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

Citation: Re Gravelle, 2019 BCSECCOM 63 Date: 20190215

James Marc Gravelle (also known as Marc Joseph James Gravelle and Marc James Gravelle) and WY ATAP Investments Inc.

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	George C. Glover, Jr.	Commissioner
Hearing Dates	October 15 and 16, 2018 December 18, 2018	
Submissions Completed	December 18, 2018	
Date of Findings	February 15, 2019	
Appearing		
Mila Pivnenko Joanne Thai	For the Executive Director	
James Marc Gravelle (aka Marc Joseph James Gravelle and Marc James Gravelle)	For himself and WY ATAP Investments Inc.	

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161(1) and162 of the *Securities Act*, RSBC 1996, c. 418.

[2] In a notice of hearing issued January 4, 2018 (2018 BCSECCOM 1), the executive director alleged that:

a) James Marc Gravelle (also known as Marc Joseph James Gravelle and Marc James Gravelle) (Gravelle) and WY ATAP Investments Inc. (WY) issued eight promissory notes totaling $740,000 without being registered to trade in securities, contrary to section 34(a) of the Act; and

b) Gravelle and WY guaranteed repayment of the eight promissory notes, contrary to section 50(1)(a)(ii) of the Act.

[3] During the hearing, the executive director called two witnesses (a Commission investigator and one investor), tendered documentary evidence and provided written and oral submissions. Gravelle testified, tendered documentary evidence and provided written and oral submissions on behalf of himself and WY.

[4] These are our findings with respect to the liability of the respondents relating to the allegations in the notice of hearing.

II. Background

[5] Gravelle is a resident of Langley, British Columbia. He has never been registered in any capacity under the Act.

[6] WY is a British Columbia corporation incorporated on December 2, 2003. The company has never been registered in any capacity under the Act.

[7] During the relevant period, Gravelle was an officer and director of WY and was its controlling mind and management. WY was incorporated to invest in real estate and other investments.

[8] Gravelle is the spiritual leader of a religious group that he founded called the Bondservants of Elohim. During the relevant period, Gravelle and members of the group met regularly for spiritual and social reasons.

[9] During the relevant period, Gravelle offered certain members of the spiritual group the opportunity to invest money in investment opportunities that he and WY were pursuing. Those investment opportunities included, at least, investments in commercial real estate, gravel pits and newspapers.

[10] Investors who elected to participate in the investment opportunities received promissory notes issued by the respondents in the principal amounts of their investments. The promissory notes differed as to maturity dates and rates of interest; however, in each case, the promissory notes were jointly issued by Gravelle and WY, and they were jointly responsible for repayment of the entire principal amount. Each note also contained a guarantee by each of Gravelle and WY of the other's repayment obligations.

[11] Between February 2012 and January 2013, eight separate investments were made by five investors (two of whom were a husband and wife) for a total of $740,000. Promissory notes aggregating that amount were issued to these investors.

[12] We heard testimony from one investor who, along with her husband invested a total of $500,000 with the respondents. It was clear that the respondents provided little information to the husband and wife as to the specifics of the use of their funds or the investments to be made by the respondents.

[13] The amounts invested by the investors were deposited into a WY bank account. From that account, certain payments were made for or on behalf of Gravelle for personal living expenses.

[14] Interest payments were made on at least some of the promissory notes for a period but then ceased. The investors all experienced financial losses in their investments and none of the principal amounts of the promissory notes has been repaid.

III. Analysis and Findings

A. Applicable Law

Standard of Proof

[15] 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 (at paragraph 49):

> 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.

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

[17] 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, paragraph 35.

Definition of "trade"

[18] Section 1(1) of the Act 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)".

Definition of "security"

[19] 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."

Registration Requirements

[20] Section 34(a) states that "A person must not… trade in a security …unless the person is registered in accordance with the regulations…"

[21] National Instrument 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) includes further detail regarding the circumstances under which persons are required to be registered to trade in securities. This National Instrument sets out these registration requirements and the Companion Policy to NI 31-

103 (CP 31-103) contains interpretations of this National Instrument by the Canadian Securities Administrators. The Canadian Securities Administrators comprises the securities regulators of all of the provinces and territories of Canada.

[22] Section 8.4(1) of NI 31-103 sets out an exemption from the requirement in section 34(a) that a person must be registered to trade in securities:

> 8.4(1) In British Columbia…, a person…is exempt from the dealer registration requirement if the person…
> (a) is not engaged in the business of trading in securities…as principal or agent, and
> (b) does not hold himself, herself or itself out as engaging in the business of trading in securities…as a principal or agent.

