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

Citation: Re Fielder, 2023 BCSECCOM 316 Date: 20230621

Order under section 161(6)

Kelly Boyd Fielder

Section 161 of the *Securities Act*, RSBC 1996, c. 418

I. Introduction

[1] This is an order under sections 161(1) and 161(6)(a) of the *Securities Act*, RSBC 1996, c. 418 (the Act).

[2] The executive director of the Commission applied on August 4, 2020 (Application) for orders against Kelly Boyd Fielder (Fielder) under the sections of the Act which are mentioned above based upon orders made by the Provincial Court of British Columbia in *R. v. Kelly Fielder*, File No. 224042-1, 224042-2-C, Vancouver Registry.

[3] The executive director tendered affidavit evidence, supporting materials and submissions to the Commission. Fielder responded to the Application, raising jurisdictional issues and submitting that in the circumstances of this proceeding it will not be in the public interest to issue any order against him. He provided written submissions and affidavit evidence. The executive director replied to Fielder's response with written submissions and further affidavit evidence.

II. Background

A. Procedural background

[4] After an investigation conducted in 2011, staff of the Commission referred issues regarding Fielder's conduct to the criminal investigation branch. Around that time, the Commission's case assessment work, which might have led to the issuance of a notice of hearing, was closed.

[5] As is explained in more detail below, on October 24, 2012, Fielder was charged with fraud and theft under the *Criminal Code*, RSC, 1985, c. C-46 (the Code). He pled guilty to theft on August 28, 2014.

[6] On August 4, 2020, the executive director brought a section 161(6)(a) application against Fielder for the criminal theft conviction and sentence.

[7] On September 23, 2020, the executive director amended his application to correct two errors.

[8] On October 15, 2020, Fielder provided responding materials.

[9] On February 1, 2021, the Commission set April 29, 2021, to have the hearing.

[10] The April 29, 2021, hearing date was adjourned at the request of Fielder and rescheduled for September 1, 2021.

[11] The September 1, 2021 hearing date was adjourned at the request of Fielder as he sought to have the Crown prosecutor from his criminal conviction be a witness at the hearing. The hearing was rescheduled for October 14, 2021.

[12] On September 27, 2021, the Attorney General's office sent a letter to the parties taking the position that any attempt to call the prosecutor as a witness at the hearing would be an abuse of process and a collateral attack on Fielder's conviction.

[13] A week prior to the October 14, 2021 hearing, Fielder retained his current counsel who requested that the hearing be adjourned. The hearing was rescheduled for January 11, 2022.

[14] On November 23, 2021, Fielder filed an application for documents and to cross-examine the Commission's investigator in the criminal investigation. The executive director provided responding materials on December 17, 2021.

[15] Fielder's application for production of documents and to cross examine was heard on January 11, 2022, the day that had been scheduled for the substantive hearing. Fielder's application was dismissed. The substantive hearing was rescheduled for April 20, 2022.

[16] On April 19, 2022, the executive director applied to adjourn the hearing to consider a recent inquiry from a member of the public about Fielder's activities since his conviction. The adjournment application was granted on April 20, 2022. The hearing was rescheduled for September 26, 2022.

[17] On June 28, 2022, the executive director made applications to cross-examine Fielder and to tender new documents into evidence.

[18] The executive director's applications were heard on September 26, 2022. On October 13, 2022, the Commission granted the new evidence application and admitted the new evidence (New Evidence) but dismissed the cross-examination application. The substantive hearing was rescheduled for February 21, 2023.

[19] The executive director later requested that the substantive hearing be adjourned due to personal reasons. The adjournment was granted and the substantive hearing was rescheduled for, and later completed on, May 19, 2023.

B. Factual background

[20] On October 24, 2012, Fielder was indicted with one count of fraud over $5,000, contrary to section 380(1)(a) of the Code, and one count of theft of monies over $5,000, contrary to section 334(a) of the Code.

