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

Citation: Re Smillie, 2024 BCSECCOM 496 Date: 20241127

David Smillie and 1081627 B.C. Ltd. operating as ezBtc

Panel	Audrey T. Ho	Commissioner
	James Kershaw	Commissioner
	Marion Shaw	Commissioner
Submissions completed	September 24, 2024	
Decision date	November 27, 2024	

Counsel

Jillian Dean Heesoo Kim	For the Executive Director
Cody Reedman	For David Smillie

Decision

I. Introduction

[1] This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418 (Act). The findings of this panel on liability made on August 7, 2024, reported at 2024 BCSECCOM 348 (Findings), are part of this decision.

[2] We found that:

a) the respondents perpetrated a fraud relating to securities by lying to customers about holding their crypto assets in cold storage in the custody of 1081627 B.C. Ltd. operating as ezBtc (ezBtc), but instead diverting 935.46 customer bitcoin and 159 customer ether for their own purposes;

b) by doing so, the respondents contravened section 57(b) of the Act; and

c) David Smillie (Smillie) also contravened section 57(b) of the Act, pursuant to section 168.2(1) of the Act.

[3] The executive director and Smillie made written submissions on the appropriate sanctions in this case. ezBtc did not make submissions or otherwise participate in the sanctions process.

[4] This is our decision with respect to sanctions.

II. Positions of the parties

[5] The executive director submitted that the extent of deceit the respondents visited on their customers was extremely significant and at the highest end of seriousness.

[6] The executive director submitted that it is in the public interest that we impose the following sanctions:

a) with respect to ezBtc:

i. permanent market bans under sections 161(1)(b)(ii), 161(1)(d)(v) and 161(1)(d)(vi) of the Act; and

ii. disgorgement order of $13 million, jointly and severally with Smillie, under section 161(1)(g) of the Act; and

b) with respect to Smillie:

i. permanent market bans under sections 161(1)(b)(ii), 161(1)(c) and 161(1)(d)(i) - (vi) of the Act;

ii. disgorgement order of $13 million, jointly and severally with ezBtc, under section 161(1)(g) of the Act; and

iii. administrative penalty of $13 million, under section 162 of the Act.

[7] The $13 million disgorgement order sought by the executive director is based on the value of the diverted bitcoin and ether as of July 1, 2019.

[8] Smillie submitted that the orders sought by the executive director are excessive, disproportionate, and go beyond what is necessary for specific and general deterrence.

[9] Smillie submitted that a ten-year market ban preventing him from acting as a director or officer of any issuer or registrant, or engaging in investor relations activities, is sufficient. Smillie asked that he be allowed to trade securities on his own account through a registrant.

[10] Smillie also submitted that any disgorgement order should be calculated based on the value of cryptocurrency at the times of misappropriation and attributed proportionately between Smillie and ezBtc based on evidence of their respective benefits. He did not refer to any evidence nor submit what those amounts should be.

[11] Lastly, Smillie submitted that any administrative penalty should not exceed $250,000.

III. Analysis

A. Factors

[12] Section 161(1) orders are protective and preventative in nature and prospective in orientation. This means that, when it crafts its orders, the Commission aims to protect investors, promote the fairness and efficiency of the capital markets, and preserve public confidence in those markets.

[13] In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 at page 24, the Commission provided a non-exhaustive list of factors relevant to making orders under sections 161 and 162 of the Act:

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 the 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, integrity of the capital markets

[14] Panels of this Commission have repeatedly found that fraud is the most serious of the misconduct prohibited by the Act. See, for example, *Durkin*, 2023 BCSECCOM 180. As noted in *Manna Trading Corp. Ltd. (Re)*, 2009 BCSECCOM 595 at paragraph 18, "nothing strikes more viciously at the integrity of our capital markets than fraud".

[15] In this case, the respondents lied repeatedly to customers that crypto assets deposited on the ezBtc platform would be stored by ezBtc in cold storage for increased safety. Instead, they diverted a significant portion of those assets to Smillie's personal accounts on other crypto exchanges (Smillie's Exchange Accounts) and to gambling websites. Smillie also lied repeatedly to customers about the reasons for delays or non-payment of customer withdrawals. He threatened customers who complained publicly with defamation lawsuits.

