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

Citation: Re Application 20230310, 2025 BCSECCOM 5 Date: 20250103

**Re Application 20230310**

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| **Panel** | Deborah Armour, KC | Commissioner |
| | James Kershaw | Commissioner |
| | Jason Milne | Commissioner |
| **Submissions completed** | August 29, 2024 | |
| **Decision date** | January 3, 2025 | |

**Parties**

| | |
|---|---|
| Karin A. Blok<br>Heesoo Kim<br>Paul Smith | For the Executive Director |
| Joven Narwal, KC | For the Applicant |

**Decision**

## I. Introduction

[1] The Applicant applies under section 171 of the *Securities Act*, RSBC 1996, c. 418 (the Act) to revoke or vary three preservation orders issued by the Commission.

[2] On September 3, 2024, this panel varied our previous ruling that had dismissed an anonymization application and ordered that:

a. the ruling and reasons of this preservation order application be anonymized;
b. the style of cause and names of the Applicant and affiant be anonymized; and
c. the hearing materials be sealed.

[3] The parties have agreed and we have determined that it is appropriate that this application proceed in writing.

## II. Factual and Procedural Background

[4] The Commission issued an investigation order on December 28, 2022, appointing staff of the Enforcement Division of the Commission to investigate the Applicant and others' compliance with various provisions of the Act.

[5] No notice of hearing has yet been issued. Based on the materials filed by the executive director, the possible allegations identified are fraud and illegal distributions. It is possible that a notice of hearing will never be issued. It is also possible that one will be issued alleging one or both of those contraventions, with or without other allegations.

[6] The executive director sought and obtained, by way of e*x parte* application, the preservation orders that were issued on February 17, 2023 (COR #2023/015, COR #2023/016 and COR #2024/017) (Preservation Orders) to restrain the Applicant from disposing or transmitting assets held in accounts at three financial institutions.

[7] In support of the application for the Preservation Orders, the executive director filed an affidavit of a Commission investigator sworn February 10, 2023 (Affidavit #1).

[8] On March 10, 2023, representatives of the Applicant wrote to the Commission seeking a variation of the Preservation Orders to allow the Applicant to take various steps including selling securities. Pursuant to section 9.10(b) of BC Policy 15-601 – *Hearings* (Hearings Policy), the Commission treats such an initiating document as having commenced an application.

[9] In response to that letter, the Commission varied COR #2023/015 on March 20, 2023 to allow the Applicant to sell securities in that account.

[10] On March 31, 2023, and also in accordance with section 9.10(b) of the Hearings Policy, the executive director filed submissions, taking the position that it was in the public interest to maintain the Preservation Orders.

[11] Also on March 31, 2023, the Commission investigator made a further affidavit (Affidavit #2) advising that, as of March 17, 2023, and taking into account the variation of COR #2023/015, approximately $680,000[1] was preserved by the Preservation Orders.

[12] On April 12, 2024, the Applicant responded to the executive director, filing submissions seeking the revocation or variation of the Preservation Orders. No evidence was filed with those submissions.

[13] On May 3, 2024, the executive director filed a reply, continuing to oppose this application. The executive director has not filed any evidence since the two affidavits in February and March 2023.

[14] Affidavit #1 discloses the following:

a. The Applicant and three individuals associated with the Applicant are the subject of the investigation order.

b. From 2017 to July 2021, the Applicant claimed that its business was proprietary automated software marketed to portfolio managers and used by the Applicant for its own trading. In an investor deck provided to the Commission, the Applicant said the company's core business was producing SAAS products focused on research and trading functions in capital markets. In a slide deck of a presentation to investors, the Applicant described itself as an independent financial technology company creating customizable trading software.

c. The Applicant raised approximately $29.7 million from investors between July 2017 and July 2022.

d. The Applicant did not file any exempt distribution reports (EDRs) for the first $3,100,123 raised from 106 investors during the period July 12, 2017 to July 2, 2019 (the First Investment Period).