[21] On August 28, 2014, Fielder pled guilty to the second count, theft of monies in excess of $5,000, contrary to section 334(a) of the Code. In Crown counsel's submissions on sentencing, the Crown stated that Fielder:

- Was introduced to an investor;
- Discussed acquiring a privately held company, Savannah Gold Limited (Savannah), with the investor, and taking it public;
- Led the investor to believe that Savannah was backed by another mining company;
- Knew that the investor had a low risk tolerance;
- Assured the investor that the investment would be fully closed in 90 to 120 days;
- Knew that the investor would have to borrow money for the investment;
- Received $170,000 from the investor who had borrowed it from his parents;
- Deposited the investor's $170,000 into the bank account of a company that he was sole shareholder of;
- Paid the investor $25,500 as a finder's fee; and
- Disbursed the investor's money as follows:
  - $107,975.29 in wire payments to another company that Fielder was sole shareholder of;
  - $20,371 in cash withdrawals;
  - $1,837.10 in personal spending;
  - $900 in Vancouver Club membership dues;
  - $6,201.41 in cash to another company that Fielder was sole shareholder of;
  - $64.16 in bank fees; and
  - $145.04 in purchasing cheques.

[22] Within a year, Fielder had ceased communication with the investor. None of the investment was repaid to the investor other than the finder's fee. None of the investment was used to acquire Savannah.

[23] On August 28, 2014, Fielder was convicted.

[24] On November 20, 2014, Fielder was sentenced to the following orders:

(a) Conditional sentence of 18 months: the first 6 months under house arrest and the remainder to be served in the community;

(b) no engagement in the promotion or distribution of any type of security and no involvement in investor relation activities;

(c) 50 hours of community services; and

(d) restitution in the amount of $144,500.00

C. Legal background

[25] The Commission is established under the Act to regulate the capital markets in British Columbia. Central to the Commission's mandate under the Act is to protect the investing public from those who would take advantage of them, and to preserve investor confidence in the regulated capital markets.

[26] Section 161(6)(a) of the Act states:

> (6) The commission or the executive director may, after providing an opportunity to be heard, make an order under subsection (1) in respect of a person if the person
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> (a) has been convicted in Canada or elsewhere of an offence
> (i) arising from a transaction, business or course of conduct related to securities or derivatives, or
> (ii) under the laws of the jurisdiction respecting trading in securities or derivatives,

[27] Section 161(6) permits the Commission to make an order under section 161(1) of the Act if the requirements of the section are met and it is in the public interest to do so. These secondary proceedings allow the Commission to use another jurisdiction's decisions without the need for inefficient parallel and duplicative proceedings in British Columbia or before the Commission. See *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, at paras. 2 and 54.

[28] In a section 161(6) application, the Commission should treat the factual findings from the originating jurisdiction as facts when determining what orders are needed. See *Re Pierce*, 2016 BCSECCOM 188, para. 27.

[29] Orders under section 161(1) 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.

[30] BC Policy 15-601 describes procedures for hearings. Section 2.1 states:

> 2.1 Procedures – The Act and Regulation prescribe very few procedures the Commission must follow in hearings. Consequently, the Commission is the master of its own procedures, and can do what is required to ensure a proceeding is fair, flexible and efficient. In deciding procedural matters, the Commission considers the rules of natural justice set by the courts and the public interest in having matters heard fully and fairly, and decided promptly.

[31] The Supreme Court of Canada (SCC) in *McLean*, at paras. 1, 2 and 54, stated:

> [1] In Canada, the individual provinces and territories bear primary responsibility for the regulation of stocks, bonds, and other securities. However, because modern securities markets transcend provincial and territorial borders, the provinces and territories have in

> recent years taken steps to harmonize their securities laws and to improve cooperation between their securities regulators.
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> [2] As a result of these efforts, the British Columbia Securities Commission (the "Commission"), like all of its provincial and territorial peers, has been empowered to bring proceedings in the public interest against persons who, among other things, have agreed with another jurisdiction's securities regulator, by way of a settlement agreement, to be subject to regulatory action; see s. 161(6)(d) of the Securities Act, R.S.B.C. 1996, c. 418. In the jargon of the industry, these proceedings are known as "secondary proceedings" because they piggy-back on another jurisdiction's efforts.
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> [54] … s. 161(6) obviates the need for inefficient parallel and duplicative proceedings in British Columbia by expressly providing a new basis on which to initiate proceedings. In other words, s. 161(6) achieves the legislative goal of facilitating interprovincial cooperation by providing a triggering "event" other than the underlying misconduct. The corollary to this point must be the ability to actually rely on that triggering event — that is, the other jurisdiction's settlement agreement (or conviction or judicial finding or order, as the case may be) — in commencing a secondary proceeding.

