IN THE MATTER OF THE *SECURITIES ACT*,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED (the "Act")

– AND –

IN THE MATTER OF YUNFU JIANG
(the Respondent)

SANCTIONS DECISION

Hearing	In writing	
Decision	October 15, 2024	
Panel	Valerie Seager	Chair
	Tom Atkinson	Commissioner
	Anne Day	Commissioner
Submissions	Jennie Pick	Counsel for the Director of Enforcement of the Nova Scotia Securities Commission
	Yunfu Jiang	For himself

I. INTRODUCTION

[1] Following a hearing on January 18, 2024 (**Hearing)** before a panel of the Nova Scotia Securities Commission (**Panel**), the Panel found that Yunfu Jiang (**Respondent**) failed to comply with certain of his written undertakings (**Undertakings)** to the Director of Enforcement (**Director**) in violation of section 29EB of the Act. The Undertakings related to funds (**Funds**) transferred by individuals and companies (**Lenders)** to the Respondent. The Commission issued a freeze direction prohibiting the use or withdrawal of the Funds. The freeze order was lifted after the Respondent agreed to certain obligations in connection with the Funds as set out in the Undertakings.

[2] Following the Hearing, the Panel requested written submissions from the Director and the Respondent on sanctions.

[3] In his sanctions submissions, the Respondent claimed impecuniosity as a mitigating factor. The Panel asked both parties to provide additional written submissions on that issue. All requested material was received by July 2, 2024.

[4] The Director requested an order imposing the following sanctions and costs:

(a) for the later of a period of 10 years and the date the Respondent pays his administrative penalty in full:

i. pursuant to section 134(1)(d)(ii) of the Act, the Respondent be prohibited from becoming or acting as a director or officer of any issuer or registrant;

ii. pursuant to section 134(g) of the Act, the Respondent be prohibited from becoming or acting as a registrant or promoter;

(b) pursuant to section 135 of the Act, the Respondent pay an administrative penalty to the Commission of $35,000; and

(c) pursuant to section 135A of the Act, the Respondent pay costs in connection with the investigation and conduct of the proceeding in the amount of $9,000.

[5] The Respondent stated that he had no ability to pay any administrative penalty or costs, and cited what he considered to be mitigating factors relating to sanctions (as more fully set out below).

[6] For the reasons set out below, the Panel will issue an order as follows:

(a) until the later of (a) the fifth anniversary of this decision, and (b) the date on which the Respondent pays his administrative penalty in full:

i. pursuant to section 134(1)(d)(ii) of the Act, the Respondent be prohibited from becoming or acting as a director or officer of any issuer or registrant;

ii. pursuant to section 134(g) of the Act, the Respondent be prohibited from becoming or acting as a registrant or promoter;

(b) pursuant to section 135 of the Act, the Respondent pay an administrative penalty to the Commission of $10,000; and

(c) pursuant to section 135A of the Act, the Respondent pay costs in connection with the investigation and conduct of the proceeding in the amount of $9,000.

II THE LAW

[7] The purpose of the Act, as set out in section 1A, is to provide investors with protection from practices and activities that tend to undermine investor confidence in the fairness and efficiency of capital markets and, where it would not be inconsistent with an adequate level of investor protection, to foster the process of capital formation.

[8] Section 134(1) of the Act allows the Commission to issue a variety of sanctions orders if, after a hearing, it considers it to be in the public interest to do so.

[9] Section 135 of the Act provides that where the Commission, after a hearing, determines that a person or company has contravened or failed to comply with any provision of Nova Scotia securities laws and the Commission considers it to be in the public interest to do so, the Commission may order the person or company to pay an administrative penalty of not more than one million dollars for each contravention or failure to comply.

[10] Section 136A of the Act provides that where the Commission makes an order under section 134 or 135, it may do so on such terms or conditions as the Commission considers necessary or appropriate.

[11] Thus, the Commission has the discretion to make an order responsive to the unique set of circumstances before it.

