation Technologies Corp. (Re)*, 2013 BCSECCOM 276 and *Solara*.

[63] We do not agree that the circumstances of the respondents in *Photo Violation* are analogous to those in this case and hence do not agree that that decision offers appropriate guidance for sanctions in this case. We do agree that the circumstances of the respondents in *Solara* are more similar to the respondents in this case and it does represent useful guidance.

[64] In *Photo Violation*, the panel found that the various respondents had engaged in illegal distributions to raise amounts varying (as between respondents) between $3.6 million and $3.2 million. The panel found that the respondents had engaged in significant due diligence efforts to carry out their capital raising by retaining sophisticated legal counsel and, notwithstanding this, upon becoming concerned about their subsequent compliance with securities laws, essentially reported themselves to the Commission. The panel made orders imposing broad, five year, market prohibitions on the respondents (with carve-outs similar to those requested by the respondents in this case) but declined to impose any financial sanctions on the respondents.

[65] *Photo Violation* is an unusual case. The level of due diligence undertaken by the respondents in connection with their financing was substantial, perhaps close to that required to establish a due diligence defence to their liability. The panel also found that rather than having been enriched by their misconduct, the respondents made substantial investments in the business that were lost when the business ultimately failed. We do not find the activities of the respondents in this case, or their financial circumstances, to be similar to those in *Photo Violation.*

[66] In *Solara*, the respondents were found to have engaged in an illegal distribution for approximately $800,000. They were also found to have engaged in other contraventions of the Act (misrepresentation and breach of a prior order). The investor losses were, without additional financing, total, as the issuer had run out of funds. The panel found that the respondents had been reckless with respect to compliance with securities laws and that there were no aggravating or mitigating circumstances. The panel found that the individual respondent was critical to the issuer being able to attract additional financing. The panel made orders imposing broad, five year, market prohibitions on the respondents (with a carve-out similar to that requested by the respondents in this case to allow them to seek new financing) and imposed a $50,000 administrative penalty under section 162 of the Act against the individual respondent.

[67] The respondents submit that the circumstances of this case are not as serious as those found in the five decisions referenced by the executive director. In particular, the respondents highlight that in all of those cases there was significant investor harm arising from the applicable misconduct and that many of the respondents in those cases had significant aggravating factors or, unlike the respondents in this case, an absence of any significant mitigating factors.

[68] We disagree that the general nature of the misconduct of the respondents in the cases cited by the executive director is not analogous to the circumstances of this case. In general, the respondents in these cases (as in the case before us) were reckless with respect to compliance with securities laws. Therefore, they offer a helpful starting point for guidance as to appropriate sanctions.

[69] However, we agree with the respondents that the circumstances of this case differ from those cited by the executive director in two significant respects – the absence of investor loss and the respondents in those cases were generally found to have aggravating factors or an absence of mitigating factors.

[70] We also agree with the respondents that there is a significant mitigating factor (the admission of liability) in this case, that distinguishes it from those decisions and that we must recognize in our orders.

Market prohibitions

[71] The executive director has asked for broad market prohibitions that will last seven years against the respondents. The respondents have submitted that three year prohibitions are more appropriate in the circumstances.

[72] We have found the respondents' misconduct to be serious. They were careless or reckless with respect to compliance with securities laws. For that reason, we believe that they represent a serious risk to our capital markets and that significant market prohibitions are appropriate in the circumstances. This risk is reinforced by the respondents' conduct in extending certain of the loans which were illegally distributed after the notice of hearing in this matter was issued.

[73] As noted above, *Solara* and the decisions cited by the executive director above, are generally supportive of the duration and breadth of the market prohibitions requested by the executive director.

[74] However, those decisions are not completely analogous to the circumstances before us owing to the lack of investor losses and the respondents' admissions of liability. Our orders for market prohibitions should be of shorter duration as a consequence. We find that four-year market prohibitions are appropriate in the circumstances. There is no reason to treat Ardalan and Flexfi differently with respect to these prohibitions.

[75] As noted above, the respondents requested three carve outs from these orders.

[76] The executive director did not object to their request that Ardalan be allowed to maintain certain personal trading accounts and to remain as a director and officer of Flexfi. Flexfi is currently an operating business and Ardalan is currently its primary mind and management. As with *Solara*, we think that barring Ardalan from continuing in a management role at Flexfi could increase the risk of its investors not recovering their investments. It is in the public interest to allow him to continue in this role. Our orders incorporate these requested exceptions.