[16] Smillie submitted that there is no evidence that the purpose of ezBtc was to commit a fraud on customers. While that may be true, the respondents intentionally lied to customers while knowing that crypto assets on the platform were being diverted at the customers' peril. The extent of the deceit here is significant and the misconduct lies in the upper range in the continuum of seriousness of fraudulent misconduct. However, it does not lie at the highest end of the range, when compared to the more egregious misconduct dealt with by the Commission in other cases, such as the conduct of Williams as the central figure in a massive Ponzi scheme in *Re Williams*, 2016 BCSECCOM 283.

Harm to investors, damage to the integrity of the capital markets

[17] As we described in the Findings, the misconduct resulted in actual financial loss and emotional harm to customers.

[18] The Commission has repeatedly found that fraud deters investors from reliance on the honesty and integrity of the capital markets. The fraud of any person who participates in the capital markets has a detrimental effect on the trust that potential investors may have in other honest and credible market participants. See *Re Bezzaz Holdings*, 2020 BCSECCOM 263 at paragraph 16.

[19] In this case, the respondents' misconduct eroded trust in the capital markets. Several customers testified that the misconduct affected their trust in crypto asset trading platforms as a whole, and in the financial markets more generally. MM testified that he now has a "lack of trust in Canadian exchanges, any exchange". KK testified that she experienced "loss of trust in bitcoin for sure, crypto currency in general, even banking to some degree." JJ testified that the experience impacted his trust in crypto asset trading platforms.

Enrichment of the respondents

[20] Both respondents were significantly enriched by their misconduct. The amount of their individual enrichment is discussed below in our analysis relating to section 161(1)(g) orders.

Aggravating factors

[21] The Commission has previously found the preparation of false financial statements for investors to be an aggravating factor (see *Mesidor (Re)*, 2014 BCSECCOM 6 at paragraph 26).

[22] The executive director submitted that similarly, the ongoing display of falsified account balance information on the ezBtc platform for customers is evidence of the respondents' intention to mislead customers, and is an aggravating factor.

[23] Smillie submitted that the ezBtc website displayed account balances that accurately reflected customers' account status and the amounts of cryptocurrency or fiat currency that customers were entitled to at all times, regardless of whether the cryptocurrency or fiat currency was stored in the client's wallet.

[24] The evidence establishes that the respondents intentionally lied about the storage of crypto assets on the ezBtc platform. The online account balances reinforced those lies even if they accurately reflected the amounts of cryptocurrency or fiat currency that customers were entitled to at all times. We view that as part and parcel of the circumstances of the respondents' deceit to be taken into account in determining sanctions. We do not view it as a separate and distinct aggravating factor. For that reason, we do not find any aggravating factors.

Mitigating factors

[25] There are no mitigating factors.

[26] Smillie submitted that the unclear and shifting regulatory landscape for crypto asset trading platforms during the Relevant Period (December 2016 to September 2019) is a significant mitigating factor and relevant to assessing the proportionality of sanctions. We disagree. Whether or not the respondents understood crypto asset trading platforms to be subject to securities law and Commission oversight, they could not have had a legitimate expectation that it was permissible to defraud customers and deprive them of their assets.

[27] Smillie submitted that there are other mitigating factors:

a) he has no regulatory history;

b) the respondents did not obstruct or frustrate the enforcement proceedings; and

c) through his counsel, Smillie participated in the hearing and demonstrated willingness to engage in the regulatory process.

[28] As the Commission has repeatedly held, the absence of an aggravating factor is not a mitigating factor (See: *VerifySmart Corp. et al*., 2012 BCSECCOM 176, *Re Streamline Properties Inc.. et al.*, 2015 BCSECCOM 66, and *Re Oriens Travel & Hotel Management Corp., et al.*, 2014 BCSECCOM 352). The lack of past securities law violations does not mitigate the severity of Smillie's fraud. Neither does the fact that Smillie did not obstruct enforcement efforts.

[29] Commission panels have found that co-operation with enforcement proceedings in the form of making admissions can act as a mitigating factor. See: *Re Stock Social*, 2023 BCSECCOM 372, at paragraph 31. But simply participating in the hearing through the presence of counsel does not rise to that level. Just as it is not an aggravating factor that ezBtc chose not to participate in the hearing process, it is not a mitigating factor that Smillie chose to take part in the hearing process through legal counsel.