[12] In its decision in *In the Matter of Electronic Benefits Inc., Everett R. Stuckless and Advantage Financial Group Inc.* (NSSEC, 12 March 2008) (affirmed 2009 NSCA 6) (**Electronic Benefits)**, the Commission set out a non-exhaustive list of the factors to be considered in determining the appropriate sanctions to be ordered in any given matter (at p. 14):

(a) the seriousness of the person’s conduct;

(b) the harm suffered by investors as a result of the person’s conduct;

(c) the damage done to the integrity of the capital markets by the person's conduct;

(d) the extent to which the person was enriched;

(e) factors that mitigate the person's conduct;

(f) the person's past conduct;

(g) the risk to investors and the capital markets posed by the person's continued participation in capital markets;

(h) the person's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or advisor to issuers;

(i) the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets;

(j) the need to deter those who participate in the capital markets from engaging in inappropriate conduct; and

(k) orders made by the Commission in similar circumstances in the past.

[13] Other factors may be relevant depending on the circumstances of the case.

[14] The foregoing list of factors was cited with approval in *Douglas G. Rudolph, Peter A.D. Mill Ltd. (CanGlobe Financial Group), and CanGlobe International Capital Inc. (Re)*, 2021 NSSEC 7, and *Wesley William Robinson and DRR900306 Ltd. (Re),* 2022 NSSEC 1 (***Robinson***).

III ANALYSIS

[15] The Panel found that the Respondent violated Section 29EB of the Act, which provides as follows: "A person or company that gives an undertaking in writing, including by electronic means, to the Commission or Director shall comply with the undertaking."

[16] The Respondent provided seven undertakings to the Commission and breached five of those undertakings. The Undertakings related to the management of the Funds. The Respondent did not manage the Funds in accordance with the Undertakings, did not perform the required record keeping, and did not provide the required communication to the Commission.

[17] Where the Funds ended up, and whether they were repaid to the Lenders, were not issues before the Panel. The Hearing was convened strictly to determine if the Respondent breached the Undertakings. The Panel found that he did. We discuss below the factors most relevant to a consideration of the appropriate sanctions in this case.

Seriousness of Conduct

[18] We agree with the Director that failure to comply with written undertakings is not trivial. In this case, the Commission relied on the Undertakings to release the Funds to the Respondent. The Respondent was then, at best, cavalier in his management of the Funds. The Director had no certainty that the outcome intended by the Undertakings was achieved.

[19] The Director referred the Panel to two decisions of the Alberta Securities Commission (**ASC**) in support of its contention that the breach of the Undertakings represents serious misconduct: *Re Spaetgens*, 2017 ABASC 38, varied on appeal 2018 ABCA 410 (***Spaetgens***), and *Re Cadman*, 2015 ABASC 836 (***Cadman***).

[20] In *Spaetgens*, the respondent failed to comply with undertakings not to act as a director or officer or trade in securities, which were given as part of a settlement agreement related to irregularities in the sale of investments. The ASC determined that the respondent's misconduct was serious and called for significant sanctions (at para. 31).

[21] In *Cadman*, the respondents failed to comply with written undertakings not to act as officers or directors of issuers, which were also part of a settlement agreement. The settlement agreement related to unregistered advising in securities, misrepresentations in advertising materials and offering memoranda and false certifications of offering memoranda. The ASC determined that the respondents' actions in failing to comply with their undertakings constituted serious misconduct (at para. 27).

[22] The Director submitted that not only does the breach of the Undertakings represent serious misconduct, the misconduct is aggravated by the Respondent's actions in concealing the movement of the Funds. The Respondent did not inform the Director when he transferred the Funds to another bank account and another entity, and he advised the Director, through his then counsel, that he continued to hold the Funds even after that transfer. The Director claims that the withdrawal and transfer of the funds and the lack of communication was deliberate, or at best reckless.

[23] The Respondent submits that he did not deliberately try to hide his conduct from the Director and that his breach of the Undertakings arose from poor communications and misunderstandings. He claimed, as he did at the Hearing, that he did not intend to lie or hide anything and that his actions arose from panic and anxiety during a stressful situation.

