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

Citation: Re Birdsall, 2025 BCSECCOM 533 Date: 20251210

Lucas Christopher Birdsall

Panel	Gordon Johnson	Vice Chair
	James Kershaw	Commissioner
	Jason Milne	Commissioner
Hearing date	August 14 and 21, 2025	
Submissions completed	August 21, 2025	
Date of findings	December 10, 2025	

Appearing

Stephen Zolnay Beverly Ma	For the Executive Director
Joven Narwal, KC	Lucas Christopher Birdsall
Michael J. Kleisinger Derek Ball	For Attorney General of British Columbia

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161, 162 and 174 of the *Securities Act*, 1996, c. 418 (Act).

[2] In a notice of hearing (Notice of Hearing) issued October 3, 2024, 2024 BCSECCOM 426, the executive director alleged, among other things, that:

a) Birdsall failed to comply with a demand for the production of records issued under section 144 of the Act; and

b) By engaging in the conduct as set out in the Notice of Hearing, Birdsall contravened section 57.5 of the Act, and he is also liable under sections 161(6.1) and 162(3) of the Act.

[3] The liability hearing proceeded in writing supplemented by oral submissions regarding a constitutional question on August 14, 2025, and oral liability submissions on August 21, 2025. Counsel for the executive director and for Birdsall participated throughout the proceedings. Counsel for the Attorney General participated with respect to the constitutional issue.

[4] In the course of these proceedings, we received a number of applications made on behalf of Birdsall. In a previous decision, 2024 BCSECCOM 459, we addressed an application to set aside the substituted service order (Substituted Service Order) which had been made by the

Commission Chair. The remaining applications, listed below, were received and addressed by the parties through a combination of written and oral submissions:

a) an application regarding whether sections 161(6.1) and 162(3) of the Act are not enforceable on the basis that they are not consistent with Section 96 of the *Constitution Act* because they confer the power to punish individuals for contempt, which is the exclusive role of superior courts;

b) an application for a constitutional exemption pursuant to s. 13 of the Charter from Birdsall complying with the June 21, 2024 Demand and Summons on the basis that Birdsall faces criminal culpability in Germany;

c) an application to compel the production of documents related to certain individuals who were the subject of criminal proceedings in Germany, and to cross examine the investigator who provided an affidavit conveying his lack of knowledge of any connection between the German proceedings and the Commission investigation;

d) an application to set aside the Notice of Hearing in this proceeding as an abuse of process;

e) an application to compel production of documents and to cross examine the executive director in relation to the abuse of process allegations;

f) a further application to set aside the Substituted Service Order; and

g) an application for this panel to recuse itself from deciding the new application to set aside the Substituted Service Order.

[5] In this decision, we list the key statutory provisions, we address the various applications in the order set out above, and then we turn to the liability issues.

II. Key statutory provisions

[6] Section 57.5 of the Act states:

> (1) A person must not
> (a) refuse to give any information or produce any record or thing, or
> (b) destroy, conceal or withhold, or attempt to destroy, conceal or withhold, any information, record or thing
> reasonably required for a hearing, review, investigation, examination or inspection under this Act.
> (2) A person contravenes subsection (1) if the person knows or reasonably should know that a hearing, review, investigation, examination or inspection is being conducted or is likely to be conducted and the person takes any action referred to in subsection (1).

[7] Section 144(1.2) of the Act states:

> (1.2) Despite subsection (1.1), if
> (a) the person to be served by personal service is evading service, or
> (b) after a diligent search,
> (i) the person to be served by personal service cannot be found, or
> (ii) the last or usual residence of the person cannot be found or is unoccupied,

the commission may make an order that the document may be served by substituted service in accordance with the order.

[8] Section 161(6.1) states:

> (6.1) The commission or the executive director may, after providing an opportunity to be heard, make an order under subsection (1) (b), (c), (d), (e), (f) or (j) in respect of a person if the person has failed or refused to comply with a summons or demand under section 144 (1).

[9] Section 162(3) states:

> (3) If the commission, after a hearing, determines that a person named in a summons or demand under section 144 (1) has failed or refused
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> (a) to attend,
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> (b) to take an oath,
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> (c) to answer questions,
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> (d) to preserve records and things or classes of records and things in the custody, possession or control of the person, or
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> (e) to provide information or to produce the records and things or classes of records and things in the custody, possession or control of the person,
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> the commission may, if the commission considers it to be in the public interest to make the order, order the person to pay the commission an administrative penalty of not more than $1 million.

III. Applications brought by Birdsall

A. Are sections 161(6.1) and 162(3) of the Act unenforceable because they are inconsistent with s. 96 of the Constitution Act

[10] Birdsall provides the following overview of his position in his notice of constitutional question:

> 1. The BC Legislature's recent efforts to enhance the enforcement powers of the Securities Commission have resulted in an invalid encroachment on the constitutionally protected role of the superior courts.
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> 2. More particularly, s. 161(6.1) and s. 162(3) of the *Securities Act*, RSBC 1996, c 418, which provide the basis for the Executive Director's October 3 Notice of Hearing against the Applicant, violate s. 96 of the *Constitution Act*, 1867. In pith and substance, the provisions unlawfully confer on the Commission the power to punish individuals for contempt, a power enjoyed exclusively at Confederation by the superior courts; the provisions further unacceptably encroach on the superior courts' core jurisdiction pursuant to the factors set out in *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 (the "Article 35 Reference").
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> 3. Given the Commission's constitutional lack of capacity to make orders of invalidity pursuant to s. 52, the Applicant seeks an order declining to apply the provisions on the basis that they are of no force and effect, as well as an order staying the Notice of Hearing given its lack of proper legal foundation.

[11] Birdsall submits that the relevant statutory landscape across Canada reflects constitutional norms that preclude administrative bodies from punishing individuals for contempt of entities which hold court-like powers.

[12] Birdsall's submissions regarding why sections 161(6.1) and 162(3) of the Act create, in pith and substance, the power to punish individuals for contempt, can fairly be summarized as follows:

a) As was established by the Supreme Court of Canada in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 735, contempt of court is deeply intertwined with the scope and history of the superior court's inherent jurisdiction. It relates to conduct which is not defined in advance and criminalized. Instead, it relates to conduct which does not occur in the absence of a court and which is between the individual and the court itself.

b) According to *C.B.C. v. Quebec Police Comm.*, [1979] 2 SCR 618, the power to make a finding of and to punish for contempt is enjoyed exclusively by the superior courts.

c) Exceptions have been recognized such that administrative bodies or certain inferior courts have, in limited circumstances, been validly granted powers to punish for contempt. These exceptions were with respect to the youth court in *MacMillan Bloedel* and with respect to federal Competition Tribunal in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 SCR 394 and those exceptions were justified in part on the ability of a specialized nature of a body other than a superior court to craft remedies for contempt which achieve the objectives of that body. These types of exceptions would not apply in the current context, where the remedy which is likely to be imposed is not expected to require any specialized knowledge by a panel of the Commission.

d) The appropriate characterization of the power being exercised under Sections 162(6.1) and 162(3) of the Act is to impose financial penalties or other consequences for "failing to obey the directives of an investigator". This characterization demonstrates that the dispute which is relevant is one between the individual and the Commission investigator.

e) Section 144(2) of the Act makes a witness who fails to comply with certain requirements liable, on application to the Supreme Court of British Columbia, to be committed for contempt as if in breach of an order or judgement of that court. Section 162(3) of the Act permits sanctions for failing to comply with an identical list of requirements, demonstrating the equivalence between the contempt process and the provisions of the Act which are challenged.

[13] Birdsall submits there are two tests for inconsistency with Section 96 of the *Constitution Act*, the test established in *Re Residential Tenancies Act 1979,* [1981] 1 SCR 714 and the core jurisdiction test (Core Jurisdiction Test) applied in the Article 35 Reference, *supra*. Birdsall submits that the first step under either test is to properly characterize the nature of the power being exercised. Birdsall submits that after characterizing the nature of the impugned sections of the Act we should consider both the *Residential Tenancies* test and the Core Jurisdiction Test. Birdsall submits that although we lack the jurisdiction to declare sections 161(6.1) and 162(3) of the Act to be constitutionally invalid, we can and should make an order declining to apply the provisions on the basis that they are of no force or effect.

[14] The application in relation to section 96 of the *Constitution Act* was brought in advance of the hearing on the merits. The Attorney General submitted that it was then premature, and that the application should be decided in the context of the full evidentiary record, including regarding what order we would impose on the merits. We received all evidence and submissions on the merits in advance of addressing the section 96 application, and, at this stage, we have determined that the application is not premature.

[15] The Attorney General agrees with Birdsall that it is not open to us to make a declaration as to the constitutional validity of Sections 161(6.1) and 162(3) of the Act.

[16] The overview of the Attorney General's submission includes the following:

> 6. The applicant does not meet his burden to overcome the presumed constitutionality of Amended Provisions. The applicant's submissions would be best addressed by a reviewing court after the Hearing, when the court has a proper record and factual matrix before it. While the prematurity of the application is dispositive, the Attorney General's broad response on the substantive issue is as follows:
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> a. the Legislature has the undisputed constitutional authority over the trade of securities in the province under s. 92(13) of the *Constitution*;
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> b. the Legislature has specific constitutional authority to levy penalties and fines to ensure compliance with provincial statutes under s. 92(15) of the *Constitution*;
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> c. while the Act allows the Commission to seek committal through the blunt tool of contempt of court, that does not extinguish the Legislature's ability to provide the Commission with other tools to ensure compliance with the Act;
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> d. the court's ability to enforce contempt penalties remains intact for use in serious and rare cases of non-compliance;
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> e. matters which do not require contempt findings and committal, but rather require specialized, tailored remedies appropriate in the securities context, are appropriately left to the Commission subject, of course, to the court's supervisory authority over the Commission's actions, which also remains intact; and
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> f. in enacting the Amended Provisions, the Legislature has not provided the Commission the power to determine and commit for contempt but has provided the Commission with the necessary types of remedies described above.
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> 7. The applicant inaccurately suggests the Commission's choice is between contempt or nothing, when dealing with those who ignore statutory requirements. Requiring statutory authorities to go to the Supreme Court for an order of committal for contempt of court in every instance, when registrants ignore statutory processes, is inefficient and disproportionate. Further, it does not reflect the range of non-contempt tools available to provincially appointed tribunals and the judiciary.
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> [citations removed]

[17] The Attorney General submits that the powers of the Commission under Sections 161(6.1) and 162(3) are separate and distinct from a court's powers to make contempt findings and to compel a party to comply with court orders or to suffer incarceration. The Commission cannot make a finding of contempt, that remedy can only come from the Court.