Past misconduct

[30] There is no evidence of past securities regulatory misconduct by either respondent.

Risk to our capital markets, fitness to be a registrant or director or officer of an issuer

[31] Smillie blatantly and repeatedly lied to customers as he authorized, permitted or acquiesced in the transfers of bitcoin and ether to his personal accounts and online gambling sites. He made excuses about non-payments and threatened customers who complained publicly.

[32] Honesty is a critical requirement of being a director or officer of a market participant. Smillie failed to act honestly or in the best interests of ezBtc's customers. His behaviour falls far short of that expected of market participants; he is unfit to participate in the capital markets.

[33] Smillie submitted that his risk to the capital markets is low, but did not provide any evidence to support that position nor give any indication as to why we should reach that conclusion.

[34] Smillie submitted that permanent market bans will effectively end any future career he may have in this field, and are punitive rather than protective. As Smillie acknowledged, there is no evidence that he was previously involved in the financial markets. There is no evidence that he plans to work in that field in the future and no evidence on how being denied the ability to work in that field is punitive to him. Moreover, given that we have found him unfit to participate in the capital markets, a permanent ban is appropriately protective of the investing public.

Specific and general deterrence

[35] The purpose of deterrence is to discourage future misconduct by the individual wrongdoer specifically and by market participants generally. Specific and general deterrence are factors for a panel to consider when determining the appropriate sanctions. See: *Durkin* at paragraph 31.

[36] The panel in *Re Smith*, 2021 BCSECCOM 486, at paragraph 22 described specific and general deterrence as:

> Specific deterrence and general deterrence are related but not identical concepts. Specific deterrence discourages this respondent from participating in future misconduct. General deterrence discourages others from participating in misconduct similar to that in the subject case. Both goals are legitimate in the crafting of a sanction which properly balances all the factors which are relevant to any particular case.

[37] The sanctions we impose should be sufficient to deter these respondents and others from engaging in similar conduct in the future. See *Durkin* at paragraph 33. At the same time, our orders must be proportionate to the misconduct of each respondent and the circumstances surrounding it and reasonable for each respondent. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual respondent. See: *Davis v. British Columbia Securities Commission*, 2018 BCCA 149; *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paragraphs 154 and 156.

Prior orders in similar cases

[38] The executive director referred us to four previous decisions of this Commission for guidance on assessing appropriate sanctions in this case: *Re Bezzaz Holdings*, 2020 BCSECCOM 263, *Re Oei*, 2018 BCSECCOM 231, *Re Williams*, 2016 BCSECCOM 283, and *Re Zhu*, 2015 BCSECCOM 264.

[39] In *Re Bezzaz Holdings*, the Commission found that Bezzasso directly and through the corporate respondents was the mastermind of a $5 million fraudulent Ponzi scheme. Bezzasso was ordered to disgorge the proceeds of the fraud less repayments made to investors, jointly and severally with the corporate respondents, and to pay an administrative penalty of $4.5 million. Permanent market bans were ordered.

[40] In *Re Oei*, Oei raised approximately $5 million from investors in a fraudulent scheme. There were serious aggravating factors, including that the fraud arose in the context of the respondents providing regulated financial services and that Oei was a former registrant. Oei was ordered to disgorge the proceeds of the fraud less repayments made

to investors, jointly and severally with one corporate respondent, and to pay an administrative penalty of $4.5 million. Permanent market bans were ordered.

[41] In *Re Williams*, the Commission found that Williams was the mastermind of a Ponzi scheme that raised approximately $12 million. Williams also breached sections 34 and 61 of the Act. There were serious aggravating factors, including payment of investor funds to persons with a history of serious securities regulatory or criminal misconduct. Williams was a former registrant. Williams was ordered to disgorge the proceeds of the fraud jointly and severally with the corporate respondent and to pay an administrative penalty of $15 million. Permanent market bans were ordered.

[42] In *Re Zhu*, the Commission found that Zhang and Zhu coordinated a fraudulent investment scheme of at least $14 million. They also engaged in illegal distributions and took steps to interfere with the Commission's investigation and lied to Commission investigators. They were ordered to disgorge the proceeds of the scheme less repayments made to investors, jointly and severally with the corporate respondent, and to each pay an administrative penalty of $14 million. Permanent market bans were ordered.