[1] All amounts are in Canadian dollars unless otherwise stated.

e. The Applicant filed EDRs in relation to $26.6 million raised from 267 investors between August 1, 2019 and July 15, 2022 (the Second Investment Period). The Applicant relied on the accredited investor (AI) and friends, family and business associate (FFBA) exemptions in the EDRs filed.

f. Another investigator with the Commission emailed a survey to 202 investors and received 33 responses. Seven of those investors said that they did not qualify for the AI exemption claimed at the time they invested with the Applicant. Those investors purchased $1,545,000 in bonds and preferred shares of the Applicant in the Second Investment Period.

g. There were 37 investors who invested $887,025 in the Applicant for whom the Applicant claimed the FFBA exemption. Of those investments, the affiant of Affidavit #1 has identified four with deficiencies in the information in the EDRs or the completion of the EDRs themselves. Those investments total $232,920.

h. Based on an examination of audited and unaudited financial statements of the Applicant, the value of the software of the Applicant declined from $264,000 in 2018 to $125,317 as at June 30, 2022. It is unclear whether there were any expenses relating specifically to the software. Unspecified expenses totaled $310,963 between 2017 and 2022.

i. The financial statements showed that, between 2017 and 2022, the Applicant had:

    i. made $2,347,353 in software sales and other income;
    ii. paid $4,591,434 in interest and dividend payments to investors; and
    iii. incurred $17,055,162 in net losses of which $7,047,659 was from the Applicant's trading in its own portfolio.

j. Based on information contained in various documents provided by the Applicant to the Commission, the Applicant sold investors bonds and preferred shares with rates of returns between 7% and 15% annually. In particular, the 5 year bonds had stated yields of 12% and the 5 year shares, yields of 15%.

k. In July 2021, the Applicant purchased a 70% interest in a US company. The Applicant claimed that the annual revenue of that company was US$1.5 million. The Applicant indicated that it intended to use distributions from that company to fund the Applicant's monthly expenditures.

l. A question in the survey sent to investors by the Commission investigator asked how they understood their money would be used. The main uses disclosed were:

    i. to fund operations, grow the business and/or develop software (16 responses);
    ii. to provide a regular rate of return (5 responses);
    iii. to enable the Applicant to trade with the software using pooled investors' funds (2 responses); and
    iv. to trade in the market (1 response).

m. In October 2022, the Applicant held an investor seminar. An investor who attended said that a representative of the Applicant claimed that the company was expanding. The attendee said that the purpose of the seminar was to get people to invest but the

Applicant did not ask for new investment at that meeting. The attendee said that all those attending were seniors.

## III. Applicable Law

### A. Applicable Legislation

#### *Section 164 Preservation Orders*

[15] The Commission has the power to issue preservation orders at various stages of a proceeding including after an investigation order has been issued. The relevant subsections of section 164 of the Act provide:

> **Preservation orders**
> **164.04** (1) In the circumstances set out in subsection (2) or (3), the commission may make one or more orders under subsection (4) in relation to
> (a) the whole or a portion of the interest in property of a person referred to in subsection (2),
> (b) the property in which the whole or a portion of the interest in property of a person referred to in subsection (2) is held,
> …
>
> (2) The commission may make an order under subsection (4) in respect of a person if any of the following apply:
> …
> (b) an investigation under section 142 or 147 has been ordered in respect of the person;
> …
>
> (4) In the circumstances set out in subsection (2) or (3), the commission may make one or more of the following orders relating to the preservation, management or disposition of property or the whole or a portion of an interest in property:
> (a) an order restraining the disposition or transmission of the property or the whole or the portion of the interest in property;
> …
>
> **Preservation order made without notice**
> **164.05** (1) Subject to subsection (2), the commission may make a preservation order without notice to any person.

#### *Section 171 application*

[16] The Commission has the discretion to make an order revoking or varying a decision under section 171 of the Act if it considers that to do so would not be prejudicial to the public interest. Section 171 reads:

> **Discretion to revoke or vary decision**
> **171** If the commission, the executive director or a designated organization considers that to do so would not be prejudicial to the public interest, the commission, executive director or designated organization, as the case may be, may make an order revoking in whole or in part or varying a decision the commission, the executive director or the designated organization, as the case may be, has made under this Act, another enactment or a former enactment, whether or not the decision has been filed under section 163.

