Citation: 2015 BCSECCOM 66

Streamline Properties Inc., 0772835 B.C. Ltd., Local 1661 Building Inc., Almaval Building Inc., Jeffrey Karl Wiegel and Michael Jerome Knight

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

Hearing

Panel	Nigel P. Cave	Vice Chair
	Audrey T. Ho	Commissioner
	George C. Glover, Jr.	Commissioner
	Don Rowlatt	Commissioner
Hearing Date	November 14, 2014	
Date of Decision	February 23, 2015	

Appearing

Jennifer Whately	For the Executive Director
Jeffrey Karl Wiegel	For himself
Michael Jerome Knight	For himself

Decision

I Introduction

¶ 1 This is the decision of a majority of the Commission panel on the sanctions portion of a hearing pursuant to sections 161, 162 and 174 of the *Securities Act*, RSBC, 1996, c.418. Vice Chair Cave has given separate reasons on the issue of an order under section 161(1)(g), starting at paragraph 70.

¶ 2 The Findings of the panel on liability made on September 3, 2014 (2014 BCSECCOM 263) are part of this decision.

¶ 3 The panel found that:

- all of the respondents, other than Streamline, contravened sections 34 and 61 of the Act in the specific manner described in the Findings;
- Knight perpetrated a fraud, contrary to section 57(b) of the Act; and
- Knight contravened an order of the executive director of April 5, 2004.

II Position of the Parties

¶ 4 The executive director seeks:

a) permanent market prohibitions against Knight and the corporate respondents (other than Streamline);

b) 10 year market prohibitions against Wiegel;

c) a disgorgement order against Knight in the amount of $3,725,000;

d) a disgorgement order against Wiegel in the amount of $3,625,000;

e) disgorgement orders against the corporate respondents as follows:
- 835 Ltd. - $1,935,000
- Local Inc. - $1,690,000
- Almaval - $100,000; and

f) administrative penalties against Knight in the amount of $300,000 and against Wiegel in the amount of $100,000.

¶ 5 Both Wiegel and Knight provided written submissions to the panel and Knight attended at the sanctions hearing and provided oral submissions on sanctions. Neither Wiegel nor Knight provided any specific submissions on what they considered to be appropriate sanctions.

III Analysis

A Factors

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

¶ 7 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

> "In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,

- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past."

B Application of the Factors

Seriousness of the conduct

¶ 8 The Commission has consistently held that fraud is the most serious misconduct prohibited by the Act. In *Manna Trading Corp Ltd.*, 2009 BCSECCOM 595, the Commission, at para. 18, said, "Nothing strikes more viciously at the integrity of our capital markets than fraud."

¶ 9 In this respect, the misconduct of Knight must be viewed as more serious than that of Wiegel. We have found that Knight committed fraud. We did not make a finding of fraud in respect of Wiegel.

¶ 10 Knight also breached a previous order of the executive director. This is serious misconduct in and of itself and, as will be discussed below, is a significant aggravating factor in this case.

¶ 11 Breaches of sections 34 and 61 are also inherently serious. The requirements to be registered when selling securities and to provide prospectus disclosure to purchasers of securities are two of the fundamental tenets of the Act. These provisions are critical to ensuring investor protection. This case is an unfortunate example of the damage to investors and the capital markets when these key protections are not complied with.

¶ 12 Knight and Wiegel both emphasized in their submissions that we should view their misconduct, as it relates to breaches of sections 34 and 61, as negligence or as mistakes rather than intentional or malicious acts. They highlight that the investments went into legitimate enterprises; including one real estate development project that was completed in North Vancouver (albeit in a manner that resulted in all of the 835 Ltd. investors losing their money).

¶ 13 In Knight's submissions, he emphasized that the investment structure was reviewed by counsel to the respondents and that the developments were also subject to significant scrutiny from outside lenders, none of whom indicated that there were problems with the manner in which the respondents were raising capital. He says he placed considerable reliance on this.

¶ 14 We agree that there was no evidence to suggest that the illegal distributions arose from a deliberate intent to structure the investments in a manner so as to subvert securities laws. Rather, the entire scheme, including the ramshackle state of the attendant paperwork, suggests either (or both) a complete disregard for securities laws or gross negligence in respect thereof.

¶ 15 There are two factors that raise the seriousness of the misconduct as it relates to the illegal distributions. First, there was evidence that the respondents' legal counsel did raise a concern in an e-mail to Knight about the structure of the investments from a securities law perspective. Wiegel says that he never saw this e-mail and there was no evidence to contradict this during the hearing. This e-mail certainly raises doubt about Knight's claim that his conduct was merely the result of making mistakes.

¶ 16 Secondly, it is clear from the testimony of the investor witnesses that they did not have sufficient information about the investment to properly understand the risks associated therewith. Investors did not understand the nature of their investments, believing them to be more of a direct investment in real estate than they really were. In addition, and more troubling, the investors in 835 Ltd. did not understand that they also exposed themselves to the possibility of being liable for the shortfall suffered by secured creditors at the end of the project. Some of the 835 Ltd. investors are subject to additional claims from certain creditors of the project.