[43] Smillie submitted that these decisions are distinguishable and should not be followed. He said each of them involved contraventions of multiple sections of the Act, and some contained aggravating factors that were not present in this case.

IV. Appropriate sanctions

Market prohibitions

[44] Participation in the capital markets is a privilege and not a right. Smillie's behaviour falls far short of what we expect from market participants.

[45] Smillie's submissions provided no comfort that anything less than permanent bans will adequately protect British Columbians. His argument that his behaviour is mitigated because there was regulatory uncertainty at the time shows a continuing failure to understand or accept that fraud is not acceptable regardless of how one's activities are regulated. It is necessary to prevent Smillie from engaging in similar conduct in the future.

[46] There is no evidence that Smillie's livelihood was or will be dependent on working in the capital markets. There is no evidence of harm to him if he could not work in that field, aside from the obvious fact that he will have fewer choices in potential occupations. Ordering permanent market bans in this case aligns well with the public interest mandate of this Commission that includes preserving and promoting public confidence in the fairness and integrity of our capital markets.

[47] Smillie asserts that the findings of fraud will create significant difficulty for him to find employment. There is no evidence that Smillie will not be able to find employment.

[48] There is no evidence that Smilie will pose less risk to the capital markets going forward. Smillie did not explain why a ten-year ban is adequate.

[49] Having weighed the evidence of the consequences of imposing permanent bans on Smillie and the protection of the public, as well as the need for general deterrence to discourage the misconduct involved here, we are satisfied that permanent market bans are necessary and in the public interest. We will allow Smillie to trade securities on his own account through a registrant, since that does not pose a danger to the public.

[50] We have found that Smillie managed and directed the affairs of ezBtc. There is no evidence that its control and management will change or that ezBtc will pose less risk going forward should it be restored as a company.

[51] The Commission has regularly imposed orders against dissolved companies, in recognition of the fact that they can be reinstated relatively easily. See: *Re SBC Financial Group Inc.*, 2018 BCSECCOM 267 at paragraph 45. Although ezBtc is currently dissolved, we will not be adequately protecting the public if we do not make orders to cover off the possibility that it might be restored in the future. It is in the public interest to impose orders that will prevent similar misconduct by ezBtc in the future should it be restored.

Section 161(1)(g) orders

[52] Section 161(1)(g) states that the Commission, after a hearing, may order:

> […] 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.

[53] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, at paragraph 144, adopted the two-step approach to section 161(1)(g) orders identified in *Re SPYru Inc.*, 2015 BCSECCOM 452:

> [131] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).
>
> [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.

[54] The Court of Appeal in *Poonian,* at paragraph 143, summarized the following principles that are relevant to section 161(1)(g) orders:

> 1. The purpose of s. 161(1)(g) is to deter persons from contravening the *Act* by removing the incentive to contravene, i.e., by ensuring the person does not retain the "benefit" of their wrongdoing.
>
> 2. The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention. Those objectives may be achieved through other mechanisms in the *Act*, such as the claims process set up under

Part 3 of the *Securities Regulation* or the s.157 compliance proceedings in the *Act*.

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

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

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

[55] The Court of Appeal also approved an approach to determining the amounts obtained, directly or indirectly, by a respondent. At paragraph 129, the Court stated:

> … securities jurisprudence has applied s. 161(1)(g) to require the Executive Director only to prove on a balance of probabilities a "reasonable approximation" of the amount obtained by the wrongdoer as a result of that wrongdoer's contravention or failure to comply. Once that onus is met, the burden shifts to the wrongdoer to disprove the reasonableness of the amount. Importantly, ambiguity or uncertainty in the calculations is resolved in favour of the Executive Director. [citations omitted]

Step 1 - Can a section 161(1)(g) order be made against the respondents?

[56] We need to answer the following questions under step 1:

a) What, if any, is the amount obtained by ezBtc, directly or indirectly, as a result of its contravention?

b) What, if any, is the amount obtained by Smillie, directly or indirectly, as a result of his contravention?

c) Can we issue a joint and several order against the respondents?