[24] Certainly, at the time the Undertakings were entered into, the Director had no concerns with the Respondent's intentions or potential malfeasance. As the Director stated in its submission asking the Commission to revoke the freeze order:

> "Even though no finding has been made that Jiang violated securities laws by receiving the frozen funds, Jiang is willing to cooperate with the Commission in returning the frozen funds to the individuals who provided them. He does not wish to violate Nova Scotia securities laws, and if any such violations can be connected to the funds frozen in Jiang's Accounts – for instance, unregistered trading via acts in furtherance of a trade – it appears inadvertence or cultural misunderstanding, rather than malintent, led to any such violations. Jiang's evidence in this respect is credible; he was forthright in his interview….." [Atkinson Affidavit, Exhibit J, page 5).

[25] The Panel made no finding of intent to deceive or malicious intent in its Hearing decision, although there is no doubt the Respondent did not act with full transparency. While aggravating factors may add to the seriousness of a person's conduct, in this case the "aggravating factors" claimed by the Director are, in many instances, the specific conduct comprising the breach itself. For example, the Respondent's failure to communicate with the Director about his actions regarding the Funds was not an aggravating factor to the breach: it <u>was</u> the breach.

[26] The Respondent submitted that the cases relied on by the Director (which we assume is a reference to *Spaetgens* and *Cadman*) had a common factor that the breacher had the intention or consequence of benefiting themselves, a factor that the Respondent argued is absent in the current case.

[27] *Spaetgens* and *Cadman* both arose in the context of undertakings provided pursuant to settlement agreements. This presupposes an admitted breach of securities laws which gave rise to the settlement – in the case of *Spaetgens* it was irregularities in the sale of securities; in the case of *Cadman* it was the breach of various laws relating to capital-raising activity. In the current case, the breach of the Undertakings is itself the violation of the Act.

[28] We agree with the Respondent that the undertaking breaches in *Spaetgens* and *Cadman* were in some way motivated by self interest. For example, in *Spaetgens* the respondent was seeking to improve the financial position of his company; in *Cadman* the respondents sought to expand their business. There is no evidence of self interest in this case.

[29] The breach of an undertaking is not a trivial offence. However, given the Director's position that the breach in this particular case is serious misconduct, the Panel questions why then some form of additional protection or monitoring of the Funds was not included in the written Undertakings in order to reduce the risk of a breach, or at least give prompt warning that a breach had occurred. Entering into the Undertakings did not absolve the Commission of any responsibility to safeguard the Funds. The Undertakings were signed on April 30, 2021, yet it appears that, notwithstanding correspondence between the Respondent and the Director (through the Respondent's counsel), the Director did not become aware that the Funds had been transferred out of the Respondent's account until many

months later. Additional protective measures such as, for example, a requirement for the Respondent to provide copies of his bank statements on a monthly basis could have provided the Director some opportunity to potentially stop further unauthorized transfers and/or alert the Director to a breach of the Undertakings much sooner than occurred.

[30] Given the foregoing, we do not find the Respondent's misconduct to be comparable with that in *Spaetgens* and *Cadman* nor to be as egregious as many other matters that come before the Commission. We do not agree that the Respondent's actions in this particular case, based on the facts before us, constitute serious misconduct.

Harm Suffered by Investors

[31] There is no evidence that the Lenders suffered harm as a result of the breach of the Undertakings. At the Hearing, the Respondent testified that he returned the Funds to the Lenders, although he did not provide evidence to substantiate this. The Director confirmed that no claims had been made to the Commission for a return of any of the Funds. The Panel finds this factor is not relevant in this circumstance.

Damage to the Integrity of the Capital Markets

[32] The Director asserts that the Respondent's breach of the Undertakings undermines investor confidence in the integrity of Nova Scotia's capital markets because it calls into question the efficacy of regulatory oversight. The Commission relies on undertakings in numerous ways in fulfilling its mandate. Section 29EB of the Act specifically requires the giver of an undertaking to comply with it. Failure to do so is a breach of the Act. In order to ensure the efficient functioning of the Commission's business and fulfillment of its mandate, the use of undertakings should not be discouraged or undermined by treating their breach as a minor matter.