Harm to investors; damage to capital markets

¶ 17 The respondents' misconduct has resulted in significant harm to investors. The investments in 835 Ltd. ($1,935,000) and Local 1661 ($1,690,000) have been lost. The losses for each investor are generally significant in that many of the individual investors lost amounts between $50,000 and $100,000.

¶ 18 Although the $100,000 invested in a promissory note of Almaval was ultimately recovered by the investors, this recovery was only achieved through lengthy legal proceedings.

¶ 19 The damage is not limited to these losses. As noted above, investors in 835 Ltd. may be exposed to further losses arising from creditor claims.

Enrichment

¶ 20 There is no evidence that Knight and Wiegel were materially enriched or otherwise personally benefitted from their misconduct. To the extent we have any evidence on this point, it suggests the contrary. Further, the evidence suggested (and was uncontradicted) that the $100,000 fraudulently raised by Knight through the Almaval promissory note was used as short term funding to shore up completion of the 835 Ltd. project.

¶ 21 The executive director directed us to some financial information relating to 835 Ltd. that suggests that Knight and Wiegel personally received funds in respect of that project. However, we were given no explanation of what these amounts were for or how the funds were used. It is possible that Knight and Wiegel received the benefit of some of the funds raised; however, we did not conclude from all of the evidence that either Knight or Wiegel was personally enriched or personally benefitted, in any material way, as a result of their misconduct.

Mitigating or aggravating factors

¶ 22 Knight and Wiegel both say that they did not intentionally contravene the Act. Although there is no evidence that Wiegel intentionally breached the Act, there is some evidence that Knight was warned by the respondents' lawyer that the distributions may not comply with the Act. Knight's failure to follow up on the lawyer's warning is further evidence of his disregard for the requirements of securities law. But even if the respondents did not set out to breach the Act intentionally as it pertains to the illegal distributions, that is not a mitigating factor. An intent to illegally distribute securities would be a substantial aggravating factor. The absence of an aggravating factor is not the same as the presence of a mitigating factor.

¶ 23 Further, in respect of Knight, his statements of knowledge of the wrongdoing or lack of intent cannot apply to his fraudulent misconduct and his breach of a previous order of the executive director. As for his breach of the previous order, we address it in the next section under "Past Conduct" but simply put, the evidence suggests that he disregarded the order and it was more than an honest mistake.

¶ 24 Knight said we should consider the involvement of the respondents' lawyer and the later scrutiny of outside experts as mitigating factors. We do not agree. The respondents' lawyer did not give evidence. We do not know exactly what information was given to him and the scope of his advice. But the one e-mail from that lawyer that was in evidence not only undermines Knight's argument on this point but suggests that he disregarded a warning from his lawyer that the distributions may not comply with the Act. The subsequent review by outside experts is not relevant as we were given no information on what that review consisted of or what was found.

¶ 25 Both Knight and Wiegel have been subject to criminal proceedings arising from the same facts that underlie the notice of hearing in this matter. Knight's criminal proceedings are ongoing. Wiegel has had criminal sanctions imposed upon him as a result of the criminal proceedings against him. The respondents have suggested that we take these matters into consideration in imposing sanctions.

¶ 26 In this case, we do not see a basis for considering the criminal proceedings and resultant sanctions relevant for our purposes. That is because the purposes of sanctions in the criminal context are different from the purposes of our sanctions. The purpose of a criminal sanction is to punish whereas Commission sanctions are meant to be preventative and remedial.

¶ 27 Both Knight and Wiegel stressed their cooperation with the Commission and the hearing process. We do not think this relevant as a mitigating factor. Obstructing the Commission in its investigation could be a significant aggravating factor but the converse is not a mitigating factor. A Commission panel may give credit for cooperation but for this to occur the behavior must be something other than "not hindering" the investigation. In this case, the respondents did not hinder the investigation, which is different from proactive cooperation.

¶ 28 The respondents both also expressed significant remorse. Wiegel's testimony and submissions suggest a level of acceptance of responsibility for misconduct and we took

that into account in determining his sanctions. We are not persuaded by the expression of remorse in Knight's submissions.

Past Conduct

¶ 29 Wiegel does not have any history of securities regulatory misconduct.

¶ 30 Knight does have a history of misconduct. He was involved in another illegal distribution which resulted in the April 5, 2004 order of the executive director. That order was explicit in its restrictions on Knight's ability to participate in capital raising. Yet, within the term of that order, Knight was again running the day to day activities associated with raising capital from investors. He clearly has not learned from that experience and was not deterred from subsequent misconduct.