<u>The amount obtained by ezBtc</u>

[57] The answer is straightforward with respect to ezBtc. The evidence clearly established that ezBtc directly obtained 935.46 bitcoin and 159 ether as a result of its contravention.

<u>The amount obtained by Smillie</u>

[58] Smillie suggested in his submissions that assets that went directly into ezBtc's corporate accounts may have been put towards business expenses. That contradicts the evidence and the Findings that all 935.46 bitcoin and 159 ether were transferred to Smillie's Exchange Accounts and/or to gambling websites.

[59] Smillie clearly benefited from the 123.53 bitcoin that were transferred from ezBtc to Smillie's Exchange Accounts. He indirectly obtained 123.53 bitcoin.

[60] The evidence established that it is more likely than not, and we conclude, that Smillie also benefited from the transfer of bitcoin and ether from ezBtc to accounts at CloudBet and FortuneJack that also received transfers from Smillie's Exchange Accounts. According to the Expert Report (as defined in the Findings), that totaled 165.84 bitcoin (160.59 bitcoin to CloudBet, plus 5.25 bitcoin to FortuneJack). Therefore, Smillie also indirectly obtained those 165.84 bitcoin.

[61] That leaves 646.09 bitcoin and 159 ether that were also transferred from ezBtc to CloudBet and FortuneJack accounts.

[62] The executive director submitted that it is impossible, and also unnecessary, to apportion the diverted crypto assets between the two respondents to determine how much each of them obtained, because Smillie was directly responsible for managing and carrying out the affairs of ezBtc, and both respondents benefited from the assets flowing out of ezBtc and together obtained all of the diverted assets, either directly or indirectly.

[63] That line of reasoning takes us to an analysis of the circumstances where a joint and several disgorgement order may be made.

Joint and several disgorgement order

[64] The Court of Appeal in *Poonian* set out some examples of circumstances where someone may indirectly obtain funds which may then properly be made part of a section 161(1)(g) order. One of those examples is where a corporate *alter ego* of an individual respondent has directly obtained the funds derived from misconduct. In such circumstances, it is possible to view the individual respondent as having indirectly obtained those funds and a joint and several order may be made against both of them.

[65] The Court of Appeal went on to say, in paragraph 134:

> Using a corporate *alter ego* is but one example of a mechanism a wrongdoer may employ to indirectly obtain funds from wrongdoing. It is impossible to imagine and enumerate the wide variety of tactics wrongdoers may use to do so. **The critical element is that the wrongdoer and the person with whom he or she is held jointly and severally liable were, in effect, acting as one person.** This may occur, in another example, where one wrongdoer directs and controls the accounts of numerous other persons, and effectively has direction and control over the activity and assets in those accounts (e.g., using nominee accounts). [**emphasis added**]

[66] We have found that even though there were other people involved in operating ezBtc, Smillie was directly responsible for managing and carrying out the affairs of ezBtc. We also considered the evidence regarding Smillie's position and authority in ezBtc and his control over its assets and bank accounts. We are satisfied that Smillie and ezBtc were, in effect, acting as one person, and Smillie benefited from and indirectly obtained all of the diverted crypto assets that were directly obtained by ezBtc. This is one of those circumstances contemplated by the Court of Appeal where a joint and several order may be made.

[67] We find that in total, the respondents obtained 935.46 bitcoin and 159 ether.

Deduction from disgorgement order for repayments to victims

[68] As noted by the Court of Appeal in *Poonian*, at paragraph 91, "amounts the wrongdoer has returned to the victims (e.g. the investors) should properly be deducted from the disgorgement amount. This is consistent with the purpose of s. 161(1)(g) of removing ill-gotten amounts... ."

[69] The evidence tendered in the liability hearing indicates the following repayments to customers:

a) JJ was eventually paid approximately $73,000 by Smillie for the sale of 43.44 bitcoin, and succeeded in having 25 bitcoin transferred to another exchange;

b) RJ was paid $1,119.38 (less $3.36 in fees) for the sale of 0.0995 bitcoin in April 2018; and

c) MM was only able to withdraw 0.07375965 bitcoin.

[70] As a result, any disgorgement order should be reduced to account for 68.61325965 bitcoin, being the total number of bitcoin sold by customers JJ and RJ and for which they received full payment, plus the total number of bitcoin returned to JJ and MM. That results in a total of 866.84674035 bitcoin and 159 ether that are relevant to any disgorgement order.