[23] This means that although the requirement is often thought of as "persons are required to be registered under the Act when they are in the business of trading in securities", the technical structure of the regulatory provisions is that a person is required to be registered if they are trading in securities **unless** they are **not** in the business of trading in securities.

[24] The following provisions of CP 31-103 set out factors that regulators consider relevant to the determination of whether a person is trading in securities for a business purpose:

- engaging in activities similar to a registrant – including whether the person is acting as an intermediary between the buyer and seller of securities;

- directly or indirectly carrying on the activity with repetition, regularity or continuity – including the frequency of transactions (but the activity does not have to be the sole or even the primary endeavor of the person); whether the activity is carried out regularly in any way that produces, or is intended to produce, profits; the person's various sources of income and amount of time allocated to the activity;

- being compensated for the activity – receiving or expecting to be compensated for carrying on the activity indicates a business purpose; and

- directly or indirectly soliciting – contacting potential investors to solicit securities transactions suggests a business purpose.

[25] Section 1.3 of CP 31-103 specifically addresses how these factors should be considered when assessing whether a securities issuer is in the business of trading. In particular, it sets out the following:

> In general, securities issuers with an "active non-securities business" do not have to register as a dealer if they:
> - do not hold themselves out as being in the business of trading in securities;
> - trade in securities infrequently;

- are not, or do not expect to be, compensated for trading in securities;
- do not act as intermediaries; and
- do not produce, or intend to produce, a profit from trading in securities.

…

However, securities issuers may have to register as dealers if they are in the business of trading. Conduct that would indicate that security issuers are in the business includes frequently trading in securities. While frequent trading is a common indicator of being in the business of trading, we recognize that trading may be more frequent during the start-up stage, as an issuer needs to raise capital to launch and advance the business. If the trading is primarily for the purpose of advancing the issuer's business plan, then the frequency of the activities alone should not result in the issuer being in the business of trading in securities….

Securities issuers may also have to register as a dealer if they

- employ or contract individuals to perform activities on their behalf that are similar to those performed by a registrant (other than underwriting in the normal course of a distribution or trading for their own account);
- actively solicit investors, subject to the discussion below;
- act as an intermediary by investing client money in securities.

…

Many issuers actively solicit through officers, directors or other employees. If these individuals' activities are incidental to their primary roles with an issuer, they would likely not be in the business of trading. Factors that would suggest that the issuer and these individuals are in the business of trading are:

- the principal purpose of the individuals' employment is raising capital through distributions of the issuer's securities;
- the individuals spend the majority of their time raising capital in this manner;
- the individuals' compensation or remuneration is based solely or primarily on the amount of capital that they raise for the issuer.

[26] Companion Policies do not have the force of law. Their function is to inform market participants of the regulators' interpretation of certain aspects of securities law. We find the statements of policy in CP 31-103 outlined above, to be appropriate to the application of some of the factors to be considered in determining whether a person (including a securities issuer) is required to be registered under the Act.

Prohibited representations

[27] Section 50(1)(a)(ii) of the Act sets out that "a person, while engaged in investor relations activities or with the intention of effecting a trade in a security, must not … represent that the person or another person will … refund all or any of the purchase price of a security".

[28] Section 1(1) of the Act defines "investor relations activities" as any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer. There are some exemptions from this definition, none of which is relevant to these proceedings.

B. Analysis

Position of the Parties

[29] With respect to the allegations pursuant to section 34 of the Act, the executive director submitted that:

a) the promissory notes were securities as defined under the Act;
b) by the respondents' issuing the securities and taking steps in furtherance thereof, the respondents had traded in securities;
c) having traded in securities, pursuant to section 34 of the Act, the respondents needed to be registered under the Act unless an exemption from that requirement was applicable to the respondents; and
d) no exemption from the requirement to be so registered was applicable to the respondents, as, in particular, the respondents were in the business of trading.

[30] With respect to the allegations pursuant to section 50(1)(a)(ii) of the Act, the executive director submitted that the respondents guaranteed the repayment of the promissory notes and, accordingly, contravened the requirements of that section.

[31] The respondents made a number of submissions that can be generalized as follows (and which appeared to be responsive to both allegations in the notice of hearing):

a) that the promissory notes were not securities as defined in the Act;
b) that they had not traded in securities as they had not solicited any investors; and
c) that they were not in the business of trading in securities.

Section 34 allegations

[32] The first issue is whether the promissory notes issued by the respondents are "securities" under the Act.

[33] The definition of a "security" under the Act includes a note or other evidence of indebtedness. The documents issued by the respondents to investors were clearly promissory notes and fit within this definition.