***Fraud***

[17] Fraud is specifically prohibited under the Act. The relevant provision of section 57 is:

> **Manipulation and fraud**
> **57**
> ...
> (2) A person must not, in relation to a security, derivative or benchmark,
> (a) perpetrate a fraud, or
> (b) attempt to perpetrate a fraud.

***Illegal Distributions***

[18] The Act states that a person must not distribute securities without a prospectus unless applicable exemptions have been met. Section 61 provides:

> **Prospectus required**
> **61** (1) Unless exempted under this Act, a person must not distribute a security unless
> (a) a preliminary prospectus and a prospectus respecting the security have been filed with the executive director, and
> (b) the executive director has issued receipts for the preliminary prospectus and prospectus.
> (2) A preliminary prospectus and a prospectus must be in the required form.

[19] The statutory limitation period in the Act states that the limitation period for proceedings is six years from "the date of the events that gave rise to the proceedings."

> **Limitation period**
> **159** (1) Proceedings under this Act, other than an action referred to in section 140 or 140.94, must not be commenced more than 6 years after the date of the events that give rise to the proceedings.

## B. Party A Decision

[20] In *Party A v. British Columbia (Securities Commission)*, 2021 BCCA 358, the Court of Appeal considered the Commission's dismissal of section 171 applications to set aside freeze orders where those orders were issued *ex parte.* While the Act was amended in 2020 to replace freeze orders with section 164 preservation orders, *Party A* remains relevant to our consideration.

[21] At paragraph 177 of its decision, the Court stated that when considering whether to maintain a freeze order, the Commission must:

> ...assess the evidence to determine if it is sufficient to raise a **serious question** that the investigation **could** show breaches of the Act **leading to financial consequences** against the asset owner by way of monetary claims or penalties under the Act. [Emphasis added]

We refer to this as the threshold test.

[22] The Court, at paragraphs 178 and 179, described the nature of the required evidentiary standard which we summarize below:

- more than mere speculation or mere suspicion, but it can be less than evidence required to satisfy a balance of probabilities;

- low and flexible, and;
- not unduly constraining of the actions of the enforcement division of the Commission.

[23] At paragraph 222*, Party A* made it clear that, where *ex parte* orders were issued, the executive director bears the burden of proof to establish that the threshold test has been met. At paragraph 223, the Court said that the Commission on a section 171 application should take a fresh look at whether continuation of orders granted is in the public interest based on the evidence and circumstances known at the time of the section 171 application. The matter should be treated by the Commission as a new hearing, without according deference to the original order.

[24] If we determine that the above threshold test is met, we must then determine whether it is in the public interest to continue the Preservation Orders. *Party A* sets out a list of possible factors to consider when assessing the public interest. It makes it clear that the list is not exhaustive and will depend on each case. The Court at paragraphs 196 and 197 said:

> [196] In summary, even where the preliminary assessment of the evidence reveals a serious question that the investigation could show that the owner of the assets breached the Act in ways that could lead to a monetary order or penalty against that party, other relevant public interest factors could include:
>
> a) The seriousness and scope of the allegations. For example, evidence of a relatively minor breach of the Act might not weigh heavily in favour of an asset freeze order, whereas evidence of a serious breach of the Act could weigh more heavily.
> b) The stage of the investigation and whether there is urgency or has been delay.
> c) The scope of the asset freeze order in relation to the potential penalties that might flow from the alleged breaches of the Act. This raises the question of whether there is proportionality between the scope of the asset freeze order and the magnitude of the prospective monetary claims or penalties arising from the investigation, to the extent it can be known.
> d) The potential consequences of the order on the asset's owner or other parties. Here, it is not an answer to the intrusive nature of an asset freeze order to observe that it preserves the status quo. The order interferes with asset owners' ability to use their property.
> e) The strength of the evidence in support of the asset freeze order. Even where the preliminary merits test is met, the relative weakness or strength of the evidence can be a relevant factor to weigh in combination with all other public interest factors.
>
> [197] The Commission is not required to run through a formal checklist of all possible relevant factors, but rather to balance those factors that are relevant to the case at hand, depending on the evidence and circumstances. There may be other factors, not mentioned above, that are relevant to the public interest in a given case.