[32] Based on subsection 161(6)(b) of the Act, the Commission or the executive director may, after providing an opportunity to be heard, make an order under subsection 161(1) in respect of a person if the person has been found by a court in Canada or elsewhere to have contravened the laws of the jurisdiction respecting trading in securities or derivatives.

[33] The SCC in *Asbestos*, *supra* at paras. 36, 39, and 56, noted that the purpose of public interest orders, such as in section 161(1), are to be "protective and preventative, intended to be exercised to prevent likely future harm" to the capital markets.

III. Submissions from the parties

A. The executive director's submissions

[34] The executive director characterizes this application as a relatively straightforward application of section 161(6)(a) of the Act. The executive director submits that there is no doubt Fielder contravened the laws of the jurisdiction regarding the trading in securities.

[35] The executive director relies on *McLean* to support the proposition that the objectives of section 161(6) include avoiding having overlapping cases clogging up the legal system and simultaneously placing a high burden on respondents to answer a multiplicity of proceedings which might all need to be defended simultaneously.

[36] Relying on *Re Pierce*, which in turn cited *Lines v. British Columbia Securities Commission*, 2012 BCCA 316 at para. 31, the executive director argues:

> In section 161(6) proceedings, a panel can rely on an order from an originating body, but is not bound to issue the same order. In a reciprocal order application, the panel treats the originating body's order and findings of fact as facts when determining whether to issue an order in the public interest. To require the executive director to re-litigate that order

and findings of fact would be contrary to the legislative intent of section 161(6) and would result in inefficient parallel and duplicative proceedings.

[37] The executive director reviews the findings from the criminal process and the factors from *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 and submits that based on factors such as the seriousness of Fielders prior conduct, the enrichment which Fielder obtained through his fraud at the expense of an investor and what is characterized as a continuing risk to the public orders should be made which permanently prohibit Fielder from participating in public markets.

[38] The executive director put before us evidence demonstrating that Fielder was, in and around the summer of 2019, soliciting funds from investors in relation to securities and has directed some of those funds to unknown purposes. The most significant of this evidence is:

- A written but unsworn complaint from another investor, supported by investigator's notes elaborating on some elements of the complaint, stating that in or around 2019, Fielder interested the investor in an investment, directed the investor to invest by cheque to a particular company and that the funds were never recovered.

- A receipt for a bank draft, payable to a numbered company, payable in the amount described in the witness statement.

- Incorporation documents and bank account authorizations for the same numbered company indicating that Fielder controlled the numbered company and the bank account into which the investor's funds were placed.

- Bank account statements for the numbered company showing that it had less than $14.00 in the bank until the invested funds were deposited and showing the exhaustion of the funds in the weeks that followed.

- Records from the Commission indicating that Fielder had no registration or exemption which would likely apply if he was selling securities to an investor.

[39] The executive director asserts that the above evidence establishes that Fielder has been active in raising funds from investors and in controlling how those funds are used, and also that Fielder was not candid with this panel when he included in his initial submissions a description of his employment history which made no mention of activity in securities markets.

B. Fielder's submissions

[40] Fielder submissions include a mix of technical and practical arguments.

[41] Fielder's initial response to this application included a description of how he had "tried to move forward in life in a positive fashion and set a good example for my (his) daughter".

Fielder continued with an explanation of his employment history since his conviction, mentioning his master's degree, and his work for a First Nations organizations, particularly in "security & resource advisory and consulting". He mentioned a project that is first nation owned and the possibility that the project might be housed within a corporation for which he might be asked to be a director.