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

[71] This is not a legal question but one of the exercise of our public interest jurisdiction.

[72] The respondents fraudulently diverted their customers' crypto assets for their own purposes. Their deceit was blatant and repeated. It is in the public interest to require wrongdoers to give up the benefits obtained as a result of their misconduct. There are no circumstances here that warrant reducing the disgorgement order from the full amount of the fraudulently diverted assets, less only repayments made to customers.

[73] Accordingly, we find that it is in the public interest, equitable and not punitive to make a disgorgement order against the respondents, jointly and severally, based on the 866.84674035 (which we will round down to 866.84) bitcoin and 159 ether that they obtained as a result of their contraventions of the Act.

Canadian dollar equivalent of bitcoin and ether

[74] The value of bitcoin and ether fluctuated significantly during and after the Relevant Period. One bitcoin was worth approximately $1,700 in late April 2017, near the start of the Relevant Period. It was worth $13,850.14 as at July 1, 2019, and rose to approximately $100,000 around the time of the April 2024 liability hearing. Similarly, one ether was worth approximately $10 in December 2016, $384.29 as at July 1, 2019, and approximately $4,000 around the time of the April 2024 liability hearing.

[75] That means the total value of 935.46 bitcoin and 159 ether was approximately $1.6 million in late April 2017, $13 million as at July 1, 2019, and $94 million around the time of the liability hearing. The total value of 866.84 bitcoin and 159 ether was approximately $12 million as at July 1, 2019 and $87 million around the time of the April 2024 liability hearing.

[76] July 1, 2019 was the approximate midpoint of customer complaints to the Commission. The executive director said each customer would have their own series of hypothetically possible valuation dates – the date they deposited their assets, the date they realized the assets had disappeared, and either today's value or some other date on which they would have disposed of the asset had Smillie not misappropriated it. The executive director submitted that using the values of bitcoin and ether as at July 1, 2019 results in a reasonable approximation of the amount obtained by the respondents as a result of their fraud.

[77] Smillie submitted that the misappropriations occurred over almost a three-year period when crypto asset values fluctuated dramatically. He said the disgorgement amount should be calculated based on cryptocurrency asset values at the times the diversions occurred, not at a later complaint date when the price was inflated.

[78] The executive director argued that Smillie's proposed valuation method is a practical impossibility. Valuing the transferred assets on the day of each transfer would require further expert evidence to ascertain how many were transferred on each day of those three years, followed by individual daily valuations of those amounts, followed by a summation of each daily valuation across both asset types. Assuming it is possible for the expert to pinpoint a daily total across the entire Relevant Period, there would be over 1,000 individual daily valuations for each asset. Aside from the logistical challenge, Smillie's proposed valuation method values the crypto asset at the earliest possible point, which is likely to be the lowest possible valuation given the overall trend of increasing crypto asset values over time. The executive director said it is not in the public interest to allow Smillie to benefit from any uncertainty as to the valuation of the misappropriated assets.

[79] The Court of Appeal stated in *Poonian* at paragraph 140:

> … The degree of latitude in determining whether an approximation is "reasonable" would depend on the circumstances, including the complexity or opacity of the scheme. As noted above, any ambiguity or uncertainty in calculations would be resolved against the wrongdoer whose wrongdoing created the uncertainty.

[80] We agree with the executive director that it is very difficult, if not impossible, with the available evidence, to arrive at a precise Canadian-dollar value for the amount wrongfully obtained. We also agree that there is no one true date to calculate a valuation of the crypto assets. Smillie has not offered a workable alternative. The respondents did not offer any records or evidence to permit a more precise calculation.

[81] We note that in the context of an extended period of misappropriations while the value of bitcoin and ether increased significantly, choosing a value near the start of the Relevant

Period would result in an amount that is less, likely considerably less, than the amount actually obtained by the respondents. On the other hand, choosing a value near the end of the Relevant Period would result in an amount that is higher, likely considerably higher, than the amount actually obtained.