## IV. Positions of the Parties

### A. Executive Director

[25] The executive director submits that Affidavit #1 sets out evidence that raises a serious question that the Applicant contravened sections 57(2)(a) and 61 of the Act by committing fraud and by distributing its securities without a prospectus or valid prospectus exemptions.

[26] To support its position that the Applicant has likely engaged in fraud, the executive director submits:

a. Despite having raised almost $30 million as a company developing software, the Applicant's software asset has a declared value of less than 1% of the funds it has raised from investors; and

b. The Applicant has never generated sufficient revenue to satisfy its obligation to investors without using other investor funds. It appears based on the Applicant's financial structure, offering high yield investments while accumulating significant net losses, that it may be operating a Ponzi scheme.

[27] The executive director notes that the Applicant has raised almost $30 million without filing a prospectus. He points out that, during the First Investment Period, the Applicant raised more than $3 million without filing any EDRs.

[28] Without elaborating further, the executive director says that some of the distributions in the First Investment Period now fall outside of the limitation period. We are not given any evidence as to which investments are outside of the limitation period nor the total value of those investments.

[29] As it relates to the Second Investment Period, the executive director says that the Applicant illegally distributed an additional $1,777,920 of its securities to 11 investors That amount is arrived at by adding the $1,545,000 raised from the seven investors who said they did not have a valid exemption and the $232,920 that the investigator said represented problematic EDRs.

[30] The executive director points out that the onus is on the Applicant to justify the exemptions it has relied on to make the distributions. With regard to the Applicant's submission that the onus is on the executive director to prove the alleged illegal distribution, the executive director acknowledges that the onus is on the executive director to establish that the Applicant distributed securities without a prospectus. The onus then shifts to the Applicant to establish that the distributions were done in valid reliance on an exemption. The onus on the executive director in the context of a preservation order application cannot be higher than it is at the liability stage.

[31] In considering the public interest factors, the executive director submits that the Commission has repeatedly noted that fraud is the most serious misconduct prohibited by the Act. He submits that illegal distributions are also inherently serious as the prospectus requirement is in place to protect investors by ensuring they receive the information necessary to make informed investment choices.

[32] With regard to the factor of proportionality, the executive director submits that the total amount preserved (approximately $680,000) is not disproportionate to any potential orders the Commission may issue under sections 161(1)(g) and 162 of the Act. In making that submission, he points to the affidavit evidence that the Applicant raised up to $4.8 million pursuant to the illegal distribution of its securities and may have obtained almost $30 million as a result of fraud. The executive director says that monetary claims and penalties could reasonably be expected to significantly exceed the value of the assets preserved.

### B. The Applicant

[33] The Applicant submits that the executive director's allegation of fraud is based on "bald conclusory statements and mere suspicion, in the absence of any meaningful evidence". It submits that the executive director has not adduced any evidence that investor funds were used to satisfy its obligations to other investors. The allegation of a Ponzi scheme is a bare assertion upon which no weight can be placed.

[34] The Applicant says that there is no evidence that the Applicant was misleading investors as to the nature of its business.

[35] As for the allegations of illegal distributions, the Applicant submits that this does not rise to a degree of seriousness that warrants preservation orders. The Applicant cites *Party A* and *Dunn v. British Columbia (Securities Commission)*, 2022 BCCA 132, for the proposition that the evidence must be more than mere speculation or mere suspicion.

[36] The Applicant also submits that there is neither sufficient nor meaningful evidence that the exemptions claimed by the Applicant do not exist. It says that the executive director has failed to adduce any evidence that brings into question the validity of exemptions claimed by the Applicant for investments in the First Investment Period. The Applicant submits that the onus is on the executive director to prove the alleged breach of the Act. The Applicant also says that the onus must not shift to the Applicant.