[33] In *Spaetgens*, the ASC discussed the harm caused by the breach of an undertaking:

> Those breaches carried foreseeable consequences. The most obvious was the jeopardy to which Spaetgens exposed the securities law enforcement process and public confidence. Participants in the capital market, as well as those charged with enforcing securities laws, must be assured that anyone whose access to the capital markets is restricted by sanction or settlement will be held to those restrictions. (at para. 27)

[34] While *Spaetgens* dealt with undertakings given in a settlement proceeding, the foregoing principles remain valid outside of the settlement context. As the Director noted, undertakings allow flexible and cooperative alternatives to less efficient regulatory measures requiring hearing and adjudication. It is not in the public interest to treat lightly capital market participants whose word cannot be

relied on and who fail to comply with freely negotiated obligations. In the present case, the Undertakings were given as an alternative to a freeze direction in an effort to ensure an efficient, cost effective and timely solution to the disbursement of the Funds, particularly given the foreign/multiple jurisdictions and language barriers involved. Failure to hold an individual who does not comply with their undertakings to account would bring the concept of cooperative, tailored regulatory solutions into disrepute.

The Extent to Which the Person was Enriched

[35] The Respondent submitted that his actions were not motivated by personal benefit nor intended to jeopardize any personal or public interest.

[36] The Director agreed that there is no evidence the Respondent personally benefitted from the breach of the Undertakings "except to the extent the Respondent benefited from the lifting of the freeze direction by saving on any further costs or time associated with the continuance of the direction".

[37] Any such benefit, however, would be offset by obligations imposed on the Respondent by the Undertakings: to contact the Lenders (who were foreign nationals facing certain political challenges and who were difficult to reach), to manage the flow of Funds and to maintain records. Complying with the terms of the Undertakings would presumably have led to expenditures of money and time by the Respondent.

[38] In fact, the benefit of the Undertakings appeared to accrue more specifically to the Commission. As the Director stated in its submission to the Commission requesting that the freeze direction be revoked:

> In addition, there may be difficult political, language, and identification barriers to overcome should the Commission undertake, without Jiang's cooperation, to return the frozen funds to their original providers. None of the individuals who provided the funds have come forward to staff. None of these individuals are compellable to give evidence or information to the Commission since none of them reside in Canada. Jiang has expressed grave concerns about potential harm to those individuals should the funds be returned directly.
>
> The undertakings provided by Jiang facilitate a return process that strikes an acceptable compromise between the Commission's interest in assisting in fund recovery (per *Future Solar*) and the unique considerations of this case.

[39] Given there is no evidence that the Respondent benefitted from entering into or breaching the Undertakings, we do not find this factor to be relevant.

Fitness to be a Registrant or to Bear the Responsibilities Associated with Being a Director, Officer or Advisor to Issuers

[40] The Respondent failed to meet his obligations to the Commission, obligations he freely entered into and upon which the Commission relied. He did not communicate with the Commission as required in a timely matter. Even if, as he states, his actions are the result of poor communication and misunderstanding, his actions indicate that his assurances and statements to the Commission cannot be relied upon. We agree that this reflects poorly on his fitness to be a registrant or to bear the responsibilities associated with being a director, officer or advisor to issuers.

General and Specific Deterrence

[41] As set out in *Re Cartaway Resources Corp*. 2004 SCC 26 (at para. 52) general deterrence sanctions target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. Specific deterrence sanctions target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. In both cases, deterrence is prospective and aimed at preventing future conduct.