[82] The challenges to determining the amount obtained by the respondents in Canadian dollars are inherent in the fraudulent scheme perpetrated by the respondents. Given the reasoning of the Court of Appeal in paragraph 140 of *Poonian,* we accept that there is broad latitude in determining whether an approximation is reasonable. Further, the respondents should not benefit from any uncertainty or ambiguity in calculating the amount obtained.

[83] The executive director has provided evidence to establish the amount of cryptocurrency wrongfully obtained by the respondents. After reducing the total amount to account for cryptocurrency sold by and returned to investors, we have determined that the respondents wrongfully obtained 866.84 bitcoin and 159 ether.

[84] The executive director has also tendered evidence about the use of CoinMarketCap.com to calculate the price of bitcoin and ether at various times. The respondents did not challenge the use of CoinMarketCap.com for that purpose. According to the evidence before us, CoinMarketCap.com is a price-tracking website for crypto assets. It was described by the CBC as a credible source for crypto data. It has been cited by news agencies such as the BBC, CBC and the New York Times for data about crypto asset pricing. According to the evidence of the Commission investigator, in his experience, it is the most widely-used online source for information about crypto asset prices. On the evidence before us, we conclude that using CoinMarketCap.com provides an appropriate method to determine the Canadian-dollar equivalent of cryptocurrency.

[85] Accordingly, we are satisfied the executive director has established both the amount of cryptocurrency wrongfully obtained by the respondents and an acceptable method for determining the Canadian-dollar equivalent of that cryptocurrency.

[86] We do not, however, accept the executive director's submission that July 1, 2019 is the appropriate date to use for determining the Canadian-dollar value of the amount wrongfully obtained by the respondents. July 1, 2019 is the 32nd month in the 34-month Relevant Period. According to the Expert Report, customers' crypto assets were quickly transferred out of ezBtc's addresses upon deposit. The Expert Report also indicates that bitcoin and ether transfers from ezBtc to FortuneJack (a subset of the misappropriations in question) halted on March 28, 2019. Accordingly, the evidence established that most of the misappropriations took place before July 1, 2019.

[87] Determining a date based on when customers realized they had suffered a loss and complained to the Commission, or when customers might have decided to withdraw or monetize their crypto assets, is not the best approach because those methods focus on quantifying the loss to the victims. Given that the purpose of section 161(1)(g) is to remove from wrongdoers the amount wrongfully obtained by them and not to compensate victims, it is more appropriate to pick a valuation date that is tied to when the misconduct took place.

[88] Since the evidence indicates that there were misappropriations throughout much of the Relevant Period and the prices of bitcoin and ether increased over time during the Relevant Period, we have determined that a valuation date near the midpoint of the Relevant Period would be a reasonable proxy for averaging the values of the crypto assets misappropriated near the start of that period and those misappropriated near the end of that period.

[89] The midpoint of the Relevant Period was April 30, 2018, and we find the value of the misappropriated bitcoin and ether as at April 30, 2018 to be a reasonable approximation of the amount obtained by the respondents. It would be fitting and proportionate to order the respondents to disgorge that amount, net of the bitcoin and ether returned to customers.

[90] The price of one bitcoin and one ether as at April 30, 2018 was US$9,240.55 and US$669.92, respectively, according to a historical snapshot of bitcoin and ether prices for that day on CoinMarketCap.com. According to the Bank of Canada daily exchange rate look-up tool, the exchange rate for one U.S. dollar as at April 30, 2018 was 1.2836. That means the Canadian dollar equivalent of 866.84 bitcoin and 159 ether as at April 30, 2018 totaled approximately $10.4 million.

[91] Accordingly, we find that it is in the public interest to order the respondents to pay $10.4 million, jointly and severally, under section 161(1)(g) of the Act.

Administrative penalties

[92] Section 162 of the Act provides the following:

> (1) If the commission, after a hearing,
>
> (a) determines that a person has contravened,
>
> (i) …a provision of this Act…
>
> (b) considers it to be in the public interest to make the order,
>
> the commission may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention.

[93] An administrative penalty against Smillie is warranted for both general and specific deterrence.

[94] Smillie did not provide any evidence or explanation as to why $250,000 is an appropriate amount for the administrative penalty against him.

[95] His blatant and repeated deceit warrants a significant penalty. At the same time, the amount should be less than the amount suggested by the precedent cases cited by the executive director, given the more egregious behaviour and aggravating factors present in those cases.