¶ 31 Worse yet, he has shown a blatant disregard for securities laws and this Commission by committing similar misconduct and doing so at a time when he was subject to the previous sanction imposed for that similar misconduct. In his testimony, Wiegel indicated that Knight had told him about his previous problems with this Commission. In doing so, Wiegel says that Knight described them as minor violations akin to "speeding tickets". This statement, which was uncontradicted, and Knight's repeated misconduct demonstrates that he does not view his misconduct to be serious or sanctions of the executive director worthy of compliance.

Risk to investors and markets

¶ 32 Due to all of the factors mentioned above, including the fraud finding, we believe Knight to be a serious ongoing risk to the capital markets. Those who commit fraud represent the most serious risk to our capital markets.

¶ 33 Recklessness or carelessness with respect to compliance with securities laws in the context of an illegal distribution also represent a significant risk to our capital markets. This Commission's decision in *Solara Technologies Inc. and William Dorn Beattie* 2010 BCSECCOM 357 (para 23) (also an illegal distribution case) stated:

> "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."

¶ 34 We agree with those comments as they would apply to Wiegel.

Specific and general deterrence

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

Previous orders and application

¶ 36 The executive director directed us to four previous decisions of this Commission relating to illegal distributions, one of which included a respondent breaching a previous order of this Commission. He also provided two decisions of this Commission relating to fraud. The respondents did not direct us to any previous decisions.

¶ 37 Of the four decisions relating to illegal distributions, we find the decisions in *VerifySmart Corp. (formerly known as Verified Capital Corp), Verified Transactions Corp., Daniel Scammell and Casper de Beer aka Casha de Beer*, 2012 BCSECCOM 176 and *John Arthur Roche McLoughlin, MCL Ventures Inc., Blue Lighthouse Ltd., and Robert Douglas Collins*, 2011 BCSECCOM 299 of most assistance.

¶ 38 In *VerifySmart*, the Commission found that the respondents had raised over $1.2 million from 99 investors through illegal distributions. The Commission banned Scammel and de Beer from the capital markets for five years, ordered each of them to pay an administrative penalty of $50,000, and ordered them and the corporate respondents to pay to the Commission the $1.2 million raised.

¶ 39 In *McLoughlin*, the Commission found that the respondents had raised $300,000 from 22 investors through illegal distributions. The Commission imposed a $50,000 administrative penalty and a 15-year market prohibition against McLoughlin and a $20,000 administrative penalty and a five year market prohibition against Collins. The higher administrative penalty against McLoughlin reflected his greater role in the illegal distributions and his breach of a prior order of this Commission.

¶ 40 The two fraud decisions referenced by the executive director (*Won Sang Cho et al*, 2013 BCSECCOM 454 and *Strategic Global Investments (dba SGI Traders SA)*, 2014 BCSECCOM 235) were different cases from the circumstances found here (as acknowledged by the executive director in his submissions). In those cases, the respondents either retained the proceeds of their fraud for personal use or there was no evidence of how the funds raised were used.

¶ 41 Here, there was no suggestion that Knight retained the proceeds of his fraud for personal use. The two cases referred to by the executive director suggest that, in these egregious examples, the administrative penalty should approximate three times the dollar value of the fraud itself. The executive director acknowledges that the administrative penalty in this case should be less than this framework.

a) Market prohibitions

¶ 42 Fraud is the most serious misconduct prohibited by the Act. Permanent market prohibitions are common for those found to have committed fraud. This was the outcome in the two cases referred to by the executive director. In addition to fraud, Knight was not deterred by a previous order of the executive director and he poses a significant ongoing risk to the capital markets. A permanent market ban on Knight is appropriate in all of the circumstances.

¶ 43 Wiegel has demonstrated some acceptance of responsibility for his misconduct that has not been demonstrated by Knight. While Wiegel's misconduct is less serious than that of

Knight, the size of the illegal distribution, the investor losses and the gross negligence or complete disregard for securities laws proven in this case warrant a significant market prohibition. The facts in this case are more serious than those in *VerifySmart* and the market prohibitions for Wiegel should be longer than the five years imposed in that case. We consider a ten-year market ban on Wiegel to be appropriate.

a) Orders under section 161(1)(g)

¶ 44 An order under section 161(1)(g) (sometimes referred to as a "disgorgement order") requires a person who has not complied with the Act to pay to the Commission "any amount obtained" as a result of the contravention or failure to comply. A sanction under section 161(1)(g) is to be applied equitably and in the public interest and is not to be punitive in the circumstances.

¶ 45 In *VerifySmart*, this Commission stated:

> "As a matter of principle, we agree that if capital is raised in contravention of the Act, it follows that it is appropriate that the amount raised be disgorged to the Commission."

¶ 46 The recent decision of this Commission in *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 457, outlines that an order for payment of the full amount obtained in the illegal distribution is possible without having to establish that the amount obtained through the illegal distribution was obtained *by that respondent*. In addition, an order under section 161(1)(g) does not focus on investor losses or a narrow analysis of the "profits" a respondent obtained from a contravention of the Act.

¶ 47 The Ontario and Alberta Securities Acts contain provisions that are identical in all relevant respects to section 161(1)(g). It is instructive to consider two decisions from the Ontario and Alberta commissions where they analyzed the purpose of this power in their legislation.