[34] In *Re FS Financial Strategies*, 2017 BCSECCOM 238, the panel acknowledged that not all evidences of indebtedness were "securities" for the purposes of the Act. However, that decision also made clear that the evidences of indebtedness which might not be "securities" are those that arise from transactions that are principally commercial in nature. That was not the case here. The promissory notes were issued by the respondents for the purpose of raising money to make investments and the purpose for which the investors provided the funds was to make an investment with the respondents and to earn a return thereon.

[35] Therefore, the promissory notes issued by the respondents were clearly "securities" under the Act.

[36] Although the respondents made a number of submissions that they never solicited any of the investors, there is no question that they "traded" in securities. The promissory notes were issued by the respondents (i.e. the promissory notes were direct promises to pay made by both of the respondents). The issuance of a security for valuable consideration by a person is a "trade" in a security.

[37] As a consequence of this finding, section 34 of the Act required that the respondents be registered under the Act unless an exemption from that requirement was applicable.

[38] The only exemption from the requirement to be registered under the Act that might have been applicable to the respondents in these circumstances is found in section 8.4(1) of NI 31-103. That exemption provides that persons are not required to be registered under the Act if they are not in the business of trading.

[39] The executive director submitted that many of the factors referred to in CP 31-103 that regulators consider relevant to the determination whether a person is trading for a business purpose were present in this case. Specifically, the executive director submitted that the respondents engaged in activities similar to a registrant in that:

a) they solicited money for their investment business from the public by promising to pay interest on the promissory notes and guaranteeing the repayment of the notes;

b) they expected to profit from the invested funds in that they intended to earn more money from the investments they would make with the investors' funds than would be payable in interest to their investors; and

c) Gravelle met with the investors and solicited the investors to invest and subsequently provided the investors with periodic updates on their investments.

[40] The executive director submitted that the respondents carried out their trading activity with repetition, regularity and continuity (i.e. the eight issuances of promissory notes during the 11 month relevant period).

[41] Finally, the executive director submitted that the respondents expected to be remunerated or compensated, as they expected to earn more money from the investments they would make with the investors' funds than would be payable in interest to their investors and the respondents were further compensated, as some of the investors' money was used to pay the respondents' expenses.

[42] We do not agree with the executive director's submissions.

[43] The registration requirement is a cornerstone of investor protection in the Act. The exemption from that requirement for a person who is "not in the business of trading" is based on a policy decision that persons who are not trading in securities for a business purpose do not raise concerns about the types of harms that the registration requirement is intended to address. An analysis whether a person is trading in securities for a business purpose should therefore start with consideration of whether, at a high level, the conduct in question raises those kinds of concerns. When considered from this perspective, there is nothing in the respondents' conduct that presents concerns about the types of harms that a registration regime based on a business trigger is intended to address. Contrary to the executive director's submissions, taken in its entirety, we do not think the respondents' conduct resembled, or could be seen to resemble, the types of conduct that a registrant usually engages in.

[44] The respondents were the issuers of the securities in question. This case directly raises the question of when an issuer of securities is in the business of trading, such that it needs to be registered under section 34 of the Act. As a general comment, before we consider each of the factors below, if the respondents in this case were "in the business of trading" then practically every junior or start-up issuer, listed on an exchange or otherwise, would also be in the business of trading and would need to be registered or engage with investors and distribute securities only through a registrant. That would not be a sensible policy outcome and would not be consistent with the existing regulatory regime. For example, there are exemptions from the prospectus requirement that specifically contemplate issuers distributing securities without the use of a registrant, including the "friends, family and business associates" exemption in National Instrument 45-106 *Prospectus Exemptions*.

[45] Section 1.3 of CP 31-103 specifically addresses how the factors should be considered when assessing whether a securities issuer is in the business of trading. In particular, it sets out the following:

> In general, securities issuers with an "active non-securities business" do not have to register as a dealer if they:
>
> - do not hold themselves out as being in the business of trading in securities;
> - trade in securities infrequently;
> - are not, or do not expect to be, compensated for trading in securities;
> - do not act as intermediaries; and

- do not produce, or intend to produce, a profit from trading in securities.

…

[46] The evidence in this case was that the respondents were engaged in an "active non-securities business". That business included, at least, investments in commercial real estate, gravel pits and newspapers.

[47] The respondents did not hold themselves out as being in the business of trading in securities. In the circumstances of this case, the eight issuances of promissory notes by the respondents to a total of five investors over an 11 month period is not frequent trading activity. It would not be an unusual number of trades for start-up or venture issuers. Even if it were, the Companion Policy correctly notes that frequency of trading for issuers of this type is not, in and of itself determinative, whether the issuer is in the business of trading. If the trading is primarily for the purpose of advancing the issuer's business plan, as it was in this case, then the frequency of the activity alone would not suggest that the issuer is in the business of trading in securities.