[18] The Attorney General submits that contempt is an extraordinary remedy meant to compel compliance and to punish behavior. The Attorney General cites *Carey v. Laiken*, 2015 SCC 17 (CanLII) for the propositions that all other options ought to be explored by the parties before attempting to use the blunt force of contempt to enforce judgments, and that courts should only use the power "cautiously and with great restraint".

[19] The further submissions of the Attorney General are reproduced in considerable detail because they are very well expressed and would be difficult to summarize without losing much of the meaning of the submissions:

> 32. Contempt of court, while pursued through civil courts, is quasi-criminal in nature, giving rise to criminal process protections because an individual's physical liberty is at stake. Contempt proceedings thus engage Charter considerations, which is why elements of contempt must be proved on a beyond a reasonable doubt standard of proof.
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> 33. A finding of contempt carries a sting, in the form of rebuke from the court, in addition to a panoply of penalties that a superior court may lay to protect its integrity and the integrity of the legal system as a whole.
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> 34. Contempt also incorporates a discretionary element. Even if satisfied that all the elements of contempt are proven beyond a reasonable doubt, the court maintains its discretion not to find a party in contempt.
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> …
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> 37. The power to require compliance, punishable by incarceration, is available where the stakes are highest - such as where an investigator seeks access to a personal residence and that access is barred (pursuant s.143.4), and presumably, in instances where the Commission determines that it needs actual compliance with an investigator's s. 144(1) orders.
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> 38. Although a determination of contempt is not among the Commission's powers under the Act, through the Amended Provisions, the Legislature has given the Commission the ability to exercise a range of non-contempt powers in response to a party's non-compliance with an investigator's orders, if it considers that doing so is in the public interest. Those orders include preventative and protective orders available under s.161(1), that, similar to how courts have characterized the ancillary purposes of s. 57.5, are meant to discourage conduct that would damage the Commission's mandate and thwart the Commission in gathering information that is reasonably necessary for an investigation. Those powers are meant to protect the investing public, including while an investigation is in contemplation or underway.
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> …
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> 46. The powers in the Amended Provisions to regulate compliance with the statute are indisputably within the Legislature's jurisdiction pursuant to s. 92(13) and 92(15) of the Constitution. The powers available to the Commission under ss. 161(6.1) and 162(3) are not contempt powers that belong exclusively to a s. 96 court and, the Commission need not engage in further analysis.
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> [citations removed]

[20] The Attorney General also provides submissions regarding the proper application of the *Residential Tenancies* test and the Core Jurisdiction test. As the Attorney General submits, we need only consider the other elements of the test if we agree with Birdsall regarding the pith and substance of Sections 161(6.1) and 162(3).

[21] The executive director's submissions are quite consistent with those of the Attorney General. The executive director emphasizes the differences between a contempt proceeding and a proceeding under Sections 161(6.1) or 162(3) of the Act. Some of the differences are procedural, but the executive director submits that there are also important substantive differences. The contempt power is inherent to a superior court. It can be criminal in nature and can result in incarceration. The scope of discretion inherent in the contempt power extends to the issue of whether a contempt finding should be made, and is focused on a form of disrespect

for the decision-making body. In contrast, the executive director refers us to the entire Act, which is populated with requirements and prohibitions coupled with provisions which create consequences for not complying. The executive director submits that Sections 161(6.1) and 162(3) are examples of the latter, and not equivalent to the contempt power which is exercisable only by our superior courts.

[22] Our conclusion is that the positions taken by the Attorney General and the executive director are the correct ones.

[23] The determinative factors, which we emphasize and which we have expressed in our own words, that inform our decision in this application, are the following:

a) The essence of the proposition underlying Birdsall's submission is that any statutory provision which creates a consequence to an individual for failing to comply with investigative requirements creates a power which is, in substance, the same as the contempt power. We conclude that Birdsall's proposition overstates the degree of congruence between provisions such as Sections 161(6.1) and 162(3) and the contempt power of superior courts. There are many differences between a contempt proceeding and the current proceeding. Many of those differences are evident from our discussion, below, regarding the merits of the Notice of Hearing and Birdsall's arguments that the requirements of a contempt finding should be read into Sections 161(6.1) and 162(3).

b) Birdsall's proposition also understates the degree of congruence between those same sections and so many other provisions of the Act where consequences can follow for non-compliance with a requirement or prohibition set out in the Act. In common with many other aspects of the Act, the relevant provisions, when read together with the entirety of Sections 161 and 162, create requirements and prohibitions and also create consequences for non-compliance.

c) Some of the submissions of the parties regarding the nature of the contempt power and the nature of the Commission's jurisdiction under the Act include reference to the public interest. We conclude that a distinct and fundamental aspect of the public interest arises in the context of a contempt application. The rule of law in Canada is dependent to a large degree on the acceptance by all Canadians of the role played by our courts. The range of remedies that can be imposed in a contempt proceeding is justifiable in part because an underlying objective of the contempt power is to support respect for the courts and for the rule of law. This contrasts with the nature of the public interest engaged by the Act. In very general terms, the Act is designed to support efficient public markets which are honest and trusted. That form of public interest is important, of course, but it is different in character and scope when compared to the nature of the public interest protected by the contempt power. The range of sanctions available for a breach of Sections 161(6.1) and 162(3) is correspondingly much more limited than would be available upon a finding of contempt.

d) A contempt proceeding creates its own unique stigma and can result in imprisonment, or an alternative order which includes punishment as an objective. This is not true with respect to sanctions under the Act, which are intended to promote the public interest in the context of the Act. The Commissions' sanctions will be imposed with deterrence as one of the objectives, but such sanctions are not intended as punishments and do not carry the same stigma as a finding of contempt.

e) The contempt power, as exercised by the courts, includes the Court's discretion, after a breach of an order of the Court, to make a finding of contempt or not, or to excuse previous contemptuous conduct when the contempt has been purged. There is an obligation for a panel to consider public interest factors under Section 162(3) of the Act when deciding whether to impose a sanction for failure or refusal to do what is contemplated to be done in that section, and a similar requirement to consider the public interest when deciding any order under to Section 161 of the Act. This means, as a hypothetical example, that if an individual fails to comply with the requirements of the impugned sections of the Act but had a good excuse, such as illness, a panel could find that there was a failure to comply but that the public interest did not support the imposition of a sanction. In general, the role of a panel conducting a hearing with respect to an alleged breach of Sections 161(6.1) or 162(3) is to determine whether it is proven that a breach occurred on a certain date. In this sense, the nature of a hearing under the impugned provisions of the Act is distinct from a hearing for contempt. The contempt power supports the rule of law, while the purposes behind the impugned sections of the Act are more limited and focused.

f) As the Attorney General has pointed out, not in these exact words, it is not an intuitive outcome that, under Canada's Constitution, the only options which a legislature can provide to an administrative body, which encounters non-compliance with statutory tools for the collection of evidence, are to bring a contempt application to the Court or to accept the non-compliance of the person who is legally obligated to produce that evidence.

g) There is a presumption of constitutionality. The onus is on Birdsall to establish that the subject provisions are unconstitutional. He has not discharged that onus.

[24] Given the foregoing, this application is dismissed.

B. Stay application – compelled evidence and foreign criminal proceedings

[25] The memorandum provided to the Chair of the Commission seeking the investigation order and appointing the investigator indicates that the matters under investigation include "potential market manipulation, misrepresentations, insider trading, and continuous disclosure involving the shares of […] Champignon Brands Inc. (Champignon), between February 5, 2020 and June 22, 2020 (the Relevant Period)." The investigation order issued was focused on the topics identified in the memorandum but was not limited to what had been described as the Relevant Period in that memorandum.

[26] Birdsall has provided an opinion from a German solicitor which indicates that evidence which is provided by Birdsall under compulsion in British Columbia would be accepted into evidence in a prosecution of Birdsall under German law.

[27] The same German expert provided evidence, in the form of a letter, that on May 8, 2014, three named individuals were convicted in Germany of offences and were given substantial penalties, including imprisonment. The letter does not provide the details of the offences in question. For example it does not mention whether the offences related to securities, or to Champignon or to Birdsall or to anything connected with the current proceeding which is before us.