¶ 48 In *Limelight Entertainment Inc.* (2008) 31 O.S.C.B. 12030, the Ontario Securities Commission (OSC) stated, in paragraph 49:

> "We noted that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. … In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members of the public, it is appropriate that a respondent disgorge all the funds that were obtained from investors as a result of that illegal activity. …"

¶ 49 Similarly, in *Arbour Energy Inc.* 2012 ABASC 416, the Alberta Securities Commission concluded that:

> "… the relevant amount is the "amount obtained". This does not mean "… the amount retained, the profit, or any other amount calculated by considering expenses or other possible deductions."

¶ 50 We agree with the principles and approaches taken in the above cases.

¶ 51 In applying the law to the findings before us, we also find the *Limelight* decision to be instructive as it involves certain facts similar to the case before us. The OSC found that Limelight, Da Silva and Campbell ran a boiler room operation and illegally raised $2.75 million from 611 investors using high- pressure sales tactics. Da Silva and Campbell were the directing minds and principal shareholders of Limelight, and committed illegal acts both personally and through their control or direction over Limelight and its salespersons. The OSC ordered disgorgement of the entire $2.75 million jointly from Limelight, Da Silva and Campbell. In doing so, the OSC stated, in paragraph 59:

> "In our view, individuals should not be protected or sheltered from administrative sanctions by the fact that the illegal actions they orchestrated were carried out through a corporation which they directed and controlled. In this case, Limelight, Da Silva and Campbell acted in concert with a common purpose in breaching key provisions of the Act."

¶ 52 In the case before us, the respondents raised over $3.6 million in contravention of the Act, and caused significant harm to many investors, some of whom may face further losses beyond their investments. As stated in the Findings, the evidence is clear that Knight and Wiegel directed the affairs of the corporate respondents.

¶ 53 Applying *VerifySmart*, we begin with the general principle that the full amount raised should be paid to the Commission under section 161(1)(g). We then consider if it is equitable, in the public interest, and not punitive, to order payment of the full amount obtained, as supposed to a lesser amount or no payment at all.

¶ 54 As a matter of general principle, we do not find payment of the full amount raised to be inequitable or punitive in circumstances where the proceeds raised were used for the purpose of the investments and not kept for personal gain by the respondents.

¶ 55 In light of the critical importance of investor protection, the fact that the proceeds raised were used for the stated purpose of the investments should not automatically reduce a section 161(1)(g) sanction. Whether the money raised was used for the stated purpose or not, the end result is the same – the investors have been denied the protections required by our securities laws and were harmed as a result of the misconduct. The purpose of a section 161(1)(g) payment is to remove from a respondent any amounts obtained through a violation of the Act. Given that, how a respondent spent the funds raised is not relevant for such purpose. Also, a respondent's ability to pay the amount is not relevant for such purpose.

¶ 56 The plain wording of section 161(1)(g) supports our interpretation. To hold otherwise would be tantamount to importing into section 161(1)(g) a requirement that payment to the Commission be limited to personal gains enjoyed by a respondent or to some notion of profits, which interpretations have been specifically rejected by this Commission and by the Ontario and Alberta Securities Commissions.

¶ 57 In a handful of illegal distribution cases, this Commission did not order payment under section 161(1)(g) against respondents who were not personally enriched. These cases include the following often-cited ones. However, the panels in those cases did not order disgorgement because of certain factors; these factors are not present in the case before us. In *Saafnet Canada Inc., Nizam Dean and Vikash Sami* 2014 BCSECCOM 96 and *Photo Violation Technologies Corp.* 2013 BCSECCOM 276, the individual respondents were diligent in obtaining legal advice in an attempt to ensure compliance with the Act. In *Pacific Ocean Resources Corporation and Donald Verne Dyer* 2012 BCSECCIN 104, the respondents did not control the issuer who did receive the money. In *Oriens Travel & Hotel Management Corp., Alexander Anderson and Ken Chua* 2014 BCSECCOM 352, the respondent Anderson had a limited role and had no control over the issuer who received the money.

¶ 58 We find no factors present in this case that would justify ordering payment to the Commission of less than the full amount obtained as a result of the respondents'illegal distributions. Accordingly, we order 835 Ltd., Wiegel and Knight, jointly, to pay to the Commission the sum of $1,935,000 and we order Local Inc., Wiegel and Knight, jointly, to pay to the Commission the sum of $1,690,000.

¶ 59 As for the $100,000 raised fraudulently by Almaval, a civil court ordered Almaval to repay that amount to the investors from whom the proceeds were obtained through contraventions of the Act, and Almaval has done so.

¶ 60 Although the purpose of section 161(1)(g) is not focused on compensating victims, and the purpose of our sanctions is different from judgments from a civil court, the fact that the amount was ordered to be repaid by a Canadian court and was repaid to the investors is in essence a disgorgement of that amount from the respondents. This is relevant to our decision on the amount to be paid under section 161(1)(g) in this proceeding.