[77] The executive director did object to the respondents' request to carry out acts in furtherance of potential trades of securities to allow Flexfi, or a new entity related to the respondents that would acquire the assets of Flexfi, to raise additional funds, provided that any actual issuances of securities would require the respondents to seek a variance of our orders. The executive director objected to this carve out on the basis that it was unnecessary and not in the public interest.

[78] The evidence supports the submissions of the respondents that Flexfi may need to raise additional capital, whether within Flexfi or in a new entity. Flexfi has existing debt obligations, including the remaining $850,000 of loan arrangements that it illegally distributed, that may be impaired without an additional influx of capital. As the panel did in *Solara*, we find it to be in the public interest to allow the respondents to take steps to seek this additional financing should the need arise, provided they apply to this Commission to seek a variance of our orders prior to issuing, directly or indirectly, any securities in furtherance of this objective. Our orders incorporate this requested exception as well.

Disgorgement orders

[79] The executive director submits that we should make an order under section 161(1)(g) of the Act against Flexfi in the amount of $850,000 (being the amount of the illegally distributed loans remaining outstanding). The respondents submit that it would not be in the public interest to make such an order.

[80] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, recently adopted a two-step approach to considering applications for orders under section 161(1)(g) (para 144):

> I now turn to apply these principles to the three appeals before this Court. I agree with and adopt the two-step approach identified by Vice Chair Cave in *Spyru* at paras 131-132:
>
>> [131] 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).
>>
>> [132] 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.

[81] The Court of Appeal in *Poonian* further adopted several principles to apply in interpreting section 161(1)(g) (para 143):

1. The purpose of s. 161(1)(g) is to deter persons from contravening the *Act* by removing the incentive to contravene, i.e. by ensuring the person does not retain the "benefit" of their wrongdoing.

2. The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention. Those objectives may be achieved through other mechanisms in the *Act*, such as the claims process set up under Part 3 of the *Securities Regulation* or the s.157 compliance proceedings in the *Act*.

3. There is no "profit" notion, and the "amount obtained" does not require the Commission to allow for deductions of expenses, costs, or amounts other persons paid to the Commission. It does, however, permit deductions for amounts returned to the victim(s).

4. The "amount obtained" must be obtained *by that respondent, directly or indirectly*, as a result of the failure to comply with or contravention of the *Act*. This generally prohibits the making of a joint and several order because such an order would require someone to pay an amount that person did not obtain as a result of that person's contravention.

5. However, a joint and several order may be made where the parties being held jointly and severally liable are under the direction and control of the contravener such that, in fact, the contravener obtained those amounts *indirectly*. Non-exhaustive examples include the use of a corporate *alter ego*, use of other person's accounts, or use of other persons as nominee recipients.

[82] Finally, the Court of Appeal in *Poonian* approved an approach to determining the amounts obtained, directly or indirectly, by a respondent that requires the executive director to provide evidence of an "approximate" amount, following which the burden of proof switches to the respondent to disprove the reasonableness of this number.

Step 1 – Can a section 161(1)(g) order be made?

[83] There was no disagreement among the parties that we could make an order under section 161(1)(g) against Flexfi in the amount of $850,000.

[84] Flexfi clearly directly obtained the benefit of the full amount of the loans that were illegally distributed. In determining the appropriate quantum of an order under this section it would also be appropriate to take into account the portion of the gross amount of the funds from the illegal distributions that have been returned to the investors (i.e. deducting the amount of the loans that have been repaid). Therefore, we find that we could make an order against Flexfi in the amount of $850,000.

Step 2 – Is it in the public interest to make a section 161(1)(g) order?

[85] There remains only the question of whether it is in the public interest for us to make such an order against Flexfi in all of the circumstances.

[86] This is an unusual case in that Flexfi remains an active business and in compliance with its obligations under both the notes it illegally distributed and under its other loan obligations. This differentiates this case from all of the other examples cited to us by the parties.

[87] Because of this, there are considerations with respect to the public interest that are not often present in cases of this type:

- will our orders negatively impact the very investors to whom Flexfi distributed securities in contravention of the Act?
- will our orders negatively impact other investors in Flexfi?