[42] The panel in *Robinson* (at para. 10) discussed the deterrent aspect of monetary penalties:

> With respect to monetary penalties, in Sponagle (*In the Matter of Quintin Earl Sponagle and Trevor Wayne Hill* (NSSC, 4 August 2011) the Commission stated (at para. 108):
>
> > … [monetary administrative penalties] are intended to deter future misconduct by the person against whom they are ordered, as well as by others who would consider similar activity, by penalizing those who have breached the Act. This deterrent effect is achieved by removing any financial incentive to breach the Act, and also by imposing additional penalties sufficient to cause an apprehension in any person considering a breach of the Act in the future that they too will suffer a similar penalty if they proceed with such activity.

[43] Sanctions reflecting both general and specific deterrence are appropriate in this case.

[44] In terms of specific deterrence, the Respondent's breach of the Undertakings, a violation of the Act, showed a lack of respect or consideration for the legal obligations he assumed. We agree with the Director that the Respondent's behaviour showed inattention to and disregard for the process he undertook to follow. Sanctions are called for to deter the Respondent from treating regulatory obligations with indifference.

[45] In terms of general deterrence, undertakings assist with the efficiency and efficacy of Commission regulation. Parties who enter into undertakings must fulfil the legal obligations the undertakings reflect and be deterred from agreeing to undertakings they will not keep. Those who do not comply with their obligations must be held to account.

Previous Commission Orders

[46] This is a case of first instance. There are no prior decisions of the Commission addressing the appropriate sanctions for a breach of section 29EB of the Act. The Director has referred us to several sanctions decisions issued by other jurisdictions for consideration. The most relevant of these are *Spaetgens* and *Cadman*, which both related to breaches of undertakings provided pursuant to settlement agreements.

[47] In *Cadman* the sanctions (most of which were agreed to between the parties in advance of the sanctions hearing) consisted of a $110,000 administrative penalty, a five year advising ban, and a 10 year director and officer and capital market management and consulting bans, with tailored carve outs. The ASC took into account some aggravating factors in considering the appropriate sanctions and crafted the sanctions with both general and specific deterrence in mind. The ASC noted that the sanctions were intended to counter a real risk of the respondents further contravening securities laws and also "a serious risk that, without such measures, others might see little risk in breaching undertakings of their own, with foreseeable harm to the enforcement process and public confidence." (at para. 39)

[48] In *Spaetgens*, the ASC noted significant differences between the factual context and scale of *Cadman* and the facts in *Spaetgens* and imposed a $40,000 administrative penalty and a 15 year ban on acting as a director and officer and trading in securities. The Alberta Court of Appeal compared the sanctions imposed in *Cadman* (which was considered a more serious breach) to the sanctions imposed on the respondent in *Spaetgens* and reduced the administrative penalty to $10,000 and the 15 year ban to 10 years. The administrative penalty was reduced, at least in part, because the respondent was impecunious.

[49] The Director cited a number of other cases involving securities regulatory violations similar to breaching an undertaking, including breaching a cease trade order and obstructing or withholding information during an investigation. The Director maintained these were comparable to breaches of undertakings given the perpetrators' dishonesty, untrustworthiness and disrespect for and lack of cooperation with regulatory staff. However, a number of these cases refer to specific instances of misconduct, such as contemptuous communications, directly lying to staff or coaching a witness to lie to an investigator. These are not comparable to the Respondent's situation or the findings of the Panel in the Hearing.

Impecuniosity

[50] In his initial submissions, the Respondent submitted that he had no ability to pay an administrative penalty or costs as he had no place to live, no income, no assets and significant debt.

[51] When asked for details on these claims, the Respondent advised that he was currently living outside of Canada, renting an apartment for a very small sum per month. A copy of the rental agreement was provided. The Respondent further advised that he had minimal income in 2022, and no income in 2023, with no way to find any office job while under investigation by securities commissions. He further advised of an injury preventing him from taking on certain jobs and indicated he was surviving on his wife's support since, as a temporary resident in his current country of residence, he was forbidden from working. He noted as debts his legal expenses relating to investigations by securities commissions and an outstanding loan. Apart from the rental agreement, the Respondent did not provide evidence to corroborate his written submissions.