¶ 61 The executive director argued that we should not reduce the section 161(1)(g) order by $100,000, and cited *Re Mesidor* 2014 BCSECCOM 6 to support his position. We find *Mesidor* to be distinguishable. In that case, the respondent raised $16,000 from two investors fraudulently, but later returned $2,000 to these investors. The Commission panel declined to reduce the section 161(1)(g) payment order by $2,000. But that was on the basis that the respondent had raised over $30,000 from these investors and the panel found no evidence that the $2,000 returned to them was related to the $16,000 attributable to the fraud.

¶ 62 In our view, it would be punitive and inequitable if our section 161(1)(g) order regarding the amount fraudulent raised by Almaval and the order from the court together exceed the total amount obtained by Almaval from investors through contraventions of the Act. (See: *Limelight* at paragraph 63.)

c) Administrative Penalty

¶ 63 The amounts of the administrative penalties should differ as between Knight and Wiegel. There have been findings of differing types and degrees of misconduct as between the two of them. Knight has breached a prior order of the executive director and committed fraud; Wiegel has not.

¶ 64 With respect to the illegal distributions, we do not draw any material distinction between the responsibility that Wiegel and Knight have for this misconduct. It is clear that both of them played an active role in soliciting investors and structuring the investments. The administrative penalty that applies to this misconduct should be the same with respect to both of these individuals.

¶ 65 The facts of this case are more serious than those in *VerifySmart* and *McLoughlin.* The magnitude of the illegal distributions and the investor losses are more significant. An aggravating factor is that the 835 Ltd. investors may be exposed to additional creditor claims. Considering all of those factors we find that an administrative penalty of $100,000 should be imposed on each of Wiegel and Knight as appropriate for specific and general deterrence purposes.

¶ 66 We also agree that the administrative penalty in respect of Knight's fraudulent misconduct should be less than three times the amount raised from the fraud (i.e. $100,000). The proceeds of the fraud were not obtained for the personal benefit of Knight nor for securities that did not exist. An administrative penalty of $150,000 is appropriate to be imposed on Knight for specific and general deterrent purposes for this misconduct.

¶ 67 Lastly, Knight contravened a previous order of the executive director. That previous order arose from similar misconduct to that found in this case. Fostering adherence to, and the vitality of, orders is of significant public interest. As a consequence, a penalty which focuses on general deterrence is warranted for a breach of a prior order of the executive director. An additional administrative penalty of $50,000 is appropriate to impose on Knight in the circumstances.

IV Orders

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

a) 0772835 B.C. Ltd., Local 1661 Building Inc. and Almaval Building Inc. (Corporate Respondents)

i. under section 161(1)(b), all persons permanently cease trading in, and be permanently prohibited from purchasing any securities of the Corporate Respondents;

ii. under section 161(1)(b), the Corporate Respondents permanently cease trading in, and be permanently prohibited from purchasing any securities or exchange contracts; and

iii. subject to paragraph 68(d)(i) below, under section 161(1)(g), the Corporate Respondents pay to the Commission the amounts obtained, directly or indirectly, as a result of their contraventions of the Act, as follows:
- 835 Ltd. shall pay $1,935,000
- Local Inc. shall pay $1,690,000;

b) Wiegel

i. under section 161(1)(d)(i), Wiegel resign any position he holds as a director or officer of an issuer or registrant; and

ii. for a period that is the longer of 10 years and the date upon which Wiegel has paid the amounts set out in paragraph 68(b)(iii) below, have been paid Wiegel be prohibited:

(a) under section 161(1)(b), from trading in or purchasing securities, except that he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;

(b) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;

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

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

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

iii.

(a) subject to paragraph 68(d)(i) below, under section 161(1)(g), Wiegel pay to the Commission $3,625,000, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act relating to 835 Ltd. and Local Inc.; and

(b) under section 162, Wiegel pay an administrative penalty of $100,000;

c) Knight

i. under section 161(1)(d)(i), Knight resign any position he holds as a director or officer of an issuer or registrant; and

ii. Knight be permanently prohibited:

(a) under section 161(1)(b), from trading in or purchasing securities, except that he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;

(b) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;

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

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

(e) under section 161(1)(d)(v), from engaging in investor relation activities; and

iii.

(a) subject to paragraph 68(d)(i) below, under section 161(1)(g), Knight pay to the Commission $3,625,000, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act relating to 835 Ltd. and Local Inc.; and

(b) under section 162, Knight pay an administrative penalty of $300,000.

d) All Respondents except Almaval and Streamline– Section 161(1)(g) Payments

The respondents' respective obligations to pay under paragraphs 68 (a)(iii), 68(b)(iii)(a) and 68(c)(iii)(a) above shall not exceed the amounts designated at paragraph 68(a)(iii), as follows:

(a) $1,935,000 (distributions relating to 835 Ltd.) - 835 Ltd., Wiegel and Knight only, on a joint and several basis; and

(b) $1,690,000 (distributions relating to Local Inc.) - Local Inc., Wiegel and Knight only, on a joint and several basis.