[42] Fielder later delivered an affidavit that partly explained his involvement in the financial transactions related to the New Evidence. However, Fielder's explanations did not extend to whether he received the funds he is alleged to have received or how he dealt with those funds. Fielder submits that the onus is on the executive director to prove any breach of the Act, and that the types of secondary and hearsay evidence received are not sufficient to meet that onus.

[43] Fielder emphasizes that the executive director initially investigated Fielder's conduct in 2011 and decided not to commence proceedings against Fielder by issuing a notice of hearing. Instead, the executive director referred Fielder's conduct to the criminal process. That referral eventually led to a guilty plea under the Code, and part of the sentence imposed included a ban which prevented Fielder from participating in public markets for 18 months. That ban expired in April of 2016. Fielder notes that the executive director did not take any steps against Fielder then, but instead waited until immediately before the six year limitation period applied to bring this application. Fielder submits that it is not in the public interest for the executive director to take that approach or to allow such delays to accumulate between the date of a party's misconduct and the date when prohibitions might be imposed against that party.

[44] Fielder submits, and has provided evidence to support his submission, that he was told by crown counsel at the time of his guilty plea that Fielder would not be subjected to further legal consequences for his conduct.

[45] Fielder submits:

> 40. The Executive Director's reciprocal order application has caused Mr. Fielder to feel like he is reliving the criminal investigation. The process is constantly on Mr. Fielder's mind and keeps Mr. Fielder up at night and has increased his anxiety and depression. The stress has deeply and negatively impacted Mr. Fielder's life and relationships. Shortly after he received the letter from the Commission, Mr. Fielder relapsed after 13 years of sobriety.
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> 41. Mr. Fielder has relied on both mental health professionals and addiction groups since this application was filed as additional supports. Mr. Fielder is deeply concerned about his future health as a result of this process. Mr. Fielder is very concerned that further sanctions from the Commission might impact his ability to find work and potentially limit his ability to do consulting work related to his degree.
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> 42. Mr. Fielder is particularly concerned that people will misunderstand and think he is being sanctioned for recent activity and not conduct he engaged in over a decade ago that he was already punished for eight years ago.

[46] Fielder made extensive submissions regarding how to properly interpret *McLean* and how to apply the public interest considerations which arise from the SCC's analysis in *McLean*. In addition to what is mentioned above, the key elements of Fielder's submission are:

(a) The legislative goal of section 161(6) as identified by the SCC is facilitating interprovincial cooperation. When an application such as this one is brought where the application is based on the findings made in proceedings within British Columbia the public interest analysis is different;

(b) *McLean* affirmed that statutory limitation period exist for good reason, including to establish a time when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations;

(c) In arguments made before the SCC in *McLean*, counsel for the executive director acknowledged that even if the limitation period for a section 161(6) application has not expired there can be circumstances which would preclude such an application, for example where proceeding would amount to an abuse of process;

(d) The SCC did not conclude that the interpretation which it accepted, that the limitation period for a section 161(6) application began from the date of a triggering event such as a finding by another securities regulator, was the only reasonable interpretation. The SCC accepted that as one reasonable interpretation. It also found that the interpretation advocated for by McLean, that the limitation period should run from the date of conduct, was a reasonable interpretation.

[47] Fielder asks that we expressly rule on whether the limitation period has expired and whether we have jurisdiction to impose a section 161(6) order in circumstances where the underlying decision was made by a court in British Columbia and where the period of prohibition imposed by that court has expired.

[48] Fielder goes on to combine all of the factors which he has identified into a submission that, either based on an abuse of process analysis or based on a proper balancing of public interest factors, we should decline to exercise our discretion to impose a section 161(6) Order.

IV. Analysis

A. The New Evidence

[49] We admitted the New Evidence because it is relevant to the public interest analysis which we are required to undertake in deciding applications under section 161(6). We did not allow the application to cross examine Fielder regarding his involvement with the investor connected to the New Evidence because we expected that no matter how Fielder answered cross examination questions we would not be in a proper position to come to firm conclusions about whether Fielder had breached the Act.