[96] Smillie submitted that imposing a $13 million disgorgement order in addition to a $13 million administrative penalty amounts to an impermissible double counting. He says that any administrative penalty should be adjusted downward to account for amounts disgorged to avoid punishing Smillie twice for the same misconduct.

[97] Smillie misunderstands the purposes of sections 161(1)(g) and 162 of the Act. It is well-established that the purpose of section 161(1)(g) is to remove from wrongdoers their ill-gotten gains in order to ensure they do not retain the benefit of their wrongdoing. Its purpose is not to punish the wrongdoer nor to compensate the victims of the wrongdoing. See *Poonian*. On the other hand, the purpose of section 162 is to deter wrongdoers and others from engaging in similar misconduct in the future; it is prospective in orientation and aimed at preventing future misconduct. The two sections are designed for different purposes. There is no double counting involved.

[98] Smillie's suggestion would lead to a ridiculous outcome. For example, if we order $13 million in disgorgement and $13 million in administrative penalty, as the executive director asked, Smillie would have us reduce the administrative penalty to $0. The net effect is that the respondents would be required to return to customers the amounts that were wrongfully taken from them, with no other financial consequence for their wrongdoing. That would be true in every instance where a panel orders an administrative penalty that is less than the disgorgement amount. That result would not provide any deterrence.

[99] We have no evidence of Smillie's personal circumstances or his ability to pay. His counsel's statement at the time of the liability hearing that Smillie was impecunious was not supported by any evidence. The seriousness of Smillie's misconduct merits a significant penalty. The $250,000 submitted by Smillie is woefully inadequate and not supported by precedents.

[100] We find that an administrative penalty against Smillie in the amount of $8 million is appropriate, proportionate and meets the need to send a clear message for specific and general deterrence. It is a very substantial amount. At the same time, it reflects our view that Smillie's misconduct, albeit less egregious than some of the precedents cited by the executive director, lies near the upper end of seriousness.

[101] We agree with the executive director that there is little public interest in ordering an administrative penalty against ezBtc. The company is dissolved, there is no evidence that it has any assets or operations, and ezBtc did not act independently of Smillie in perpetrating the fraud.

V. Orders

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

ezBtc

1. ezBtc is permanently prohibited:

    a) under section 161(1)(b)(ii) of the Act, from trading in or purchasing any securities or derivatives, a specific security or derivative or a specified class of securities or class of derivatives;

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

c) under section 161(1)(d)(v) of the Act, from engaging in promotional activities by or on behalf of an issuer, security holder or party to a derivative, or another person that is reasonably expected to benefit from the promotional activity;

d) under section 161(1)(d)(vi) of the Act, from engaging in promotional activities on its own behalf in respect of circumstances that would reasonably be expected to benefit it; and

2. ezBtc pay to the Commission $10.4 million, jointly and severally with Smillie, under section 161(1)(g) of the Act.

Smillie

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

2. Smillie is permanently prohibited:

a) under section 161(1)(b)(ii) of the Act, from trading in or purchasing any securities or derivatives, a specific security or derivative or a specified class of securities or class of derivatives, except that he may trade and purchase securities or derivatives for his own account (including one RRSP account, one TFSA account and one RESP account), through a registered dealer or registrant, if he gives the registered dealer or registrant a copy of this Decision;

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

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

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

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

f) under section 161(1)(d)(v) of the Act, from engaging in promotional activities by or on behalf of an issuer, security holder or party to a derivative, or another person that is reasonably expected to benefit from the promotional activity;

g) under section 161(1)(d)(vi) of the Act, from engaging in promotional activities on his own behalf in respect of circumstances that would reasonably be expected to benefit him; and

3. Smillie pay to the Commission:

a) $10.4 million, jointly and severally with ezBtc, under section 161(1)(g) of the Act; and

b) an administrative penalty of $8 million under section 162 of the Act.

November 27, 2024

For the Commission

Audrey T. Ho
Commissioner

James Kershaw
Commissioner

Marion Shaw
Commissioner

NOTICE: The orders made against David Smillie and 1081627 B.C. Ltd operating as ezBtc in this matter may automatically take effect against them in other Canadian jurisdictions, without further notice to them.