[37] The Applicant notes that the executive director did not include, in the affidavit evidence, the survey sent to investors nor the actual responses. It also notes that the investigator who made Affidavit #1 commented on the responses of four investors during the Second Investment Period but neglected to comment on the other four.

[38] As for the four EDRs that the investigator said were problematic, the Applicant submits that she does not say they were invalid. With respect to the EDR without a signature, the Applicant notes that the affiant does not provide any evidence that that investor should not be considered a FFBA investor.

[39] The Applicant refers to a number of criminal cases to establish that the executive director cannot simply make bald conclusory statements. He must provide facts and the source of evidence upon which conclusions are based. A conclusory statement of opinion is of no value.

## V. Analysis

### A. Has the evidentiary threshold been met?

[40] Following the *Party A* decision, the threshold question we need to first answer is whether:

- there is sufficient evidence
- to raise a serious question that the investigation could show breaches of the Act
- that could lead to financial consequences (monetary claims or penalties under the Act) against the asset owner.

[41] At this stage we are not making any findings of fact for the purpose of liability under the Act. That would be done following a hearing on the merits, if the investigation ultimately leads to the issuance of a notice of hearing against the Applicant.

[42] We will now analyze the possible allegations of fraud and illegal distributions in the context of the *Party A* threshold question.

***Allegation of fraud***

[43] The executive director has made two arguments with regard to the possible allegation of fraud. The first is that the Applicant misled investors as to the nature of its business and the purpose for which it was raising money. The second argument is that the Applicant was possibly operating a Ponzi scheme by using investor funds to pay redemptions and interest to earlier investors.

[44] As for the submission of the executive director that the Applicant misled investors, he points to the fact that the Applicant marketed itself as a company developing software and yet its financial statements indicate that it spent less than 1% of the almost $30 million it raised on software development. It is unclear whether the Applicant was paying expenses relating to the software development but we do note that the Applicant disclosed generating more than $2.3 million in revenue on software sales and other sources during the relevant period indicating that it was carrying on that business.

[45] We are more compelled by the allegation that the Applicant was possibly committing fraud by operating a Ponzi scheme. We note the following:

a) The returns promised to investors ranged from relatively high (7%) to very high (15%). Absent substantial profits, any such payments would have to funded from alternative available sources of cash including the proceeds of other financing activity.

b) Between 2017 and July 2022, the Applicant reported paying $4,591,424 on account of interest on bonds and dividends on preferred shares to investors.

c) The Applicant was not profitable. Its financial statements during the relevant period showed that it recorded cumulative losses in the amount of $17 million, with $7 million of such losses arising on account of its own trading activity.

d) While the Applicant expected the US company in which it had acquired a majority stake to generate substantial revenue, it was planning to use cashflow from such stake to cover its monthly expenses. The Applicant did not anticipate using those funds to make payments to investors. In any event, based on its own projections, the revenue in the US company would not materialize until 2022 at the earliest.

[46] Given that the evidence before this panel is that the Applicant was generating material losses from its operations while also paying out to its investors material amounts on account of interest and dividends, a rational inference can be drawn that such payments were funded from capital raised through the distribution of its securities. The investor presentation attached as Exhibit A to Affidavit #1 suggests that the Applicant, unlike other start-ups, had an immediate revenue model. The Applicant did not, in such presentation, disclose to potential investors that the proceeds of their investments would fund the return on that investment until the business was sufficiently profitable.

[47] We find that there is evidence before us sufficient to raise a serious question that the investigation could show that the Applicant breached the Act by committing fraud when funds raised from some investors were used to pay others. This falls within the classic definition of a Ponzi scheme. This conclusion, formed without speculation, is based on the factual evidence presented to date and goes well beyond suspicion. The onus to be met is low and flexible in these circumstances and is less than the standard to satisfy a balance of probabilities. This

panel finds that onus has been met at this stage with respect to the alleged commission of fraud by the Applicant. If the executive director makes and proves such allegations, they would almost certainly lead to financial consequences against the Applicant.

***Allegation of Illegal Distribution***

[48] We will look at each of the investment periods separately in analyzing this possible allegation.