[28] The substance of Birdsall's submission is captured by the following paragraphs of Birdsall's amended application:

> 31. Sections 169.1(2)(b), 141(1)(b), and 142(1)(b) of the Act authorize the Commission to share information with foreign regulators and to gather information and to investigate for the purpose of assisting in the administration of securities laws of another jurisdiction.
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> 32. The Court of Appeal in Tak stated at paragraph 74 that, "section 7 of the *Charter* places limitations on the Commission to compel testimony that may be shared with a foreign government authority only where the witness establishes on a balance of probabilities a real and substantial risk of (a) criminal prosecution in a foreign state, and (b) reasonably comparable protection from the derivative use of the compelled testimony being unavailable."
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> 33. As noted, it is the expert opinion of Dr. Oliver Kipper that under German law, the Applicant faces a substantial risk of having any evidence tendered in the Commission proceedings used against him in German criminal proceedings. There is a real and substantial risk that the documents provided by the Applicant to the Commission could be used in a criminal prosecution of him in Germany. (*Tak v. British Columbia (Securities Commission)* 2023 BCCA 76)

[29] The executive director has asserted a consistent position throughout regarding Birdsall's application for a constitutional exemption from his obligation to provide evidence under sections 161(6.1) and 162(3) of the Act. The executive director refers to the same provisions of *Tak* as are referenced in Birdsall's submission. The executive director submits that the onus is on Birdsall to establish on a balance of probabilities that there is a real and substantial risk of a criminal prosecution against Birdsall in Germany before it becomes necessary to evaluate German law regarding what protections it might or might not afford against derivative use of compelled evidence.

[30] The executive director seeks leave to provide responsive opinion evidence should we come to the conclusion that there is a real and substantive risk of criminal prosecution against Birdsall in Germany. However, the primary submission of the executive director is that Birdsall has provided no basis to conclude Birdsall faces a real and substantive risk of a criminal prosecution in Germany.

[31] Although counsel for Birdsall submits in argument that the individuals who were convicted in Germany "were involved in the promotion of Champignon", Birdsall's submissions do not identify any evidence in support of such involvement. For example, we were not pointed to any portion of the memorandum seeking the investigation order which mentions any of the individuals convicted in Germany or a connection between Germany and the matters sought to be investigated by the Commission. In addition, we were not pointed to any decision or other document in Germany which indicates that there is any potential connection between Germany and the matters under investigation here.

[32] In contrast to the absence of evidence identified by Birdsall connecting him to a potential German criminal prosecution, the executive director has provided evidence to the contrary. We have affidavit evidence from the investigator deposing that he is not aware of any investigation of Birdsall or Champignon by German regulatory or criminal authorities and that, to the best of his knowledge, there is no overlap between the subject matter of the Commission's investigation of Birdsall and the German prosecution which Birdsall references. We also have affidavit from a staff member of the Commission which includes the following:

> 4. I obtained a copy of the Regional Court of Mannheim's judgment against the German Defendants (the **Judgment).** The Judgment is more than 600 pages and, of course, it is entirely in German. The Commission's Technology and Evidence Control team used

a Microsoft language translation program to create an English language version of the Judgment (the **Translated Judgment).**

5. Based on my review of the Translated Judgment, it appears that:

   a) the German Defendants were involved in promoting the securities of several Canadian companies and were found guilty of market manipulation, and
   b) the German Defendants were not prosecuted for participating in any unlawful activities involving the securities of Braxia Scientific Corp. (formerly known as Champignon Brands Inc.) **(Champignon).**

No German criminal or regulatory investigation of Birdsall

6. To the best of my knowledge, Birdsall and Champignon have not been charged with any criminal offence and have never been the targets of any German criminal or regulatory investigation.

…

9. I contacted Detectives Baumer and Pfister to confirm that Birdsall and Champignon are not the subjects of any criminal investigation. In a letter dated November 18, 2024, Detective Baumer responded as follows:

> after consultation, we confirm on behalf of the public prosecutor's office that no investigations are being conducted against Lucas Christopher BIRDSALL or Braxia Scientific Corp. (previously named Champignon Brands Inc.).
> We also confirm on behalf of the public prosecutor's Office that no records or information relating to Mr. Birdsall, Braxia Scientific Corp., or Champignon Brands Inc. were requested from the British Columbia Securities Commission.

…

11. Commission staff also contacted Germany's Federal Financial Supervisory Authority **(BaFin)** to confirm that Birdsall and Champignon are not the subjects of any regulatory investigation. In a letter dated June 6, 2025, BaFin responded as follows:

   (1) BaFin is not currently conducting any investigation into Lucas Christopher Birdsall or Braxia Scientific Corp, formerly known as Champignon Brands Inc.

   (2) Lucas Christopher Birdsall or Braxia Scientific Corp, formerly known as Champignon Brands Inc., have not been the target of any investigation within the market surveillance of BaFin.

[33] We conclude that the executive director's submissions are compelling and Birdsall's are not.

[34] As is explained below in greater detail, Birdsall was alerted, since before the commencement of this proceeding, to the executive director's position that the onus is on Birdsall to establish the existence of the criminal jeopardy in Germany. Birdsall responded by producing evidence that certain individuals with German sounding names were convicted of something in Germany. The executive director has provided strong evidence that the German proceedings are not connected to the Commission's investigation. Based on this, it is fair to conclude, and we do conclude, that the basis for this application for a constitutional exemption was always, at best, highly speculative and doomed to fail.

[35] This application is dismissed.

C. Application for production of documents and a cross examination of the investigator in connection with jeopardy in foreign criminal proceedings

[36] It is unquestionable that respondents are entitled to a fair hearing, that they are entitled to prepare and present their case and that sometimes respondents will require orders from a panel to assist them in obtaining evidence. At the same time, there are occasionally situations where respondents will seek evidence based only on speculative or unsupportable theories about how that evidence might be relevant. There are a number of precedents in which panels have distinguished between legitimate applications to obtain evidence which can be expected to be useful and other applications. These precedents include *Re Wang*, 2020 BCSECCOM 504 at paras. 86-89, *Wang v. British Columbia (Securities Commission)* 2023 BCCA 101 (CanLII) at para. 55, *Re White*, 2024 BCSECCOM 21 at paras. 83, 85-87, and 100-105, and *Re North American Frac Sand Inc*., 2022 ABASC 110 at paras. 582-583.

[37] Given our conclusion above about the merits of the underlying application for a constitutional exemption, and given the clarity of the evidence which we have already quoted regarding the lack of any connection between the proceeding in Germany and the investigation by the Commission, we see no basis to order production of the documents or the cross examination sought by Birdsall.

[38] This application is dismissed.

D. Stay application – abuse of process

[39] Birdsall alleges that it was an abuse of process for the executive director to issue the Notice of Hearing against him based on the following circumstances:

a) On July 24, 2024, Birdsall brought an application for various relief, including to set aside the Substituted Service Order which became the basis of service of the summons and demand, and that application (mentioned above in the introduction to this decision) was proceeding in camera;

b) On September 20, 2024, Birdsall's counsel advised the Commission's investigator of the conviction in Germany of the individuals mentioned above, of the absence of protection in Germany against the use of compelled evidence and that Birdsall was in jeopardy of having information "harvested" from him through the summons and demand in a manner which engaged Birdsall's Charter interests, with the result that Birdsall would be preparing an application for a constitutional exemption; and

c) On October 23, 2024, the executive director issued the Notice of Hearing.

[40] Birdsall submits that the effect of the issuance of the Notice of Hearing at the time it was issued was to put the public on notice that Birdsall was under investigation for breaches of the Act, with the potential that substituted service would later be set aside and Birdsall would be left in the incurable position of being publicly accused of not complying despite there no longer being a requirement to comply.

[41] Birdsall also submits that it was improper for the executive director to issue the Notice of Hearing until after Birdsall's application for a constitutional exemption was adjudicated.

[42] Finally, Birdsall submits that the original application by the executive director for a substituted service order was improper because it was supported by a memorandum alleging that several

individuals were evading service "which unfairly cast the allegation" upon Birdsall, "when service was attempted by a process server at an incorrect address, an attempt was made on a single day to contact him by phone and email, and commission staff attended a residence that the process servers had previously attempted on one occasion in the company of police officers."

[43] With respect to that final submission, we confess to not fully understanding it. For example, Birdsall has not explained how the address he references was the wrong address or why this was not resolved by the application to set aside the Order for Substituted Service. As another example, we do not understand how it was prejudicial to Birdsall to have his name included in the memorandum regarding substituted service along with other individuals who were alleged to be evading service. The implication may be that it was the association of Birdsall's name with the conduct of others which would create an impression that Birdsall was alleged to have been evading service. We find this suggestion too speculative to have merit. In reality, the allegation that Birdsall was evading service was quite open and explicit within the relevant memorandum that included distinct and specific evidence specific to Birdsall. In summary, Birdsall's counsel did not explain this ground of the abuse of process application, and we will not analyze it further.

[44] With respect to Birdsall's submission that the issuance of the Notice of Hearing publicizes Birdsall's connection to that Notice of Hearing as well as his connection to an investigation under the Act, we agree with Birdsall. For that reason, and also because it was necessary for us to discuss the connection between his proceeding and the prior, anonymized application in order to address some of Birdsall's current submissions, we have, in this decision, mentioned that connection.

[45] The executive director responds to Birdsall's abuse of process submissions in a number of ways. First, the executive director notes that in his initial application to set aside the Substituted Service Order and at the initial hearing management meeting related to that application, Birdsall indicated that he would seek an order from the panel that the Demand not be enforced until the panel ruled on the revocation application. The executive director notes that Birdsall never sought such an order from the panel.

[46] Next, the executive director references the letter summarizing the initial hearing management meeting regarding the application to set aside the Order for Substituted Service. The following quote from that letter is relied upon by the executive director:

> 12. **Mr. Narwal said that with respect to the order which he is seeking to review, producing the documents demanded from his client is not feasible on a short time line given the number and nature of the documents. He said that he is requesting an extension on that basis, and so there may be no need for a stay because there may be no deadline imminent.** He will be seeking a delay to the interview date for similar reasons, including that his own schedule conflicts with he [*sic*] specified date. He asked that the interview be adjourned to mutually convenient dates, perhaps September or October, while the parties make submissions on the substantive issues.
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> [emphasis added in executive director's submission]

[47] The executive director references efforts to schedule a deadline for the delivery of materials from Birdsall and for the interview contemplated by the summons, and the executive director summarizes events as follows:

16. Record emailed Birdsall's counsel and stated that Commission staff did not agree to postpone the September 16, 2024 deadline and that Birdsall was required to provide the records sought under the Demand by September 16, 2024 at 4:00 PM. Record also stated:

> Please remind Mr. Birdsall again that the failure to produce the records by September 16, 2024, or to attend the interview on October 8-9, 2024, may result in enforcement proceedings against him under section 161 of the Securities Act or a contempt application in the Supreme Court under section 144(2) of the Act.