[52] In its response to the Panel's request, the Director provided materials setting out the factors relevant in determining whether impecuniosity should be considered in a sanctions decision.

[53] The Director noted that the Commission has, in the past, recognized inability to pay as a relevant factor in crafting a sanctions order. In *In the Matter of John Alexander Allen* (NSSEC, 29 June 2011) the Commission noted one relevant factor to be "the effect any sanctions may have on a respondent" (at p. 3). In *In the matter of Bruce Elliott Clarke* (NSSEC, 28 June 2004) and *In the Matter Quintin Earl Sponagle, Trevor Wayne Hill and Larry Enos Beaton* (NSSEC, 28 June 2011) (***Sponagle***), the Commission noted one relevant factor to be "the shame or financial pain that any sanction would reasonably cost the respondent, and the remorse of the respondent". (*Sponagle* at p. 4) In *Maritra Trading Services Inc. (Re)*, 2022 NSSEC 6) the Commission accepted that the proposed administrative penalty was proportionately severe relative to the size of the respondent's revenues. These decisions relate to settlement proceedings and it appears the issue has not previously been raised before the Commission in a contested matter.

[54] The Director also noted a recent decision of the Canadian Investment Regulatory Organization (**CIRO**), which considered inability to pay after finding a Nova Scotia resident breached Mutual Fund Dealer Association rules pertaining to outside business activity and processing transactions as switches (*Re Khaldi*, 2024 CIRO 29) (***Khaldi***).

[55] The Director also referred the panel to CIRO's Sanction Guidelines, which provide in section 5:

> Inability to pay is a relevant consideration in determining the appropriate financial sanctions to be imposed on a respondent. It should not be

> considered a predominant or determining factor, but it may be relevant depending on the circumstances and natures of the misconduct, and consideration of other applicable factors such as general and specific deterrence and the need to ensure public confidence in the disciplinary process.

[56] Based on a review of cases of other securities regulatory authorities provided by the Director, the following principles can be considered relevant in considering impecuniosity as a factor in setting penalties.

Monetary Sanctions must be Proportional and Appropriate to the Individual Circumstances

[57] An appropriate monetary sanction requires a balancing of general deterrence and individual circumstances. The ASC, in *Spaetgens*, adopted a discussion of proportionality in *Re Homerun International Inc.*, 2016 ABASC 95 as follows (at para. 18 of *Spaetgens*):

> Ensuring that sanctions are proportionate involves appropriate consideration of other decisions and settlement outcomes, while recognizing that decisions or outcomes seldom involve identical factual circumstances or wrongdoing.
>
> Panels may be faced with assessing the proportionality of contemplated sanctions against a respondent claiming impecuniosity, or at least a constrained ability to satisfy any monetary order. In this regard, we note the statements in *Walton* that an administrative penalty "beyond the capacity of the individual offender cannot be justified on the basis that it will deter others who are in a better financial conditions" (at para. 165) and that the amount of an administrative penalty should not be "determined after over emphasizing the requirement of general deterrence, without having sufficient regard to the individual circumstances" (at para. 166).
>
> We do not understand these statements to preclude consideration of general deterrence in assessing either the need for, or the appropriate extent of, an administrative penalty against an individual respondent. Rather, this was an admonition not to focus exclusively, or excessively, on general deterrence. The Court of Appeal explained this, and the dangers to be avoided, as follows (*Walton* at para. 156): "An administrative penalty [focused] purely on general deterrence of an unidentified and amorphous sector of the public could easily become disproportionate to the circumstances of the individual involved." We are mindful, however, that a monetary sanction almost inevitably involves (and indeed that a sanction of any type might impose) a burden on a respondent. This does not in itself demonstrate disproportion or unreasonableness in the *Walton* sense; an order with no real effect on the recipient may be no sanction at all.