[49] During the First Investment Period, the evidence discloses that the Applicant did not file any EDRs while raising more than $3.1 million. While this is strong evidence that the investigation could establish an illegal distribution thus meeting the *Party A* threshold test, we also know, based on the executive director's own submissions, that some of those possible claims could be statute barred. As we have not been provided with any evidence as to the extent of that issue, we are unable to conclude that the evidence could lead to financial consequences for the Applicant as it relates to the First Investment Period.

[50] The Second Investment Period covers the period August 1, 2019 to July 15, 2022. As of the date of this decision, it would appear that the events that took place during this period that could give rise to a proceeding, are not statute barred.

[51] To summarize the relevant evidence relating to the Second Investment Period, the Applicant raised approximately $26.6 million from 267 investors. The Applicant filed EDRs for those financings, specifically relying on the AI and FFBA exemptions from the prospectus requirement.

[52] The uncontroverted evidence found in Affidavit #1 shows that seven of those investors said they did not qualify for the exemption claimed at the time they invested. Those investors purchased $1,545,000 worth of securities of the Applicant.

[53] There are also four investors for whom the affiant of Affidavit #1 says problematic FFBA forms were filed. As the evidence relating to those claims is somewhat equivocal, we will not include it in our analysis of the Second Investment Period.

[54] The Applicant has submitted that the onus is on the executive director to prove the illegal distributions. The Applicant says that the onus must not shift to the Applicant. We agree that the onus lies with the executive director and that the *Party A* threshold must be met. We do not agree that the executive director has the onus to prove illegal distributions. Rather, this panel must assess the evidence adduced by the executive director to determine if it is sufficient to raise a serious question that the investigation could show that the distributions in these circumstances were illegal and thereby constituted breaches of the Act.

[55] As stated above, section 61 of the Act states in part:

> (1) Unless exempted under this Act, a person must not distribute a security unless
> (a) a preliminary prospectus and a prospectus respecting the security have been filed with the executive director, and
> (b) the executive director has issued receipts for the preliminary prospectus and prospectus.

[56] The definition of "distribute" includes, if used in relation to trading in securities, "a trade in a security of an issuer that has not been previously issued".

[57] The definition of “trade” under the Act is extremely broad and includes “a disposition of a security for valuable consideration”.

[58] Section 2.3(1) of *National Instrument 45-106 – Prospectus Exemptions* (NI 45-106) states that the prospectus requirement does not apply to a distribution of a security if the purchaser purchases the security as principal and is an “accredited investor”.

[59] An accredited investor is a defined term in section 1.1 of NI 45-106. It requires a purchaser to meet certain income or asset tests in order for securities to be sold in reliance on the exemption including the following:

> a) $1 million financial asset test in section (j): an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $1,000,000;
>
> b) $5 million net asset test in section (l): an individual who, either alone or with a spouse, has net assets of at least $5,000,000; and
>
> c) Net income test in section (k): an individual whose net income before taxes exceeded $200,000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year.

[60] At this early stage, we are satisfied for our analysis of section 61 that the Applicant is an issuer and that it distributed securities without filing a preliminary prospectus or prospectus.

[61] The dispute between the Applicant and the executive director focused primarily on the issue of exemptions from the prospectus-filing requirement.

[62] The panel in *Solara Technologies Inc. (Re)*, 2010 BCSECCOM 163, at paragraph 33 stated that “the person trading has the onus of proving that the exemption is available” and that there should be documentation about the exemption “at the time of the trade”.

[63] The Applicant has not filed any evidence to support its claims of exempt distributions. To the contrary, we have evidence from the executive director that seven investors did not qualify.

[64] The Applicant has also suggested that the executive director needs to establish that all of the investments involved illegal distributions. That is not the case. It is enough for the executive director to raise a serious question with regard to some of the investments. It is the value of the trades for which the executive director has met that threshold that will inform our public interest analysis, not the value of all trades for which we have evidence.