17. On September 13, 2024, only three days before the agreed upon deadline, Birdsall's counsel suggested for the first time that Birdsall's compliance with the Demand should be held in abeyance until the panel issues a decision on the 2024 Application. That day, Record received an email with an attached letter from Birdsall's counsel requesting that Record "hold the requirement to produce as we are waiting for a ruling on the motion, where we have sought a stay as a remedy". Birdsall's counsel also requested that the deadline for the production of records under the Demand be extended to September 30, 2024.

18.On September 17, 2024, Record sent an email to Birdsall's counsel stating that staff did not receive any documents from Birdsall. Record also stated:

> Mr. Birdsall has failed or refused to comply with a demand and may therefore be subject to enforcement proceedings before the Commission under sections 161(6.1) and 162(3) of the Securities Act, or contempt proceedings in the Supreme Court under section 144(2) of the Securities Act.
>
> ... We do not agree to any further extensions of the deadline. **We urge Mr. Birdsall to comply with the demand as soon as possible**.

[emphasis added in executive director's submission]

[48] With respect to the events surrounding the constitutional exemption application, the executive director quotes counsel for Birdsall's statement in a September 20, 2024 letter to Commission staff that, "To the best of my knowledge, your investigation of Mr. Birdsall and Champignon …covers matters that the German Defendants were successfully prosecuted for." Counsel for the executive director respondent promptly, explaining that he was not aware of any connection between the Commission's investigation and the German defendants, requesting information from Birdsall about a connection and characterizing Birdsall's position as unsupported speculation. No evidence of any such connection was ever produced.

[49] The executive director submits that the onus of proving abuse of process is on Birdsall and that the circumstances identified by Birdsall do not provide the foundation for his application. Even if they did, the executive director submits that Birdsall has not identified any prejudice because Birdsall's application to set aside the Substituted Service Order was unsuccessful, the notice of hearing had to be issued at some point, thereby revealing the allegations against Birdsall, and Birdsall has had an opportunity to fairly present his case.

[50] Our analysis with respect to the portion of this application regarding issuing the Notice of Hearing before completion of the challenge to the Substituted Service Order begins with the following conclusions:

a) Under the Act, the Commission is empowered to issue a notice of hearing, and, as a matter of practice within the Commission, the executive director exercises his discretion about when to do so within the limitation period identified in the Act.

b) There may be rare circumstances where it is appropriate for a potential respondent to request that the issuance of a notice of hearing be delayed, and there may be circumstances where it is appropriate for the executive director to exercise his discretion to agree.

c) Where the executive director has not agreed to defer issuing a notice of hearing, a potential respondent may apply to the tribunal for relief. This can be done with great speed and efficiency where, as here, a proceeding has already been commenced and a panel appointed. Where such an application is made, the onus is on the applicant to demonstrate why the executive director should not exercise his discretion to issue a notice of hearing under the Act.

d) In the absence of a stay or an agreement with the executive director, no party has a legitimate expectation that he or she is entitled to preclude the issuance of a notice of hearing, and in particular no party is entitled to do so by asserting an intention to bring some future application regarding a charter issue or a procedural issue or some similar application. The reality is that applications which are mentioned might or might not eventually be brought, and which are filed might or might not eventually succeed. The executive director does not have a duty to hold back a notice of hearing while waiting, and no potential respondent should assume otherwise.

e) For the purposes of this decision, we based our findings on the condition that, at all relevant times, the executive director had actual knowledge of the positions taken by Birdsall, or that such knowledge should be imputed to him.

[51] Given our observations and conclusions, it is apparent that there is no basis for this ground of the alleged abuse of process. Potential respondents will almost always want to have the issuance of a notice of hearing deferred while procedural issues are finally determined. The executive director is not obligated to agree. One factor which might motivate the executive director to press ahead without waiting for the final resolution of procedural issues is that decisions of panels might not finally resolve procedural issues. Panel decisions might be followed by applications for leave to appeal to the British Columbia Court of Appeal, then appeals themselves if leave is granted, followed by applications for leave to appeal to the Supreme Court of Canada. Potentially, appeals can consume many years before any particular issue can be said to have been finally resolved. Even then, sometimes the result is for the issue to be remitted back for further analysis by a panel. Sometimes it is appropriate for a stay to be issued pending one or more steps, but if the executive director does not agree then that is up to a panel or a Court, it is not a decision over which a respondent or potential respondent has a veto.

[52] In this proceeding, Birdsall was aware of the option to apply for a stay. Birdsall elected not to apply for a stay. The investigator tried to cooperatively schedule dates for delivery of documents and for an interview, lost patience, and warned Birdsall that enforcement proceedings might be commenced. The Notice of Hearing was issued after that warning. There is no legitimate basis to conclude this was abusive, and we dismiss it.

[53] We turn to the allegation of an abuse of process on the ground that the executive director issued the Notice of Hearing after Birdsall asserted the existence of a constitutional exemption from providing evidence. We conclude that this proceeding provides a textbook example of why it is sometimes preferable, and not contrary to the public interest and not an abuse of process, for the executive director to issue a notice of hearing or to otherwise press ahead with a proceeding, even when constitutional issues or significant procedural concerns are alleged by a respondent or potential respondent.

[54] In applications for a constitutional exemption of this nature, the onus is on an applicant such as Birdsall to establish the elements identified in *Tak*. The baseline element which must be established is the existence of a real and substantial risk of jeopardy to foreign criminal proceedings. In this case, we have now seen all of the evidence and have concluded that Birdsall has produced no evidence of such a risk. In contrast, the executive director has produced convincing evidence that such a risk never existed.

[55] In this case, it is important to focus on the communications from Birdsall's counsel which might have provided a basis for the executive director to defer issuing the Notice of Hearing or otherwise moving the proceeding forward. The initial communication between counsel on that topic is worthy of our review and focus. In counsel for Birdsall's September 20, 2024 letter, he stated that "to the best of (his) knowledge, Commission staff's investigation covers matters that the German Defendants were successfully prosecuted for". This could be read as a representation from counsel for Birdsall that he had seen and would be relying on evidence to support what he characterized as his knowledge of the situation.

[56] The delivery of such communication by counsel for a respondent or potential respondent should cause the executive director and all staff of the Commission to pause. The Commission, the executive director and all staff of the Commission should be vigilant to create opportunities for individuals to assert their rights. The Commission, the executive director and all Commission staff must avoid contravening Charter rights or other rights to a fair hearing. When a serious concern is raised, fairness compels the executive director to pause and to consider what has been asserted by a respondent or potential respondent. However, it can be quite reasonable for staff to initially respond to concerns raised by explaining that staff's knowledge of the situation is different from the situation alleged by the respondent or potential respondent involved, as happened here. It can also be quite reasonable for staff to respond further by asking the respondent or potential respondent involved to identify evidence in support of the circumstances alleged, as also happened here.

[57] Commission staff have the discretion, in appropriate circumstances, to accept bare representations from counsel about the need to consider constitutional or other issues and therefore to delay issuing a notice of hearing or to delay taking some other step. But staff are not obligated to rely on bare assertions, and, here, staff of the Commission chose not to do so. Staff skepticism turned out to be well justified. After a careful review of the evidence, this panel finds that the suggestion that Birdsall had a real and substantial risk of jeopardy under a German criminal proceeding lacks even the slightest degree of evidentiary support. The executive director properly saved a lot of time by not waiting for the resolution of Birdsall's unfounded application for a Charter exemption.

[58] This application is dismissed.

E. Application to compel production of documents – abuse of process

[59] Birdsall seeks the disclosure of all communications between staff of the Commission regarding the issuance of the Notice of Hearing while the Substituted Service Order was being challenged, as well as an order for the cross examination of the executive director.

[60] Birdsall has not identified what useful information might be revealed by the documents and cross examination sought. It is a fair inference that Birdsall wishes to confirm that the executive director knew about the communications which had been delivered on behalf of Birdsall, and that the executive director understood Birdsall asserted that he was entitled to delay the issuance of the Notice of Hearing pending resolution of the applications to set aside substituted service and for a constitutional exemption. Such a confirmation would not have changed our analysis. As is clear from our analysis above, regardless of what the executive director knew, staff acted reasonably by asking Birdsall about the basis for his suggestion that he faced jeopardy to German criminal proceedings. As noted above, no evidence of such jeopardy was provided by Birdsall and we have completed our analysis embracing the perspective that the executive director had whatever knowledge was relevant to the positions taken by Birdsall.

[61] We have provided a brief analysis and conclusion above in relation to Birdsall's application to compel production of documents and to cross examine the investigator in relation to the constitutional exemption application. The same analysis and conclusion applies here with respect to the documents and cross examination applied for.

[62] This application is dismissed.

F. Further application to set aside the Substituted Service Order

[63] As described in the decision regarding Birdsall's application to set aside the Substituted Service Order and above, the application by staff to the Chair of the Commission for a substituted service order was made in the form of a single memorandum which sought similar orders against a number of individuals based upon individual by individual descriptions of how it was alleged that each was evading service.