¶ 69 February 23, 2015

Audrey T. Ho
Commissioner

Don Rowlatt
Commissioner

George C. Glover, Jr.
Commissioner

** On March 5, 2015, the panel issued a revised decision. The revisions are incorporated in paragraph 68.*

Reasons for Decision of Nigel P. Cave, Vice Chair

V Introduction

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

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

VI Analysis

A Previous Commission decisions

¶ 72 The scope of section 161(1)(g) orders made by the Commission in previous illegal distribution cases has run the full spectrum from no order for disgorgement, as in *Solara Technologies Inc. and William Dorn Beattie*, 2012 BCSECCOM 357, to an order for the full amount obtained in the illegal distribution, as in *VerifySmart*.

¶ 73 In another decision of the Commission in *Oriens Travel & Hotel Management Corp., Alexander Anderson and Ken Chua*, 2014 BCSECCOM 352, a disgorgement order in the full amount of an illegal distribution was made against one respondent, while no disgorgement order was made against another respondent who was also found to have contravened the Act by participating in the illegal distribution.

¶ 74 This range of outcomes is consistent with a statutory remedy that is to be applied equitably, in the public interest and in accordance with the facts and circumstances of each case.

¶ 75 The recent decision of this Commission in *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 457, outlined certain general principles that should apply to orders under section 161(1)(g). They include that:

(a) an order for disgorgement of the full amount obtained through contraventions of the Act can be made without having to establish that the amount obtained through the contraventions was obtained by that respondent;
(b) an order under section 161(1)(g) should not focus on investor losses or restitution or on a narrow analysis of the "profits" a respondent has obtained from a contravention of the Act; and
(c) sanction under section 161(1)(g) is to be applied equitably, in the public interest and is not to be punitive in the circumstances.

¶ 76 This case requires me to expand further on certain of these principles and also to further articulate my views on the proper application of section 161(1)(g).

Compensation or restitution is not the purpose of an order under section 161(1)(g)

¶ 77 Compensation or restitution to investors is not the purpose of a disgorgement order. Only the BC Supreme Court can order compensation or restitution under the Act, pursuant to

sections 155.1(a) or 157(1)(i). Since these two provisions specifically refer to compensation and restitution, it would be incorrect to interpret section 161(1)(g) as also being a compensation or restitution provision.

¶ 78 The wording of section 161(1)(g) shows it is not a compensation or restitution provision. The goal of restitution is to restore the victim to his or her original position, which requires the court to consider victims' losses. In contrast, section 161(1)(g) requires the panel to consider the amount obtained as a result of misconduct. These are two different things.

¶ 79 For example, a court order for compensation or restitution may include more than what an investor actually invested (and a respondent obtained), such as interest payments or loss of opportunity. A respondent would not have obtained these amounts as a result of misconduct and consequently an order under section 161(1)(g) that included these amounts would be broader than what that section allows.

¶ 80 The OSC has also stated that compensation is not the purpose of its disgorgement provision:

> Subsection 127(1)10 of the Act provides that a person or company that has not complied with Ontario securities law can be ordered to disgorge to the Commission "any amounts obtained" as a result of the non-compliance. The disgorgement remedy is intended to ensure that respondents do not retain any financial benefit from their breaches of the Act and to provide specific and general deterrence. It is not intended primarily as a means to compensate investors for their losses. However, subsection 3.4(2)(b) of the Act allows the Commission to order that amounts paid to the Commission in satisfaction of a disgorgement order or administrative penalty be allocated to or for the benefit of third parties.
>
> *Sabourin (Re)* 2010 LNONOSC 385, ¶65 (emphasis added)

¶ 81 The ASC has interpreted its disgorgement provision in the same way:

> The rationale for ordering disgorgement in a securities commission proceeding reflects the equitable policy designed to remove all money unlawfully obtained by a respondent so that the respondent does not retain any financial benefit from breaching the Act. It is not a compensation mechanism for victims of the wrongdoing. A disgorgement order thus provides a further element of specific and general deterrence.
>
> *Planned Legacies Inc. (Re)* 2011 ABASC 278, ¶71 (emphasis added)

¶ 82 The OSC and ASC interpretations are consistent with United States authorities, where for many years courts have ordered disgorgement in securities law violation cases, using the courts' disgorgement powers:

> The appellants claim that the district court erred in ordering disgorgement of the proceeds of the illegal trades. They contend that the disgorgement remedy's only purpose is to provide restitution for victims of the illegality. In SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90 (2d Cir.1978), Judge Friendly explained that "the primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched."
> As the Sixth Circuit has recently stated in SEC v. Blavin, 760 F.2d 706, 713 (6th Cir.1985) "[o]nce the Commission has established that a defendant has violated the securities laws, the district court possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged by [the] fraud." Whether or not any investors may be entitled to money damages is immaterial. The paramount purpose of enforcing the prohibition against insider trading by ordering disgorgement is to make sure that wrongdoers will not profit from their wrongdoing.
>
> *SEC v. B Tome*, 833 F. 2d 1086 (2d Cir. 1987) (emphasis added)

¶ 83 The fact that investors have lost their investments and the total amount of their losses is not the basis for considering the quantum of a disgorgement order.