[58] Impecuniosity, on its own, is not the defining feature of proportionality and does not invalidate the need to impose a monetary sanction. As the ASC stated in *Re Budzinski*, 2023 ABASC 146 (at para. 92):

> […] of course, a monetary sanction invariably imposes a burden on a wrongdoer, but that alone does not "demonstrate disproportion or unreasonableness", given that "an order with no real effect on the recipient may be no sanction at all" (*Homerun* at para. 18). The fact that an administrative penalty has a burdensome effect does not invalidate the regulatory need to encourage lawful conduct by market participants (*Alberta Securities Commission v Brost*, 2008 ABCA 326 at para. 54).

The Party Claiming Inability to Pay Must Substantiate the Claim

[59] The party claiming inability to pay must substantiate the claim in some way, and a bald assertion, without more, should generally be given little weight. However, the nature of the evidence required to sufficiently substantiate the claim varies from case to case.

[60] The CIRO Sanction Guidelines consider this issue in section 5:

> The burden is on the respondent to raise the issue and provide evidence of financial hardship. Evidence of financial hardship should be in the form of sworn affidavits or declaration, along with standard or commonly accepted documents, such as tax returns, bank and investment statements, audited financial statements, or other externally verified financial statement.

[61] The CIRO evidentiary standard is somewhat unhelpful as it does not address the case where a respondent claiming true impecuniosity is unlikely to have investment statements or audited financial statements and indeed, depending on their circumstances, may not have recent bank statement or tax information.

[62] Other securities commissions have considered this issue and provide some guidance on the nature of the substantiation required. In *Rezwealth Financial Services Inc. et al.,* 2014 ONSEC 18, the OSC hearing panel gave no weight to the respondent's claim of impecuniosity in his sanctions submission because no evidence was provided in his submissions other than his annual salary.

[63] In *Feng (Re),* 2023 ONCMT 43, the OSC gave no weight to a respondent's claim he had no ability to pay a significant administrative penalty because no evidence was provided to support the claim.

[64] In *Re Donald Bergman and others*, 2022 BCSECCOM 20, the BCSC rejected a claim of impecuniosity since, while the respondent stated he had no assets and limited income to satisfy any administrative penalty against him, he did not provide any evidence of his financial circumstances.

[65] In *Solar Income Fund Inc. (Re)*, 2023 ONCMT 3, (affirmed on appeal in *Kadonoff v OSC*, 2023 ONSC 6027), the OSC rejected the impecuniosity claims of two respondents because “they simply assert in submission that they are unable to pay. Those assertions are not sufficiently supported to warrant any reduction in financial sanctions.” (at para. 76) One respondent provided an affidavit which stated he was retired and had no significant active source of income but lacked information about assets or actual income. However a third respondent filed a comprehensive affidavit containing detailed information about financial and personal matters that were sufficiently compelling to justify making his inability to pay a administrative penalty a significant factor for the tribunal’s consideration. The tribunal noted “It is well established that an inability to pay is generally not a determinative factor. The burden remains very high for a respondent to demonstrate circumstances that are sufficient to relieve the respondent, partially or wholly, of what would otherwise be their financial sanctions.” (at para. 85)

[66] In *Spaetgens*, the tribunal accepted that the respondent was currently impecunious “although compelling evidence was lacking” (at para. 50). The evidence consisted of a statutory declaration of the respondent as to his assets (or lack thereof) and debt, and oral testimony as to his employment prospects. However, the tribunal did not consider this a factor in determining the amount of an administrative penalty since they were not persuaded that it was impossible or improbable that the respondent’s circumstances would improve. The Court of Appeal accepted the claim of impecuniosity on the record and reduced the administrative penalty of $40,000 to $10,000.

Weight to be Given to Substantiated Claims of Inability to Pay

[67] if a claim of impecuniosity is substantiated, it does not negate the need for an administrative penalty, although in some cases it may affect the quantum of that penalty. Inability to pay, where appropriately substantiated, is just one factor to be considered in the process of determining an appropriate penalty. The ASC noted in *Re Ghani*, 2024 ABASC 48 “[i]n other words, impecuniosity does not justify a nominal administrative penalty” (at para. 104).