[50] In the end, we do not need to decide whether Fielder breached the Act. In fact, the executive director is not asking us to conclude that Fielder has breached the Act since the time of Fielder's criminal conviction.

[51] We reviewed the New Evidence with a clear recognition that it had not been tested by full investigation, disclosure or cross examination. We kept in mind that the onus of proving allegations rests with the executive director and the evidentiary record was far from complete at this point. However, some of the evidence was clear enough that, when viewed collectively and fairly, we reached some conclusions. We concluded that on a balance or probabilities Fielder did deal with the investor, did initiate discussions about an investment, did incorporate a company which received the alleged investment funds and did control the bank account into which the funds were received and from which the funds were largely dissipated. We do not have a proper evidentiary basis to take the analysis much further and we did not do so.

B. Jurisdiction

[52] The potential objections to our jurisdiction are that the limitation period has expired, that section 161(6) does not apply in circumstances where the underlying decision was made by a court in British Columbia and that the prohibition imposed by the court has expired. We do not agree that any of those objections are valid.

[53] The limitation period is six years. *McLean* establishes that the triggering event that triggers the commencement of the limitation period is the guilty plea entered on August 28, 2014. This proceeding was commenced by application made on August 4, 2020, before the limitation period expired, and we find that the executive director commenced these proceedings within the time frame contemplated by the Act.

[54] The issues of whether a decision of a court in British Columbia can provide a basis for a section 161(6) order and whether a period of prohibition under section 161(6) of the Act is limited to the duration of whatever term was ordered by a court were addressed by prior panels of the Commission: *Re Chieduch*, 2019 BCSECCOM 29, *Re Mawji*, 2020 BCSECCOM 59 and *Re Wong*, 2022 BCSECCOM 7. We agree with the analysis of those panels.

[55] We conclude that we have jurisdiction to make the order sought by the executive director.

C. Abuse of process

[56] The executive director argued, and we agree, that the leading authority regarding establishing the general test for abuse of process is *R. v. Regan*, 2002 SCC 12. The executive director also argued, and we agree, that the leading authority for abuse of process based primarily on delay is *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII). Although the SCC in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, used more flexible language in that decision than was used in *Blencoe*, that was in a fundamentally different context. The *Blencoe* test has been repeatedly applied by panels of the Commission, and for good reason.

[57] The Supreme Court of British Columbia found that the 30-month delay breached Blencoe's section 7 *Charter* rights and stayed the proceeding. That decision was reversed on appeal with the Court of Appeal concluding that Blencoe's opportunity to make full answer and defence had not been compromised. The decision was appealed to the SCC. The SCC was not persuaded that Blencoe's case constituted an abuse of process. In order to find an abuse of process, the court must be satisfied that:

> [120] …"the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power, supra,* at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" *(Power, supra,* at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[58] The SCC held that the "principles of natural justice and the duty of fairness" form part of every administrative proceeding. As such, where delay impairs a party's ability to answer the complaint, administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy.

[59] Panels and courts have recognized that proceedings that are considered an abuse of process will be extremely rare. The key principles gleaned from *Blencoe* are:

(a) Delay, in and of itself, does not justify a stay of proceedings.

(b) Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period.

(c) The party claiming abuse of process must show that the inordinate delay "directly caused [them] a significant prejudice" that is related to the delay itself. A finding of abuse of process requires delay that caused "actual prejudice of such magnitude that the public's sense of decency and fairness is affected," and "unfair to the point that they are contrary to the interests of justice". A similarly high threshold was found in *R v. Regan*, whereby an applicant must demonstrate that the proceedings are oppressive or vexatious, and violate the fundamental principles of justice underlying the community's sense of fair play and decency.

(d) A stay of proceedings may be justified when the delay causes a prejudice to the fairness of the hearing and affects the ability of a party to defend itself, such as when the parties or witnesses' memories have faded, essential witnesses have died or are unavailable, or evidence has been lost.

(e) The delay must be unreasonable or inordinate as to be clearly unacceptable.

(f) The determination of whether a delay has become inordinate depends on factors which include the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, and the various rights at stake in the proceedings. There must also be proof of significant prejudice which results form an acceptable delay.