A disgorgement order is limited to what each individual respondent obtained

¶ 84 The *Michaels* decision provided that an order for disgorgement of the full amount obtained through contraventions of the Act can be made without having to establish that the amount obtained through the contravention was obtained by that respondent.

¶ 85 The *Michaels* case dealt, effectively, with only one respondent (the corporate respondent was the alter ego of the individual respondent). Where there are multiple respondents, as in this case, the principle set out above must be refined.

¶ 86 Section 161(1)(g) must be interpreted to mean that an order under that subsection is limited to:

(a) the amount a person obtained, that was
(b) directly or indirectly a result of that person's misconduct.

¶ 87 This is based on the language in the subsection:

> (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention

The phrase "the failure to comply" can only refer to the opening phrase of the section "if a person has not complied with the Act". The "amount obtained" referred to in the subsection must be based on that person's failure to comply, not the failure of anyone else.

¶ 88 This interpretation is consistent with section 161(1)(g) being a disgorgement provision and not a compensation provision – the intention of a disgorgement order is to take away ill-gotten financial benefits from a wrongdoer, not compensate victims; compensation would be the goal in ordering joint and several liability for the full amount obtained by every person who took part in the misconduct.

¶ 89 Supreme Court of Canada case law supports this interpretation. The Court recently ruled on disgorgement under the *Copyright Act*. It stated:

> **85** The trial judge ordered disgorgement against all the parties that he found liable for infringement on a solidary [joint and several] basis. The Court of Appeal held that this misconstrued the disgorgement remedy under s. 35 of the *Copyright Act*. It held that a defendant can only be made to disgorge profits that it made, as opposed to the profits of other defendants with whom it participated in an infringement.
>
> **86** I agree with the Court of Appeal. Section 35 of the *Copyright Act* provides a dual remedy for copyright infringement: damages for the plaintiff's losses and disgorgement of the profits retained by the defendant. Disgorgement of profits under s. 35 is designed mainly to prevent unjust enrichment, although it can also serve a secondary purpose of deterrence: Vaver, at p. 650. It is not intended to compensate the plaintiff. ...
>
> **87** Disgorgement under s. 35 of the *Copyright Act* goes no further than is necessary to prevent each individual defendant from retaining a wrongful gain. Defendants cannot be held liable for the gains of co-defendants by imposing liability for disgorgement on a solidary [joint and several] basis.
>
> **88** For the same reasons, Weinberg, Charest, and Izard [officers and directors] are not personally liable to disgorge profits. The profits from *Sucroe* [the television show that infringe copyright] were retained by the corporate entities that acted as co-producers. Weinberg, Charest, and Izard should not be required to disgorge profits that they did not retain in their personal capacity.
>
> *Cinar Corporation v. Robinson*, 2013 SCC 73 (emphasis added).

(In some cases an order of joint and several liability for individuals is appropriate: see for example *Sabourin (Re)*, 2010 LNONOSC 385, cited below).

¶ 90 An interpretation that allows an order greater than the amount a person obtained, directly or indirectly, is inconsistent with the disgorgement purpose of the provision – it would no longer be depriving a person of their ill-gotten financial benefits, it would be requiring them to pay amounts they never obtained. That would be a penalty, which section 162 deals with exclusively. A penalty made under section 161(1)(g) would be invalid.

¶ 91 Having said the above, it is important to note that the concept of benefit, in certain cases, may be construed broadly and does not need to be limited to amounts obtained by that respondent (as was noted in *Michaels*). An example of this would be a benefit, derived from the respondent's misconduct, obtained by a respondent's family member.

An order should not include amounts returned to investors

¶ 92 Section 161(1)(g) should be read to refer to the financial benefits respondents continue to have at the time the order is made. Amounts returned to investors should be deducted from the amount of the disgorgement order.

¶ 93 This is consistent with the purpose of a disgorgement order, namely to deprive a respondent of wrongly obtained benefits. If an order requires disgorgement of a benefit a respondent no longer has, then it will not serve the purpose of removing wrongly obtained benefits, and instead will simply be a penalty.

¶ 94 The OSC consistently has deducted amounts returned to investors when fashioning disgorgement orders. For example: *North American Financial Group Inc. (Re)* 2014 LNONOSC 580; *Rezwealth Financial Services Inc. (Re)* 2014 LNONOSC 450; *Empire Consulting Inc. (Re)* 2013 LNONOSC 132; *McErlean (Re)* 2012 LNONOSC 782; *Maple Leaf Investment Fund Corp. (Re)* 2012 LNONOSC 196.