[64] Later, enforcement proceedings were commenced against some of the individuals who were named in the memorandum in support of the Substituted Service Order. Even later, a notice of discontinuance was issued with respect to one Respondent. Staff's letter of explanation for the discontinuance included the following:

> The issues Staff identified are that the Affidavit#3 of Kyle Record dated June 18, 2024 states in paragraph 8:
>
> > "According to [REDACTED] BC driver's license records, [REDACTED]:
> > a. resided at [REDACTED], Langley, BC, [REDACTED] as of February 2022,
> > b. resides at [REDACTED], Vancouver, BC, [REDACTED] ([REDACTED] Address) as of July 2023."
>
> Staff now realize that was inaccurate and omitted another address: [REDACTED] driver's license record shows that he was at the Langley address until April 2021, at a Burnaby address between April 2021 and March 2022, and at the Vancouver address since March 2022.
>
> Paragraph 8(b) of the affidavit is correct – at the time of attempted service in July 2023, [REDACTED] driver's license records showed he resided at the Vancouver address.

> The affidavits staff provided to the Chair included evidence of service attempts at the Langley address, a [REDACTED] address, and other addresses. Staff provided the [REDACTED] address to the process server to serve another individual with the same last name as [REDACTED]. Staff did not believe [REDACTED] resided at the [REDACTED] address. The process server's attempt to serve [REDACTED] at the [REDACTED] address was made in error.
>
> Staff submissions in support of the substituted service order relied solely on the service attempts at the Vancouver address to establish [REDACTED] was evading service, nevertheless it is possible the Chair relied on all service attempts to determine that [REDACTED] was evading service. Since the evidence regarding service was unclear, the Executive Director submits that it would not be prejudicial to the public interest for the panel to revoke the substituted service order.

[65] Based on the events acknowledged by the executive director, Birdsall applies under Section 171 of the Act for an order setting aside the Substituted Service Order against him, and Birdsall seeks the production of unredacted copies of all materials related to the substituted orders, including the order sought against him and the orders sought against others.

[66] Birdsall cites numerous case authorities in support of his application. The case authorities consistently affirm well-established obligations which were also recognized in our prior decision regarding Birdsall's application to set aside the Substituted Service Order. There are variations between the precedents in exactly how the obligation is expressed, but throughout the precedents it is recognized that a party seeking an *ex parte* order has a duty of full and frank disclosure. An applicant must state his own case fairly and must inform the decision maker of any points of fact or law known to it which favor the other side.

[67] The executive director's submission includes the following:

> 30. It is correct that, on June 18, 2024, counsel for the Executive Director applied for substituted service orders against five individuals, including Birdsall and [REDACTED], who were subjects or witnesses in the same investigation. In the circumstances, it was most efficient to address these five separate requests in one submission rather than preparing five separate and repetitive submissions and providing them all to the Commission Chair.
>
> 31. The application record for the 2024 Application included the submissions of counsel for the Executive Director. Those submissions outline some background information and legal issues that were relevant to each of the requested substituted service orders. However, the Executive Director sought a separate order for each of the five individuals. Counsel for the Executive Director listed and reviewed the separate and distinct affidavit evidence relating to each individual, and then made a separate submission for each individual based on that individuals' particular facts and circumstances. The submissions were clearly divided into different sections for each individual, and the evidence was compartmentalized.
>
> 32. Paragraphs 65 to 77 of the submissions, together with the supporting affidavits that are clearly referenced, provided the basis for the Executive Director's argument that Birdsall was evading service. The relevant affidavits are listed at paragraphs 3-4 of the submissions. The Executive Director did not rely on any affidavits outlining the service attempts on [REDACTED] – those affidavits were not relevant to any order against Birdsall.

> 34. Birdsall unfairly characterizes the Executive Director's application to revoke the substituted service order against [REDACTED] as evidence that Commission staff attempted to mislead the Chair. The Executive Director submits that this is rather an example of Commission staff acting with integrity and in the public interest when they identified an error in one of the affidavits.
>
> 35. In any event, the Substituted Service Order against Birdsall should not be set aside because of any issue relating to a separate substituted service order involving a third party. The issue with respect to [REDACTED] concerned specific facts about his address, which did not impact any of the evidence or submissions relied on to obtain the Substituted Service Order against Birdsall.
>
> 37. Commission staff have disclosed all relevant documents in the investigation file relating to the Notice of Hearing. In addition, Executive Director provided Birdsall with an application record for the 2024 Application, which included the following documents:
>
> (a) a copy of the Substituted Service Order against Birdsall;
>
> (b) the affidavits that were provided to the Chair in support of the Substituted Service Order, including:
>
> i. affidavit of Kyle Record dated June 11, 2024;
> ii. affidavits of Carrie-Lee Godfrey dated September 22 and October 19, 2023;
>
> (c) a redacted copy of the submissions provided by counsel for the Executive Director dated June 18, 2024.
>
> 38. There are no redactions in the above documents except for the submissions. These redactions were made to the sections of the submissions that relate to third parties. The third party information is plainly irrelevant and Birdsall is not entitled to it.
>
> [footnotes removed]

[68] The executive director's submissions are compelling regarding why there is no basis to set aside the Order for Substituted Service. We agree that issues that have been identified surrounding an address which is unrelated to Birdsall have no relevance to any issue related to the validity of the Order for Substituted Service granted with respect to Birdsall. The information in question could not have made any difference to the Chair's analysis of the factors relevant to her decision regarding Birdsall.

[69] The information in question relating to someone else's address does not fall into any category of information which should have been disclosed with respect to Birdsall, and it certainly does not fall into the category of a point of fact or law which favored Birdsall. The information had nothing to do with Birdsall or the order which was granted against him.

[70] The executive director's submissions are also compelling regarding why there is no basis to order the production of further documents. The executive director has established that Birdsall has been provided the materials relevant to the application against Birdsall. The executive director has provided convincing arguments for why materials potentially relevant to other individuals are not relevant with respect to Birdsall.

[71] This application is dismissed.

G. Application for the panel to recuse itself

[72] Birdsall applied to have the panel recuse itself from the Section 171 application to set aside the Substituted Service Order. Birdsall submits that a reasonable apprehension of bias exists "given that the conduct at issue was already before the Panel and the Panel's prior decision is the subject of an application for leave to appeal which has been adjourned by the consent of the parties."

[73] The balance of Birdsall's submissions on this issue is as follows:

> 12. The test to be applied is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that is more likely than not [the Panel], whether consciously or unconsciously, would decide fairly. The principles from *Wewakyum* to be considered in determining a recusal application premised upon an allegation of a reasonable apprehension of bias were summarized by our Court of Appeal in *Taylor Ventures Ltd. (Trustee of) v Taylor*, 2005 BCCA 350:
>
> > i. a judge's impartiality is presumed;
> >
> > ii. a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
> >
> > iii. the criterion of disqualification is the reasonable apprehension of bias;
> >
> > iv. the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;
> >
> > v. the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;
> >
> > vi. the test requires demonstration of serious grounds on which to base the apprehension;
> >
> > vii. each case must be examined contextually and the inquiry is fact-specific.
>
> 13. It is respectfully submitted that an informed, reasonable, and right-minded person, viewing the matter realistically and practically, and having thought the matter through, would think that it is more likely than not that the Panel, whether consciously or unconsciously, would not decide fairly, given it has already ruled on a prior application which is currently under appeal.
>
> [citations removed]

[74] The executive director's position is that the onus is on Birdsall to establish a reasonable apprehension of bias. The executive director submits that Birdsall has failed to do so.

[75] The executive director submits:

> 43. The Commission's recent decision in Re Morabito included a review of the case law on reasonable apprehension of bias, including a distillation of the following principles from leading cases:
> …

> b. Tribunal members are presumed to be impartial, and that presumption is not easily displaced (*Yukon Francophone School*, supra, at para 25);
>
> c. The party alleging bias bears a high burden, and the evidence of bias must be substantial (*Broersma*, supra, at para 8, and cases cited therein);
> …
>
> e. When the basis of an alleged reasonable apprehension of bias is common evidence and inquiries with decisions already made, it is appropriate to look … into the nature of that evidence and of those inquires. Prior adjudication on some types of issues raises greater concerns than prior adjudication on other types of issues. For example, decisions on evidence going to the final merits or on questions of credibility have a greater impact in demonstrating a reasonable apprehension of bias. (*Bennett and Kochan*, supra);
>
> …
>
> 44. Birdsall has not provided substantial evidence of bias to rebut the presumption that the panel is impartial, and this case is distinguishable from precedents involving two matters with significant common issues or evidence. There are no issues of credibility, and Birdsall does not rely on evidence in his current application that was previously rejected by the panel in the 2024 Application.
>
> 45. Birdsall says that there is a reasonable apprehension of bias because the "conduct at issue" was already before the panel. There is no meaningful overlap between Birdsall's current section 171 application and the 2024 Application. In support of his section 171 application, Birdsall relies only on the allegedly "misleading evidence" regarding the attempts to serve [REDACTED]. That issue was not before the panel in the 2024 Application.
>
> 46. Birdsall also refers to his application for leave to appeal the panel's previous ruling, but he does not explain why this is relevant to his recusal application. The Court of Appeal heard Birdsall's applications for a leave to appeal and for a stay in March 2025. The Executive Director opposed Birdsall's applications. On March 14, 2025, the Court of Appeal ordered, with Birdsall's consent, that the applications be adjourned generally. These facts do not give rise to any reasonable apprehension of bias.
>
> [citations removed]

[76] Once again we find the executive director's submissions to be compelling.

[77] We agree with both parties that our impartiality is presumed and that the onus is on Birdsall to establish that a reasonable apprehension of bias exists.