(g) The analysis requires a weighing of competing interests. In order to find an abuse of process, the court must be satisfied that "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted."

(h) A finding of abuse of process is available only in the "clearest of cases."

[60] In the present case Fielder is correct that the underlying conduct took place approximately nine years before this application was filed and the guilty plea took place almost six years before this application was filed. Those are long periods of time, but they are time periods which are permitted by the legislation and, therefore, applications filed within the prescribed time period are presumptively not the product of delay for the purposes of considering whether the timing of such application is an abuse of process. Absent other significant factors which were identified by the SCC in *Blencoe*, delay is not sufficient to support a conclusion that proceedings should be stayed.

D. Public interest in this context

[61] As Fielder points out, the exercise of our discretion should be based on our assessment of the public interest. As Fielder further points out, the concept of the public interest arises in many contexts within the Act and for each context different factors inform the public interest analysis. We agree with Fielder's general comments related to the public interest.

[62] Fielder's specific submission on how we should implement a public interest analysis is that we should begin with the question of whether, based on the public interest concerns which Fielder has identified, we should impose any order against Fielder. We do not agree with that part of Fielder's submission. Essentially, Fielder is asking us to focus on some public interest factors in a preliminary step of the analysis, and later consider the other public interest factors. Instead of adopting that approach, we conclude it is best to balance and weigh all of the relevant public interest factors together.

[63] Under Fielder's approach we would first consider the public interest to determine if it is appropriate to issue any order. Then, if we decide that it is in the public interest to make an order, we would again evaluate the public interest to determine what terms should be included in the order. While that manner of presenting the outcome might be convenient in how reasons for a decision will be laid out, in substance we do not agree with the approach. We do not consider it useful to evaluate whether to issue an order in the abstract without a contemporaneous evaluation of the terms of the order that will be issued. Also, we conclude that the same public interest factors arise on both of the proposed assessments; whether to issue an order and what terms should be included in an order.

[64] Our evaluation of what we consider are the most important public interest factors follows under the following two subheadings. In addition, we discuss below a factor that was asserted by Fielder to be a significant public interest factor, but that we conclude is not material in this context.

E. Public interest factors which favor not making an order, or favor making an order of limited scope and duration

[65] In no particular order, the factors which favor not making an order and the weight which we apply to those factors are set out below:

- Fielder was told by the crown prosecutor at the time of Fielder's guilty plea that there would be no further sanctions against Fielder. There is uncontradicted and untested evidence that Fielder was given incorrect information about the potential for further consequences after his guilty plea. Although that does not negate the guilty plea, and although it is still appropriate for us to rely on the facts Fielder admitted to in the course of this proceeding, we acknowledge that Fielder would naturally perceive some loss of confidence in the justice system as a result of being given incorrect information. We will give some modest consideration to that impact on Fielder which we will balance against all of the other relevant factors.

- Fielder has already been penalized by Justice Galati's sentence. We recognize this factor, but we place very limited weight on it because the purpose of our order is to protect the public, not to penalize Fielder.

- Fielder was stigmatized by the criminal conviction, has suffered a loss of reputation and professional prospects as a result, and any new decision will re-stigmatize Fielder. We recognize this factor, but we place very limited weight on it because the consequences complained of are most accurately attributable to Fielder's breach of the Act, not to the imposition of an order which is found to be in the public interest.

- There was a significant delay between the breach of the Act and the filing of this application. This factor can be significant in some cases. The factor was recognized and taken into account in *Re Gozdek*, 2022 BCSECCOM 10, in connection to an affirmative finding of good conduct during the period of delay between the breach of the Act and the date when an order is issued. In this case, as is discussed in more detail below, we accept that it is for the executive director to prove any breach of the Act, and in the absence of that proof Fielder is entitled to rely on the presumption that he has not breached the Act. Based on that presumption, we draw no conclusion that Fielder has breached any law. At the same time, we do not have an evidentiary basis to make a specific finding of good conduct. Delay is a factor which we will give some weight to while balancing all factors, but in this case we do not assign significant weight to the delay that has been identified. The Act identifies a period during which the executive director

may bring an application under section 161(6) of the Act. Our role is to consider all relevant public interest factors regardless of whether the application was brought in the first months after an application became possible or in the weeks just before the limitation period expired.