[68] In *Khaldi*, the matter heard before a CIRO panel, the respondent testified as to his ability to pay and provided a credit report, declaration and emails with his tax service to substantiate his claim. This was not sufficient to overcome what the panel saw as the need to impose an appropriate administrative penalty and costs order. The panel referred to the CIRO Sanction Guidelines and noted:

> The Sanction Guidelines make provision for consideration of the Respondent’s ability to pay monetary penalties. However, it is not the determining factor. The issues of general and specific deterrence, the appropriateness of the penalty vis a vis the misconduct, public interest and the maintenance of fair and efficient capital markets, and public trust in the ability of the industry to self regulate are essential considerations. (at para. 18)

[69] Ultimately, no pre-determined formula can be applied in apportioning the weight to be given to impecuniosity when determining appropriate sanctions. The sanctions imposed must be appropriate to the circumstances of the individual respondent, including impecuniosity where appropriately substantiated and relevant, the nature of the offence, the presence of aggravating factors, the need for deterrence and the protection of the public interest. Impecuniosity may reduce an administrative penalty or costs order, but it does not mean that there should be no administrative penalties or costs order, or that they should be nominal.

Conclusion

[70] In our view, the actual misconduct in this case was on the lower end of the scale of severity and the presence of aggravating factors was limited. However, any breach of an undertaking can damage the integrity of the capital markets and negatively affect the Commission's ability to fulfil its mandate. We agree with the Director that allowing the Respondent to flout the Undertakings without consequence would discourage cooperative, tailored regulatory solutions. In the interests of fostering efficient capital market regulation and fulfilling the Commission's public interest mandate, sanction decisions must reflect the principle that undertakings represent legal obligations and parties must be deterred from agreeing to undertakings they will not keep, whether intentionally or not.

[71] We agree that an administrative penalty and a market ban are appropriate in this case. The Director seeks an administrative penalty of $35,000 and a 10 year market ban, relying on *Spaetgens*, which resulted at first instance in an administrative penalty of $40,0000 and a 15 year market ban (later reduced on appeal).

[72] A number of factors distinguish *Spaetgens* from the current matter:

(a) the respondent's breach was found by the sanctions panel to be serious misconduct;

(b) the respondent was considered to be an experienced capital market participant;

(c) the respondent's undertaking was given in the context of a settlement agreement relating to prior securities market misconduct;

(d) the respondent derived an intangible and indirect financial benefit from the breach; and

(e) a third party suffered a financial loss in connection with a financial arrangement that was found to be a breach of the Undertaking.

[73] As a result, we believe the sanctions in the current matter should be less than the sanctions imposed in *Spaetgens*.

[74] We do not give any weight to the Respondent's claims of impecuniosity. The Responded did not provide any supporting evidence to substantiate that claim other his bare assertions.

[75] The Director asked for costs of $9,000, supported by an affidavit of the Director of Enforcement. While it may be that some of those costs could have been avoided had the Undertaking included some additional protective measures, we nevertheless accept the requested amount as reasonable in the circumstances.

[76] Based on the foregoing, we will issue an order as follows:

(a) until the later of (a) the fifth anniversary of this decision, and (b) the date on which the Respondent pays his administrative penalty in full:

i. pursuant to section 134(1)(d)(ii) of the Act, the Respondent be prohibited from becoming or acting as a director or officer of any issuer or registrant;

ii. pursuant to section 134(g) of the Act, the Respondent be prohibited from becoming or acting as a registrant or promoter;

(b) pursuant to section 135 of the Act, the Respondent pay an administrative penalty to the Commission of $10,000; and

(c) pursuant to section 135A of the Act, the Respondent pay costs in connection with the investigation and conduct of the proceeding in the amount of $9,000.

NOVA SCOTIA SECURITIES COMMISSION

(signed) "*Valerie Seager*"
Valerie Seager
Chair of the Panel

(signed) "*Tom Atkinson*"
Tom Atkinson
Commissioner

(signed) "*Anne Day*"
Anne Day
Commissioner