[78] We adopt the following paragraphs of *Re Morabito*, 2025 BCSECCOM 133, referenced by the executive director in his submissions, *supra*:

> [87] The nature and form of paragraph 8 of Morabito's application suggests that it is the respondents' position that a reasonable apprehension of bias is conclusively established by the mere fact that some evidence was in front of the panel in the Public Interest Decision hearing which will again have some relevance in the upcoming abuse of process applications. That perspective is not consistent with the law and it is not reasonable.
>
> [88] The law is that a decision maker's prior engagement with factual issues can in some cases lead to a reasonable apprehension of bias, but that conclusion is not always

> justified and it is not automatic. The need to look deeper is supported by precedents such as *Walton* which confirm that in some circumstances (which are not particularly relevant here), a decision maker's prior familiarity with the evidence can be advantageous and lead a court to direct that a panel which had prior involvement in making factual findings continue in its role, even after being reversed.
>
> [89] Whether a reasonable apprehension of bias exists is always a fact specific, individualized assessment of the entire relevant context. The existence of some common facts between a prior application and a pending application is the starting point for analysis, it is not the end of the analysis.

[79] Birdsall asserts that a reasonable apprehension exists because the panel has some prior involvement with similar issues. The onus is on Birdsall to explain the nature of the common issues and how the panel's involvement in the prior decision creates a reasonable apprehension that the new issues will not be fairly adjudicated. Birdsall has not done so.

[80] As the executive director submits, there really are no material contested facts which we are adjudicating. We are not, for example, asked to make credibility findings here, let alone to make credibility findings which conflict with our earlier decision. The basis of the application from which we are asked to recuse ourselves is the emergence of new evidence on a new issue which was not apparent at the time of our initial decision. The issue which we are called upon to resolve is whether the Substituted Service Order against Birdsall, obtained *ex parte*, should be set aside because information which was not relevant to Birdsall was not disclosed at the time to the Commission Chair. We see no basis that an informed observer would have a reasonable apprehension of bias based on our prior decision.

[81] This application is dismissed.

IV. Liability

A. Factual background

[82] On June 19, 2024, the Commission Chair issued the Order authorizing substituted service of a demand and a summons on Birdsall by:

a) mailing copies of the summons or demand by ordinary mail to Birdsall's residence on King Edward Ave W (the King Edward Address);

b) affixing copies to the building door of the King Edward Address; and

c) emailing copies to Birdsall at his email address (the Email Address).

[83] A process server served the Demand, the Summons and the Order, together with cover letters, according to the terms of the Order, namely by:

a) sending the Demand, the Summons, and the Order to Birdsall by ordinary mail to the King Edward Address on June 25, 2024;

b) affixing the Demand, the Summons and the Order in a sealed envelope addressed to the building door of the King Edward Address on June 25, 2024; and

c) emailing the Demand, the Summons and the Order to the Email Address on June 28, 2024.

[84] The Demand and a cover letter were addressed to Birdsall and stated that he was required to produce records by July 24, 2024.

[85] On July 22, 2024, the investigator sent an email to Birdsall at the Email Address. The attached two sets of documents, which included the Demand, the Order, a cover letter, and copies of relevant sections of the Act. These documents were the same as the ones served by the process server on June 25 and 28, 2024.

[86] On July 22, 2024, the investigator reminded Birdsall that he was required to produce records under the Demand by July 24, 2024. Record sent this email at 11:14 AM. Birdsall's counsel responded promptly to Record's email.

[87] On July 22, 2024, at 12:26 PM, the investigator received an email and an attached letter from Birdsall's counsel requesting an extension to the week of August 12, 2024 for providing a response under the Demand.

[88] On July 23, 2024, the investigator emailed Birdsall's counsel and stated that he was granting an extension under the Demand to August 12, 2024 at 4:00 PM.

[89] On July 26, 2024, Birdsall filed his initial application to revoke the Substituted Service Order.

[90] On August 6, 2024, counsel for Birdsall and counsel for the executive director attended a hearing management meeting with Vice Chair Johnson. At that meeting, counsel for Birdsall said that producing the documents demanded from Birdsall is not feasible on a short time line given the number and nature of the documents. He said that he is requesting an extension on that basis.

[91] On August 8, 2024, Birdsall's counsel sent the investigator an email requesting an extension to the week of September 16, 2024 for providing a response to the Demand.

[92] On August 9, 2024, the investigator emailed Birdsall's counsel and stated that the deadline to respond to the Demand was extended to September 16, 2024 at 4:00 PM.

[93] On August 14, 2024, the investigator sent an email to Birdsall's counsel and stated again that the deadline for producing records under the Demand was extended to September 16, 2024 at 4:00 PM.

[94] On September 11, 2024, the investigator reminded Birdsall's counsel that Birdsall was required to produce records under the Demand by September 16, 2024 at 4:00 PM. He also stated:

> Please remind Mr. Birdsall that his failure to produce the records by [September 16] may result in enforcement proceedings against him under section 161 of the Securities Act or a contempt application in the Supreme Court under section 144(2) of the Act.

[95] In reply, Birdsall's counsel requested an extension of the September 16, 2024 Demand deadline to October 4, 2024.

[96] The investigator emailed Birdsall's counsel and stated that Commission staff do not agree to postpone the September 16, 2024 deadline and that Birdsall is required to provide the records sought under the Demand by September 16, 2024 at 4:00 PM. The investigator also stated:

> Please remind Mr. Birdsall again that the failure to produce the records by September 16, 2024, or to attend the interview on October 8-9, 2024, may result in enforcement proceedings against him under section 161 of the Securities Act or a contempt application in the Supreme Court under section 144(2) of the Act.

[97] On September 13, 2024, three days before the agreed upon deadline, Birdsall's counsel suggested for the first time that Birdsall's compliance with the Demand should be held in abeyance until the panel issues a decision on his July 26, 2024 application under section 171 of the Act.

[98] On September 13, 2024, the investigator received an email with an attached letter from Birdsall's counsel requesting that Record "hold the requirement to produce as we are waiting for a ruling on the motion, where we have sought a stay as a remedy". Birdsall's counsel also requested that the deadline for the production of records under the Demand be extended to September 30, 2024.

[99] Birdsall's counsel had not, in fact, applied for or obtained a stay of the Demand pending the resolution of his section 171 application.

[100] On September 16, 2024, the investigator sent an email to Birdsall's counsel and stated that Commission Staff do not agree to further extend the deadline to produce records under the Demand. The investigator also stated:

> If Mr. Birdsall fails to produce the records by today at 4 p.m., we may initiate enforcement proceedings before the Commission and seek orders against him under sections 161(6.1) and 162(3) of the Securities Act, or initiate a contempt proceeding against him in Supreme Court under section 144(2) of the Securities Act.

[101] On September 16, 2024, at 3:35 PM, the investigator received an email from Birdsall's counsel asking if he can have until the end of the week to seek instructions with regard to the Demand.

[102] On September 17, 2024, the investigator sent an email to Birdsall's counsel stating that staff did not receive any documents from Birdsall. The investigator also stated:

> Mr. Birdsall has failed or refused to comply with a demand and may therefore be subject to enforcement proceedings before the Commission under sections 161(6.1) and 162(3) of the Securities Act, or contempt proceedings in the Supreme Court under section 144(2) of the Securities Act.

[103] The investigator also stated in that same email:

> We do not agree to any further extensions of the deadline. We urge Mr. Birdsall to comply with the demand as soon as possible.

[104] Birdsall's counsel replied to the investigator's email on September 17, 2024 and stated that he expected to be in touch before the end of the week regarding the Demand.

[105] On September 25, 2024, the investigator emailed Birdsall's counsel to remind him that, at his request, the deadline under the Demand had been extended to August 12, 2024 and then further extended to September 16, 2024. Record stated that the deadline to produce records under the Demand had passed and that Birdsall had failed or refused to comply with the Demand.

[106] To date, Birdsall has not provided any records under the Demand.

B. Position of the executive director

[107] The executive director submits that Birdsall has breached each of Sections 161(6.1), 162(3) and 57.5 of the Act.

[108] With respect to section 161(6.1), the executive director submits that he must prove:

a) There was a demand issued to Birdsall under section 144(1) of the Act; and

b) Birdsall has failed or refused to comply with the demand.

[109] With respect to section 162(3) of the Act, the executive director submits that he must prove:

a) There was a demand issued to Birdsall under section 144(1) of the Act; and

b) Birdsall has failed or refused to produce the records and things or classes of records and things in his custody, possession or control.

[110] With respect to section 57.5 of the Act, the executive director submits that he must prove:

a) the person refuses to give any information or produce any record reasonably required for an investigation under the Act or the person withholds, or attempts to withhold, any information or record reasonably required for an investigation; and

b) the person knows or reasonably should know that an investigation is being conducted or is likely to be conducted.

[111] The executive director points to the representation from Birdsall's counsel about not being able to produce records responsive to the Demand on a short time line due to the number and nature of the documents. The executive director submits that an inference can be drawn from this that Birdsall had at least some records which are responsive to the Demand.

[112] The executive director submits it is well established in the evidence that Birdsall was served with the demand and that he failed or refused to produce anything in response.

[113] With respect to section 57.5 of the Act, the executive director makes more detailed submissions as follows:

> 90. Further, a respondent does not need to have knowledge that the information, record or thing is reasonably required for an investigation. In Re North America Frac Sand Inc., the Alberta Securities Commission stated that section 93.4(1) of the Alberta *Securities Act* (equivalent to section 57.5 of the Act) does not require that the panel find that a respondent have knowledge that the information is "reasonably required":
>
> > [582] As stated by the ASC in *Re Fletcher*, 2012 ABASC 222 at para. 108 (also see *Re TransCap Corporation*, 2013 ABASC 201 at para. 92):
> >
> > To find a contravention of section 93.4(1) of the Act, we need not find that

there was an obstruction of the investigation (although this may well be a relevant consideration at any required sanction hearing). Rather, to find such a contravention, we must determine first whether [a respondent] concealed or withheld, or attempted to conceal or withhold, information and, second, whether that information was reasonably required for an investigation under the Act.