- Any order might impact Fielder's ability to find work and cause emotional and other harm to Fielder. We acknowledge that any order we make can have negative consequences on the person who is the subject of the order. However, we place very limited weight on this factor in this case. In part, that follows from the point we have made above that it is Fielder's prior criminal conduct, not a current public interest order, which is the true cause of negative consequences for Fielder. In addition, we note that Fielder's evidence regarding his own specific vulnerability to the consequences of an order establishes that he has health issues and family issues which are relevant but does not establish that Fielder needs to participate in capital markets to earn his income.

F. Public interest factors which favor making an order of significant scope and duration

[66] Fielder's underlying misconduct was very serious and caused significant harm. Fielder introduced an investor to an investment, then accepted investment funds from the investor knowing that the funds were borrowed, then diverted most of the funds to his own use. That conduct caused a significant loss to the investor. All conduct of that type has a tendency to impair the confidence that investors have in the integrity of financial markets.

[67] The executive director provided four past Commission decisions involving a finding of fraud, and submitted that they provide guidance for an appropriate sanction against Fielder. In particular, each decision ordered permanent market prohibitions against some of the respondents in the context of similar facts to those underlying this proceeding:

- *Re Davis*, 2016 BCSECCOM 375, where there was a finding of fraud on the respondent relating to one investor in the amount of $7,000. The respondent purported to sell the investor shares he did not own.

- *Shen Cho (Re)*, 2013 BCSECCOM 454, where the respondents made misrepresentations and perpetrated a fraud when they promised investors that an investment was risk-free and investors would receive a rate of return over 40% . The respondents received $101,846 from five investors.

- *Re Dhala*, 2015 BCSECCOM 336, where the respondent took $38,250 from four investors on the promise to buy shares of a TSXV listed company that was conducting a private placement. No shares were purchased, instead the respondent used the investors' funds on personal expenses.

- *Re Braun*, 2019 BCSECCOM 65, where the individual respondents committed fraud on two investors in the amount of $450,000. Two of the

respondents received permanent market prohibitions after it was demonstrated that they used investors' funds on personal expenses.

[68] Fielder has not made any re-payment to the investor. Fielder was ordered to pay restitution to the investor in the amount of $144,500 but, more than a decade later, he has not paid any of that amount.

[69] Fielder has raised funds from investors since his criminal conviction and that suggests some continuing risk to the public. We have not reached any conclusion that Fielder has broken any law. However, the New Evidence establishes, on a balance of probabilities, that Fielder has, since his criminal conviction, accepted investment funds from investors. Although he has been given an opportunity to do so, Fielder has not explained what happened to those funds, other than suggesting the existence of some business ventures which did not work out. This combination of circumstances suggests that Fielder is open to accepting funds from investors and a reasonable person could conclude that some risk exists that Fielder might repeat the conduct which led to his criminal conviction.

[70] Fielder was less than candid in describing his employment and business activities. As is described above, Fielder volunteered information about his activities since his conviction. We conclude that Fielder did so in an effort to convince the panel that Fielder was living a good life, setting a good example for his daughter and not involved in any activities which would cause concern to securities regulators. We find that the New Evidence is inconsistent with what Fielder initially reported to us. Fielder's lack of candor has some impact on our assessment of whether prohibitions should be put in place against him in order to protect the public in the future.

G. Factors which we concluded were not significant in this proceeding

[71] Fielder placed considerable emphasis on the fact that, before and at the time of the initial referral of Fielder's conduct to the criminal investigation branch, the executive director had an option to issue a notice of hearing in relation to Fielder's conduct. Fielder notes that the executive director could have issued a notice of hearing either instead of making the referral or concurrently with the criminal process. We agree with Fielder that the executive director had those options. However, we do not agree with Fielder that there is a public interest reason why the executive director should be precluded from later seeking a section 161(6) order once the executive director elects not to issue a notice of hearing.