[48] The respondents did not act as intermediaries between the buyers and sellers of securities, but were sellers of securities themselves. The investors in this case did not obtain any right, title or interest in any of the investments subsequently made by the respondents.

[49] The Companion Policy also sets out other circumstances in which securities issuers may have to register as a dealer, including if they employ or engage third parties to perform activities on their behalf that are similar to those performed by a registrant. There was no evidence that the respondents engaged finders or investor relations consultants.

[50] Another indicator that a securities issuer may have to register is if they actively solicit investors. While the respondents may be said to have engaged in solicitations of investments from some members of the spiritual group, there was no evidence of solicitation of investments more broadly. Gravelle was both an issuer of the promissory notes and the controlling mind and management of WY. The Companion Policy acknowledges that many issuers actively solicit investors through officers, directors and other employees. It states that if those individuals' activities are incidental to their primary roles with an issuer, they would likely not be in the business of trading. The policy sets out factors relating to solicitation that would suggest that the issuer and these individuals are in the business of trading. None of those factors is present in this case. There was no evidence that Gravelle spent the majority of his time raising funds for WY or was compensated by WY based upon the quantum of funds raised (e.g. through commissions or bonuses tied to raising funds).

[51] Lastly, the executive director relied heavily on the submission that the respondents expected to profit from, or be compensated from, their trading in securities. The executive director pointed to a) the respondents' own admission that they expected to earn a profit on their investments of the investors' funds in excess of the interest obligations on the promissory notes; and b) that Gravelle's use of some of the investors' funds for personal living expenses.

[52] It is safe to assume that every business intends to earn a profit on its funds raised in excess of the cost of capital. That has nothing to do with earning a profit or being compensated for the activity of trading in securities which may suggest a person is "in the business of trading". There was no evidence that Gravelle or WY set up their business in order to profit from the activity of trading in securities or that either was compensated based on or related to the amount of capital raised. The evidence was that their intention was to profit from the investments made with the investors' funds, rather than through trading activity. That Gravelle used some of the investors' funds for personal living expenses is not indicative of anything other than Gravelle personally was one of the borrowers and would have had access to those funds as principal borrower. There was no evidence that Gravelle obtained those funds as a commission or some other compensation tied to the issuance of the promissory notes.

[53] The executive director referred to *Re Fauth,* 2018 ABASC 175, in which the Alberta Securities Commission found that the respondent engaged in and held himself out as engaging in the business of trading in securities. The ASC found that he promoted securities of an issuer he controlled and solicited investments in that issuer with repetition, regularity or continuity. He was the only person involved in promoting and selling the securities of that issuer. The panel found that while it did not appear that the issuer paid the respondent a sales commission *per se,* he nonetheless received the proceeds from the investments he solicited and obtained the benefit of them for himself, his family and entities he owned, controlled or managed, including in the form of management and director's fees. That case is distinguishable from this case. The respondent in that case was not an issuer of securities, he met many of the investors in the context of providing investment advice and he intermediated trades between the investors and the issuer. The amounts raised, number of investors and frequency of trading were also all considerably higher than in the present case. The respondent had arranged for the issuance of 24 secured debentures to 19 investors for $3,525,000 over approximately two years, as well as seven notes to six investors for $545,000 over just one year. We do not find the circumstances of that case analogous to those in this case.

[54] As we stated at the outset, there was nothing in the conduct of the respondents, as it related to the need to be registered under the Act, to differentiate them from a vast number of other start-up or venture issuers to suggest that they were "in the business of trading". Many issuers engage in activities similar to the respondents to raise capital for their businesses. While issuers can be in the business of trading in securities, in the circumstances of this case, we find that the respondents were not. Therefore, we find that the exemption in section 8.4(1) of NI 31-103 was available to the respondents and we dismiss the allegations that they contravened section 34 of the Act.

Prohibited representation allegation

[55] We also dismiss the allegations against the respondents that they contravened section 50(1)(a)(ii) of the Act.

[56] Each promissory note was issued jointly by Gravelle and WY. Both of the respondents were borrowers under the notes. The guarantee of each respondent's obligations under each note, provided by the other respondent, was simply a restatement of the legal payment obligations of each respondent to each investor.

[57] The regulatory purpose of section 50(1)(a)(ii) must be directed at circumstances such as those where there is a promise to repay an amount paid for a security where that security does not contain a right to repayment. It cannot be a contravention of section 50(1)(a)(ii) to provide a guarantee in the terms of a security that is simply a restatement of the promise to pay in the document.

IV. Conclusion

[58] Therefore, we dismiss all allegations in the notice of hearing against the respondents.

February 15, 2019

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

George C. Glover, Jr.
Commissioner