[65] We find that there is sufficient evidence to raise a serious question that the investigation could show that the Applicant was engaged in illegal distributions. In all of the Commission cases of which we are aware where illegal distributions were found, monetary claims or penalties were ordered.

[66] The *Party A* threshold test has been met as it relates to the $1,545,000 raised in the Second Investment Period from the seven investors apparently without valid exemptions.

**B. The Public Interest**

[67] Having established that the *Party A* test has been met, we must now determine whether the continuation of the Preservation Orders is in the public interest. As stated by the Court of Appeal at paragraph 116 of *Party A,* "the purpose of securities legislation includes three goals: protection of the investing public, which is the primary goal; capital market efficiency; and ensuring public confidence in the system". Public confidence in the system is in part ensured when the Commission is able to recover amounts ordered against those found to have contravened the Act. Preservation orders are an important tool in making those recoveries. This is an important factor in our public interest consideration.

[68] We will now consider those factors from the *Party A* decision that are relevant to this case. We start by considering the seriousness of the potential allegations. It is often said that fraud is the most serious conduct prohibited in the Act. Certainly, this potential allegation is very serious.

[69] We also agree with the executive director that illegal distributions are inherently serious. As stated by the commission in *Re Wong*, 2017 BCSECCOM 57 at paragraph 40, the prospectus requirement is in place to ensure that investors receive the information they need to make sound investment decisions.

[70] As for the scope of the fraud, the $26.6 million raised during the Second Investment Period is a very significant amount. As for the scope of illegal distributions in the Second Investment Period, the evidence establishes a serious question as to the validity of exemptions for at least $1,545,000 of the amount raised. That is also a significant amount.

[71] The next factor we consider is the stage of the investigation, urgency and whether there has been delay. We do not have any evidence of delay or urgency. As for the stage of the investigation, it was at the early stages when the executive director filed his submissions in March 2023. While considerable time has passed since then, investigations involving possible fraud are complex and take considerable time. This factor does not influence us one way or the other in considering the public interest.

[72] Turning to the factor of proportionality, we note that $680,000 has been preserved. Administrative penalties (under section 162 of the Act) and section 161(1)(g) (often called disgorgement) orders could be issued if contraventions of the Act are ultimately found.

[73] Given the amounts raised, a section 162 penalty could be significant if the executive director alleges and proves that the Applicant was operating a Ponzi scheme.

[74] Proof of an illegal distribution, even in the amount of $1,545,000 that we have identified as having met the serious question threshold at this early stage, would be a significant additional consideration for a hearing panel in assessing the amount of a section 162 order.

[75] A hearing panel could also make an order for an amount payable under section 161(1)(g) which allows the Commission to order that someone who has been found to contravene the Act, pay to the Commission any amount obtained as a result of the contravention. We conclude that the $680,000 preserved is not disproportionate given the financial consequences that could be ordered against the Applicant.

[76] Turning to the issue of impact of the Preservation Orders on the Applicant or third parties, the Applicant provided affidavit evidence stating that because of the Preservation Orders, the Applicant was unable to make payroll and had to let staff go as a consequence. While we

accept that the Preservation Orders may have had an impact on the Applicant, the impact does not alter our conclusion below.

[77] The last factor we consider is the strength of the evidence. The evidence presented is sufficient for the conclusions we have reached.

## VI. Conclusion

[78] We find that, in all the circumstances existing at the time of this application, and taking all relevant factors into account, it would not be prejudicial to the public interest to maintain the full amount of the Preservation Orders, for the time being.

[79] We note that, starting in August of next year, the effluxion of time and the operation of the limitation period might start to reduce the number and amount of investments that will ultimately be in issue should this matter proceed to a section 161 hearing. Accordingly, it might be in the public interest to revoke the Preservation Orders or to further vary the amount preserved sometime in the second half of 2025.

[80] We grant the Applicant's alternative submission and vary the Preservation Orders to order that, absent a successful application by the executive director to extend the Preservation Orders, they will be revoked effective August 1, 2025.

January 3, 2025

**For the Commission**

Deborah Armour, KC
Commissioner

James Kershaw
Commissioner

Jason Milne
Commissioner