[72] The Act is, on its face, structured to allow the executive director the option of making a referral to the criminal investigation branch and later, if there is a conviction, to rely on a conviction in the context of a section 161(6) application. Permitting that option reduces the need for a duplicative hearing proving the same facts. The additional "harm" to Fielder or any convicted person when the executive director chooses the option that was chosen here is that there can be significant delays between the conduct in question and the eventual section 161(6) application. The limitation period provides some protection against extensive delay. *Blencoe* provides further protection. As we have noted above, while there was some delay in this proceeding, it was not serious enough to engage the

test in *Blencoe*. However, we can and will take the delay into account as we balance all of the relevant factors together into our order.

[73] Fielder also placed considerable emphasis on the language in *McLean* reflecting the SCC's recognition that section 161(6) achieves the legislative goal of facilitating interprovincial cooperation. Fielder extends this point in support of the proposition that there is no legitimate legislative goal in allowing the Commission to rely on findings made by bodies within British Columbia. We conclude that Fielder's submission goes too far. We absolutely agree that facilitating interprovincial cooperation is a critical legislative objective. But the language of the Act allows section 161(6) orders based on convictions "in Canada or elsewhere". There is no public interest reason to interpret those words to mean "in Canada (excluding British Columbia) or elsewhere". British Columbia cannot be the only jurisdiction within Canada that cannot rely on a conviction made in British Columbia. Since the deeper legislative objective being achieved is to protect the public in British Columbia, excluding criminal convictions in British Columbia from circumstances which can trigger a section 161(6) order would create a perverse result.

[74] The fact that the conviction occurred in British Columbia is not a public interest factor which would lead us to not make an order, or to include more limited prohibitions in any order.

V. Conclusions

[75] We have considered the executive director's Application and Fielder's response, the circumstances of Fielder's misconduct, and the factors from *Re Eron Mortgage Corporation*, *supra*, and *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149.

[76] Of the public interest factors which we have identified as most relevant, the most compelling are the factors demonstrating that orders are necessary to protect the public. The seriousness of Fielder's criminal conduct, his failure to pay any restitution and his lack of candor about all of his activities related to investment in securities after his conviction are the most compelling factors to us. Those same factors require that any period of prohibition which we impose should be extensive.

[77] A consideration of some factors which were emphasized by Fielder does lead us to impose less than life long prohibitions. In particular, we recognize that the underlying conduct occurred over a decade ago.

[78] We conclude that a prohibition of 20 years is appropriate, and the order which we make below reflects that.

[79] Fielder has asked that any restriction related to his future trading activities permit him to operate a disability account for himself and for his daughter. That request was not opposed by the executive director and we consider that the request is well justified. There is no history here of any form of deceptive trading and it is in the public interest that Fielder be able to save and invest for his future and that of his daughter. We have crafted

our order to reflect the terms which we believe will achieve our objective, but if Fielder finds that his account opening efforts are limited by the order he can apply for an amendment to the order.

VI. Order

[80] After providing Fielder an opportunity to be heard, and considering the record and the submissions of the parties, we find that it is in the public interest to order that, pursuant to section 161 of the Act:

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

(b) Fielder is prohibited until June 21, 2043:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or derivatives, except that, if he gives a registered dealer a copy of this decision, he may trade and purchase securities through a registered dealer in:

(A) RRSPs, RRIFs, or tax-free savings accounts (as defined in the *Income Tax Act* (Canada)), a registered disability account, locked-in retirement accounts for his own benefit or an account for the benefit of his daughter;

(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;

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

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

(vi) under section 161(1)(d)(v) from engaging in promotional activities by or on behalf of

(a) an issuer, security holder or party to a derivative, or

(b) another person that is reasonably expected to benefit from the promotional activity; and

(vii) under section 161(1)(d)(vi) from engaging in promotional activities on Fielder's own behalf in respect of circumstances that would reasonably be expected to benefit Fielder.

June 21, 2023

For the Commission

Gordon Johnson	James Kershaw
Vice Chair	Commissioner