[583] Both *Fletcher* (at para. 113) and *TransCap* (at para. 92) clarified that **a panel need find only that the information was reasonably required for the investigation, not that the person being questioned knew it was reasonably required for such an investigation. In other words, interviewees during Staff investigations do not get to decide what they consider is important or relevant to an investigation.** [emphasis added]

91. Recently, in *Re White*, the Commission found that the respondent breached section 57.5(1)(a) of the Act by failing to comply with demands for information and records made during the course of an interview under section 144 of the Act.

92. In *Re White*, the respondent attended a compelled interview under oath with Commission investigators. During the interview, Commission investigators made 14 requests for the respondent to provide additional documents and information. The respondent failed to provide the additional documents and information and stated that "providing this info is only a waste of my time and won't change the outcome." The investigator later followed up with the respondent again, and the respondent stated that she had retained counsel and would require additional time to provide the requested information. Ultimately, the respondent failed to respond to the requests made during the interview.

93. The panel in *Re White* considered the interview requests in the context of the interview questions and the Executive Director's overall case against the respondent, and found that the interview requests were "reasonably required for an investigation" for the purposes of section 57.5(1) of the Act. Further, the panel found that, for the purpose of section 57.5(2), the respondent knew there was a securities investigation underway because she had complied with previous demands and attended a compelled interview during which the investigation order was entered as an exhibit.

94. In *Re Zhu*, the Commission found that the respondent obstructed justice contrary to section 57.5 of the Act by withholding information in response to a demand issued under section 144 of the Act. In that case, a Commission investigator had issued a demand to the respondent. The respondent provided a partial response to the demand, but failed to disclose any monies received from investors for the purchase of shares or consumer credits. The panel found that the respondent was aware that there was an ongoing investigation at the time the section 144 demand was made.

[references removed]

[114] The executive director also submits as follows:

103. As set out in the investigation order, the matter to be investigated included conduct related to the trading in Champignon's securities; the marketing or promotion of Champignon's securities; and the accuracy and sufficiency of Champignon's disclosure. The requests in the Demand concerned records relating to Champignon and the

companies that Champignon acquired in exchange for its shares, including copies of Birdsall's correspondence with others and documents related to work performed by Birdsall.
…

105. As outlined above, in late June 2024, a process server served Birdsall with the Demand and a cover letter in accordance with the terms of the Order. Record emailed the Demand and cover letter to Birdsall on July 22, 2024, and Birdsall's counsel promptly responded to that email. Birdsall's counsel filed an application on July 26, 2024 to revoke the Order and then corresponded with Commission staff for several weeks about Birdsall's compliance with the Demand. There can be no doubt that Birdsall knew, by no later than July 2024, that an investigation is being conducted under the Act.

106. The cover letter to the Demand, which was addressed to Birdsall and signed by Record, stated:

> If you fail to comply with this Demand, you could be liable to an administrative penalty of not more than $1 million under section 162(3) of the Act, enforcement orders under section 161(6.1) of the Act and, on application to the Supreme Court, to imprisonment for contempt under section 144(2) of the Act.
>
> Any attempt by you to destroy, conceal or withhold any information or record that is required for this investigation is obstruction contrary to section 57.5 of the Act.

107. The Demand stated:

> TAKE NOTICE that by order of the British Columbia Securities Commission I have been appointed to make an investigation in the matter noted above. In connection with that investigation, you are required to produce to me by 4:00 p.m. on July 24, 2024, records and things and classes of records and things that are in your custody, possession, or control relating to the matter noted above …

109. Indeed, Birdsall gave evidence confirming that he knew he was the subject of an investigation. In the Affidavit of Lucas Birdsall dated September 9, 2024, Birdsall affirmed that:

> On May 13, 2022, the BC Securities Commission … issued an Investigation Order in which I was named as one of the subjects of the investigation ...

C. Position of Birdsall

[115] Birdsall's submissions can be divided into three categories. The first category are submissions regarding the constitutional issues and procedural fairness issues which are addressed earlier in this decision. We will not summarize or address those submissions a second time.

[116] The second category of Birdsall's submissions address why sections 161(6.1) and 162(3) of the Act incorporate requirements and procedural elements which would apply in a contempt proceeding, and why those requirements and elements have not been proven.

[117] The final category of Birdsall's submissions address elements of the breaches alleged which the executive director agrees must be proven but which Birdsall submits have not been proven.

[118] Turning to Birdsall's submission that sections 161(6.1) and 162(3) lie "squarely under the aegis of contempt" or "the nature of the dispute clearly amounts to one of contempt", Birdsall repeats

some of the submissions made in relation to the application of Section 96 of the Constitution Act. Building from that, Birdsall submits:

> 24. In anticipation of the argument, by the Executive Director, that a proceeding involving breach of an administrative statute does not attract the same procedural protections, the respondent points again to the nature of the charges as being, in essence, charges of contempt. The conduct at issue is the disobedience of an entity possessed of powers equivalent to those of the Supreme Court. There is no reason in principle, given the nature of the dispute and potentially heavy (even if non-penal) consequences, that the same procedural protections should not apply to a liability hearing of this nature.

[119] From this, Birdsall submits that in proceedings related to sections 161(6.1) and 162(3) contempt rules and procedures should apply. The rules of *strictissimi juris*, the requirement of proof beyond a reasonable doubt, the need to establish the validity of the underlying administrative order and the requirement to prove that the alleged breach was intentional are all asserted to be essential to establishing a breach by Birdsall.

[120] With respect to the elements of the breach which the executive director submits exist but which Birdsall submits are not proven, Birdsall's primary submissions are as follows, first generally and then specifically regarding section 57.5:

> 68. Section 161(6.1) does not itself refer to the "public interest", although s. 161(1), to which it refers, contains this requirement; s.162(3) expressly requires that any orders "be in the public interest".
>
> 69. No case law in this province has discussed the relationship between imposing penalties for failing to obey an investigator's directive and the broader public interest. In one Ontario Securities Commission decision, *Daley (Re)*, 2021 ONSEC 27, the Commission linked "public interest" with the substantially broader concept of "obstruction", in circumstances where the two respondents had engaged in protracted, deliberate and active conduct specifically calculated to obstruct and disparage an investigation through encouraging others to ignore summons, among other things: see paras 64-66. *Daley (Re)* did not involve any efforts, by the parties in question, to set aside or appeal the orders at issue.
>
> 70. The Ontario Securities Commission reached a different conclusion, moreover, in relation to a failure to comply with an investigator's summons in *Mughal Asset Management Corp (Re)*, 2023 LNONOSC 435. The Commission held of that province's *Securities Act*'s s. 13(1)—the functional equivalent of this province's s. 144—that "s. 13(1) of the Act does not create a positive obligation on individuals or prohibit certain conduct, such that it can be breached. Rather, the section grants powers to investigators to summon a person and to enforce a summons by seeking a contempt order" (paras 7, 97). The Commission found the respondent guilty of various misconduct under the Act, including fraud and making misleading statements to investigators, contrary to s. 122(1)(a) of that Act; it declined in the circumstances, however, to find that to his failure to comply with a s. 13(1) summons "is an additional example of conduct contrary to the public interest": para. 119. While the Commission's conclusion appears to have been based on the Staff's failure to particularize the respondent's conduct in relation to s. 13(1) separately from his conduct in concealing information and making misleading statements, there was apparently no dispute between the parties that the respondent had failed to produce the information or documents requested in the s. 13 summons: see para. 94.
>
> 72. More broadly, it is submitted that for the "public interest" to be engaged every time

a party fails to obey an investigator, no matter the circumstances or stage of proceedings, so as to attract a penalty under ss. 161(6.1) and/or 162(3), amounts to a boundless expansion of the concept: more specifically, it equates the Commission's convenience with the public interest in all cases.

The Executive Director has not met his burden to establish a breach of s. 57.5

73. The Executive Director's discussion of the interpretation and scope of s. 57.5 acknowledges the section's inclusion both of a "conduct" and a "knowledge" requirement, and refers to the (extremely scanty) case law to have considered this provision and its recent predecessor.

74. The respondent takes no issue with the assertion that an "investigation" under s. 57.5 includes both formal and informal investigations and that it is not necessary that a respondent "have knowledge that the information, record or thing is reasonably required" for the section to be engaged.

75. It appears, however, that no case law has considered the meaning of "reasonably required" separately from the respondent's knowledge thereof: in particular, the fact that "reasonably required", as an issue that lies upstream of any question of the respondent's knowledge, must rest on an assumption of good faith and adherence to procedural fairness in the particular context of the investigation and/or dispute. More particularly, where there is strong and consistent evidence of the respondent's having expressly objected to a summons or other directive on the basis of a breach of procedural fairness and/or the duty of good faith—in this case, in counsel's failure in the duty of full and frank disclosure in *ex parte* proceedings—it is submitted that the "knowledge" requirement cannot be established in proving obstruction.

76. Such an interpretation, it is submitted, is consistent with the purpose of s. 57.5, as described in *Wang v British Columbia (Securities Commission)*, 2023 BCCA 101 at para. 50: "Section 57.5 serves [the *Securities Act*'s] statutory purposes by prohibiting conduct that would thwart the Commission in gathering information that is reasonably necessary for an investigation, among other regulatory processes" (emphasis added). "Reasonably", it is submitted, implies and necessitates adherence to procedural fairness requirements and good faith on the part of the administrative actor, as principles that animate administrative law independently of statutorily confined administrative regimes: *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para. 165 (per Côté J. in dissent).

77. More broadly, the respondent submits that the same exception to the doctrine of collateral attack noted above—that is, that in contempt proceedings brought in relation to administrative orders, the respondent may attack the validity of the order in question (see again *British Columbia (Workers' Compensation Board) v EHZ Pre-Demolition Ltd*, 2023 BCSC 831 at para. 33; *British Columbia (Workers' Compensation Board) v D&G Hazmat Services Ltd*, 2024 BCCA 127 at para. 46)—applies equally to the question of "obstruction". The respondent, on this point, repeats his arguments regarding the flawed service process and the resulting nullification of the orders in question.