[88] The executive director submits that an order against Flexfi under section 161(1)(g) is in the public interest. He says such an order is required to support the principles of specific and general deterrence. He says that without this order there will be no financial sanctions imposed upon Flexfi and that misconduct of the type committed by the company should result in material financial sanctions.

[89] The respondents say that it is not in the public interest to make such an order. They note that a disgorgement order (which can be turned into a judgment by the Commission by filing it in court) would do little more, if anything, to ensure Flexfi does not benefit from its contravention of the Act. The effect of such an order would be similar to the existing contractural rights of the investors who provided the $850,000 and their legal rights to pursue debt repayments from Flexfi. As a consequence, they say that a disgorgement order would not act as any form of specific or general deterrence. They also submit that a disgorgement order has the possibility of harming other investors who have provided funds to Flexfi and that we should be mindful of this potential consequence in weighing the public interest of making such an order.

[90] We agree with the respondents submissions on this point. We do not see that a disgorgement order that would impose few, if any, obligations on Flexfi over and above its existing contractual obligations acts as any real form of deterrent. We also are concerned that a disgorgement order may trigger a financial event for Flexfi that could impair the ongoing financial situation of the very investors who provided the funds in the illegal distribution. To date, the respondents' obligations to the investors under the terms of the loans have been met. Finally, we are concerned about the impact a disgorgement order may have on other investors who have provided funds to Flexfi.

[91] In sum, we decline to make such an order as we are concerned that the potential harms of a disgorgement order significantly outweigh the benefit, if any, of such an order and, therefore, it is not in the public interest.

Administrative penalties

[92] The executive director sought a $75,000 order under section 162 of the Act against Ardalan. He did not seek any order under section 162 against Flexfi.

[93] The respondents submit that a $15,000 order under section 162 is more appropriate in the circumstances.

[94] As noted above, under our discussion of the appropriate length of our market prohibitions, Ardalan's misconduct was serious. His misconduct warrants a meaningful sanction under section 162.

[95] Again, *Solara* and the five cases cited by the executive director suggest a sanction closer to what the executive director seeks. However, as with our findings with respect to the appropriate market prohibitions we must recognize that there has not been any default under the loans nor any investor loss to date and that Ardalan has voluntarily admitted his liability.

[96] In support of providing a meaningful sanction for the purpose of both specific and general deterrence, we find that an order for $40,000 against Ardalan is appropriate in all of the circumstances.

V. Orders

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

(a) under section 161(1)(d)(i), Ardalan resign any position he holds as a director or officer of an issuer or registrant except that he may continue to act as a director and officer of Flexfi Inc.;

(b) Ardalan is prohibited for the later of four years and the date that the amount set out in subparagraph (c) below is paid:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase securities or exchange contracts for his own account (including one RRSP account, one TFSA account and one RESP account) through a registered dealer, if he gives the registered dealer a copy of this decision;

(ii) under section 161(1)(c), from relying on any of the exemptions set out in this Act, the regulations or a decision;

(iii) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant, except that he may continue to act as a director and officer of Flexfi Inc.;

(iv) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;

(v) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and

(vi) under section 161(1)(d)(v), from engaging in investor relations activities;

(c) Ardalan pay to the Commission $40,000 pursuant to section 162 of the Act; and

(d) Flexfi is prohibited for four years:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts;

(ii) under section 161(1)(c), from relying on any of the exemptions set out in this Act, the regulations or a decision;

(iii) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;

(iv) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and

(v) under section 161(1)(d)(v), from engaging in investor relations activities.

[98] The above prohibitions imposed on Flexfi and Ardalan are subject to the following exceptions:

a) each may engage in conduct necessary to find financing for Flexfi's business, including advertisement, solicitation, negotiation or other investor relations activities, except that if either Ardalan or Flexfi identify a prospective means of financing Flexfi's business, they must apply for an appropriate variation order from this Commission before distributing securities of Flexfi; and

b) each may engage in conduct including advertisement, solicitation, negotiation or other investor relations activities, in order to find financing to enable a new corporate entity (New Entity) to purchase the assets of Flexfi, except that if either Ardalan or Flexfi identify a prospective means of financing the purchase through the New Entity, they must apply for an appropriate variation order from this Commission before distributing securities of Flexfi or the New Entity.

May 24, 2018

For the Commission

Nigel P. Cave Vice Chair	Audrey T. Ho Commissioner

Gordon Holloway
Commissioner