¶ 95 In *Sabourin (Re)*, the panel deducted amounts returned to investors and stated the following:

> **70** Having considered the relevant factors, we will order that Sabourin and the Corporate Respondents disgorge $27,900,000, on a joint and several basis. That amount represents the up to $33.9 million obtained by Sabourin and the Corporate Respondents from investors less the amount of $6 million that appears to have been returned to investors (paragraphs 176 and 177 of the Merits Decision).
>
> We impose joint and several liability on Sabourin and the Corporate Respondents because, as stated in the Merits Decision, Sabourin was the directing and controlling mind of the Corporate Respondents and it would be impossible to treat them separately (paragraph 187 of the Merits Decision). As stated at paragraph 370 of the Merits Decision, Sabourin concocted and orchestrated the investment schemes.
>
> Because of our view that the Individual Respondents are less culpable than Sabourin and the Corporate Respondents and played distinct roles in the investment schemes, we will not order that any of the Individual Respondents pay, on a joint and several basis, the amounts we order disgorged by Sabourin and the Corporate Respondents.

¶ 96 In *Planned Legacies (Re)*, Planned Legacies Inc. raised money from investors which it then used to invest in the Righthedge funds. During the course of scheme, the Righthedge funds paid Planned Legacies Inc. purported returns on the investment. The ASC panel ordered disgorgement of the net amount the Righthedge Funds retained:

> **75** In our view, a disgorgement order of at least the amount retained by Michaud, the Righthedge Fund, Righthedge Vanuatu and Righthedge Nevada after they had made some payments to PLI -- $3,547,796 -- is appropriate because they obtained this money as a direct result of their non-compliance with the registration and prospectus requirements of the Act. The evidence suggests that the money was not

used in the manner in which they told investors it would be used.
(emphasis added)

¶ 97 I do not believe that expenses or other similar deductions should be deducted when fashioning a disgorgement order. These sorts of payments do not remove ill-gotten financial benefits like repayments to investors do; in fact, payments like expenses, in many cases, allowed the wrongdoer to obtain ill-gotten benefits in the first place.

Applying the disgorgement principles in this case

a) The corporate respondents

¶ 98 The starting point for this analysis is the amount obtained by the respondents, which the executive director provided.

¶ 99 Both the ASC and OSC have adopted the US approach that the once the executive director provides evidence, consistent with the principles described above, of an "approximate" amount of disgorgement then the burden shifts to the respondent to disprove the reasonableness of the number: *Limelight*, paragraph 48; *Schmidt (Re)*, paragraph 66. I agree with this approach.

¶ 100 In order to assess the reasonableness of the number, it is necessary to assess whether the proceeds of an illegal distribution were generally used to the benefit of the investors (i.e. in furtherance of their investment objectives) or whether they were used to the benefit of the respondents (i.e. ill-gotten benefits). Where funds were used for the benefit of investors it would be inappropriate to make a disgorgement order for those funds

¶ 101 In this case, 835 Ltd used the proceeds of the illegal distribution for the business purposes that the investors bargained for - to construct a residential real estate project which was actually completed. There is no evidence that the funds were used in a manner inconsistent with what investors were told.

¶ 102 The proceeds of Knight's fraud also were used for the business purposes that the investor intended, as part of completing the 835 Ltd. project. As a consequence, the proceeds of that offering were also used to the benefit of the investor and not to the benefit of the respondents.

¶ 103 Further, the proceeds of this offering were ultimately returned to the investor and, as I discussed above, should not be the subject of a disgorgement order as a consequence.

¶ 104 The evidence is less clear about the use of proceeds of the offering of Local Inc. Very little evidence was introduced at the hearing about this entity or its use of proceeds. We do know that Local Inc. went into bankruptcy prior to completion of the real estate development.

¶ 105 However, there was no evidence that the funds raised by Local Inc. were used for the benefit of the respondents. The executive director did not make submissions that there was an ill-gotten gain to be disgorged in this case. As a result, I do not think that the executive director established the approximate quantum for a disgorgement order against Local Inc.

¶ 106 In this case, I do not think a disgorgement order is appropriate against the corporate respondents.

b) The individual respondents

¶ 107 In considering a disgorgement order against the individual respondents, it is necessary to consider if they directly or indirectly obtained the proceeds of the illegal distribution.

¶ 108 In the case, the individual respondents did not obtain directly the funds the corporate respondents raised.

¶ 109 There was some evidence that the individual respondents indirectly received some of the proceeds of the offering by 835 Ltd. (through payments made by the corporate respondents to them) although the purpose of these payments was not established. I do not find that this evidence is conclusive.

¶ 110 On the whole, I do not find that the evidence establishes that the individual respondents directly or indirectly received amounts obtained through their misconduct and for that reason, I would not order disgorgement against them. Any order for disgorgement against the individual respondents in this case would amount to a penalty.

¶ 111 February 23, 2015

Nigel P. Cave
Vice Chair