78. Again—and again unsurprisingly—no case law exists in which a charge of "obstructing justice" is pursued, within an administrative forum, against a party in circumstances where his or her pursuit of the appeal process with regard to the underlying order or proceedings remains outstanding. And again, an equally reasonable conclusion, it is submitted, is that such proceedings are clearly premature.

79. Regardless of prematurity, however, it is submitted that the circumstances must equally bear on whether the "knowledge" requirement is made out. Expressed bluntly, to find that an individual is, specifically, "obstructing justice" on the basis of his or

> "knowledge" that the information sought is "reasonably required", where he or she not only questions the legal foundation of the order in question but is actively and consistently pursuing his or rights of review and appeal through the justice system, verges on the Kafkaesque. It is repeated that there is no evidence that the respondent has lied to any Commission staff, has encouraged any other person to lie or to withhold information, or that the respondent has specifically refused to provide information further to a demand or summons, as opposed simply to opposing both the validity and timing of the demands.

[121] In addition to the above submissions which were presented in written form, Birdsall objected to the executive director's reliance on a statement made by Birdsall's counsel at a hearing management meeting regarding the need for time to respond to the Demand because of the number of documents in question. During oral arguments counsel for Birdsall expressed some outrage at the conduct of the executive director in relying on such statements, and counsel for Birdsall expressed a concern about how this would inhibit the candor of counsel at and the value of future hearing management meetings.

D. Standard of proof

[122] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), the Supreme Court of Canada held, at paragraph 49:

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

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

E. Analysis and conclusions regarding liability

[124] We conclude that we should give effect to the plain meaning of the wording of Sections 161(6.1) and 162(3) of the Act.

[125] Birdsall submits that since the conduct at issue is the disobedience of a requirement in a manner which could be the subject of a contempt proceeding, there is no reason in principle, given the nature of the dispute and the potentially heavy consequences, why the same procedural protections should not apply to a proceeding under Sections 161(6.1) and 162(3) of the Act. We disagree.

[126] A significant body of law has been established with respect to the Act. For example, a substantial body of precedent exists regarding the purposes of the Act, regarding the importance of investigations under the Act, regarding the applicability of common principles of interpretation regarding the language of the Act and regarding what standard of proof applies under the Act. If the legislature had intended that sections 161(6.1) and 162(3) should be interpreted differently such that, for example, a different standard of proof applied to them or that they incorporated requirements outside of the plain meaning of the words of those sections, the legislature would have indicated that intention.

[127] A convincing explanation for the purpose of sections 161(6.1) and 162(3) is that they were intended as simplified and streamlined alternatives to the contempt procedure which authorize different and less severe consequences than a contempt ruling. That intention would be

frustrated to a large degree if the elements of the contempt procedure which have been identified by Birdsall were all intended to be incorporated into those sections.

[128] We return to the specific issue of what standard of proof applies. We note that currently, the same standard of proof applies to all enforcement proceedings, whether in relation to fraud or to the filing of financial statements which do not comply with specified standards. It makes no sense to us to interpret Sections 161(6.1) and 162(3) of the Act such that a much higher standard of proof applies to those sections than would apply to an allegation of fraud or other serious misconduct under the Act.

[129] This panel finds that the executive director has correctly identified the elements which must be proven in order to establish liability under the relevant provisions of the Act and, moreover, that the standard of proof required to be met on any such element is the balance of probabilities.

[130] Turning to Birdsall's submissions regarding the public interest, we note that although section 162(3) permits a panel to impose an administrative penalty only if it considers it to be in the public interest. This incorporates the public interest inquiry into the analysis of whether the potential sanction should be ordered. A finding that it is in the public interest to impose such a sanction is not a prerequisite to a finding that the elements of a breach of the section have been proven.

[131] Similarly, although a breach of section 161(6.1) can lead to the sanctions mentioned in section 161 only if it is found that it is in the public interest, it is not a prerequisite to a finding that a breach of the Act has occurred that the conduct in question was contrary to the public interest.

[132] In any event we strongly disagree with Birdsall that his conduct was in the public interest. It is quite legitimate for Birdsall to assert his rights, and to assertively have those rights adjudicated. An assertive approach by Birdsall or any respondent might include an application to stay proceedings while constitutional issues or other issues are determined. But Birdsall never had any right, and he never had any legitimate expectation, to unilaterally insist that the executive director cease procedural steps while Birdsall contemplates and then files applications.

[133] What is in the public interest here is for Birdsall to comply with the Demand so the investigation can continue.

[134] With respect to Birdsall's concerns about his counsel's statements being relied upon as evidence regarding Birdsall's possession of documents which were the subject of the Demand, we agree with Birdsall that some caution should be exercised by parties and by panels in extracting evidence from statements made by counsel at a hearing management meeting. There may be circumstances where it would be appropriate to exclude a particular statement. However, there is no general exclusionary rule as there is, for example, with settlement discussions between the parties.

[135] Hearing management meetings are held to ensure hearings start on their scheduled dates, run fairly and efficiently and conclude promptly. While caution should be exercised in relying on statements made during these meetings, we reject any suggestion that this particular statement should be excluded. The statement in question was a simple, factual statement made by Birdsall's counsel related to how long it would take to produce documents based on the number of documents in the possession of Birdsall. The statement was made voluntarily for the purpose of obtaining an extension to a deadline which existed at the time, all within the context of moving the matter forward towards a hearing. To summarize, a factual statement was made with the

intention that the statement would be relied upon to obtain an advantage for Birdsall. Later the statement was included in a summary letter which was reviewed by all counsel in draft before being signed and circulated by the panel chair. In these circumstances it is clear that the statement is evidence available to all. It is not a statement which is available to be relied upon only when it is in Birdsall's advantage to do so.

[136] The statement in question is sufficient to establish, on a balance of probabilities, that Birdsall had documents in his possession which were responsive to the Demand. Otherwise Birdsall's counsel would not have been familiar with the volume of such documents. We draw the inference that Birdsall had such documents at all relevant times.

[137] We have previously concluded that Birdsall was served with the Demand. We now conclude that he failed or refused to comply with that demand and that he failed or refused to produce the records and things or classes of records and things in his custody, possession or control. As a result, Birdsall breached both section 161(6.1) and 162(3) of the Act as alleged in the Notice of Hearing.

[138] Turning to Section 57.5 of the Act, we observe that in part the divergence in positions of the executive director and Birdsall regarding the proper interpretation of that section is illustrated by Birdsall's choice to bold and emphasize the particular word "obstruction" in his submission, quoted above. That word does carry a connotation of intentionally taking steps to impede an investigation. However, the word does not appear in the section. The language of the section is not as confined as the word "obstruction" might suggest if the concept of obstruction was included as an element of a breach.

[139] The language of Section 57.5 captures a refusal of a respondent to give a record reasonably required for an investigation when the respondent knows or reasonably should know that an investigation is being conducted.

[140] The memorandum in support of the investigation order provides context for the meaning of the investigation order and the investigation order itself determines the scope of the investigation. In context, and in simple terms, the investigation included a focus on what are sometimes referred to as Trojan asset transactions, or transactions where assets are acquired by a company at inflated prices, usually with a public announcement which is meant to attract investors, and later it is disclosed that the asset value had to be written down. The documents sought from Birdsall in the Demand included records related to Champignon and to the companies that Champignon acquired in exchange for its shares. Objectively, it is established that the records sought were reasonably required for the investigation.

[141] We agree with the conclusion of the Alberta Securities Commission in *Re North American Frac Sand, supra*, that the section requires a finding that the information in question was reasonably required for the investigation. It does not require a finding that a respondent knew it was reasonably required. However, in this case the evidence quoted above from the executive director's submissions amply demonstrates that Birdsall was provided with information about the scope of the investigation before the deadline which establishes Birdsall's refusal to produce records which were subject to the Demand. We have enough information to draw the inference that having received the investigation order and the Demand prior to September 16, 2024, Birdsall would have understood by that date that the Demand reasonably related to the investigation.

[142] Birdsall submits that it is “verging on Kafkaesque” to suggest that Birdsall is obstructing justice when Birdsall was questioning the validity of the underlying order and actively pursuing his appeal and review rights. Birdsall submits that he never refused to provide the materials which are the subject of the Demand, he is merely challenging the validity and timing of the demand. This submission has no merit. Birdsall had every right to challenge the validity and the timing of the demand. When he raised his challenge he put the executive director in the position of having to decide whether or not to agree to defer the deadline for the demand. The executive director declined to agree. At that point, and before the deadline expired, Birdsall had the option to apply to the panel for relief. Birdsall chose not to do that.

[143] Finally, we should express our agreement with a point which counsel for the executive director made during oral submissions. A failure by a respondent to provide a record is generally enough to establish that the respondent has failed to produce the record. It is not necessary for the respondent to utter the words, “I am refusing to comply with the demand”.

[144] All of the elements of Section 57.5 of the Act have been proven. This panel finds that Birdsall breached that section as alleged in the Notice of Hearing.

V. Submissions on sanction

[145] We direct the executive director and the respondents to make their submissions on sanctions as follows:

By January 8, 2026	The executive director delivers submissions to the respondent and the Commission Hearing Office.
By January 22, 2026	The respondent delivers response submissions to the executive director and the Commission Hearing Office.
By January 22, 2026	Any party seeking an oral hearing on the issue of sanctions so advises the Commission Hearing Office. The hearing officer will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By January 29, 2026	The executive director delivers reply submissions (if any) to the respondent and to the Commission Hearing Office.

December 10, 2025

For the Commission

Gordon Johnson
Vice Chair

James Kershaw
Commissioner

Jason Milne
Commissioner