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22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue Queen ouest
Toronto ON M5H 3S8

Citation: *Nova Tech Ltd (Re)*, 2024 ONCMT 18
Date: 2024-07-19
File No. 2023-20

**IN THE MATTER OF
NOVA TECH LTD and CYNTHIA PETION**

REASONS AND DECISION

(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)

Adjudicators: M. Cecilia Williams (chair of the panel)
Sandra Blake
Jane Waechter

Hearing: April 25, 26 and 29 and June 7, 2024

Appearances: Brian Weingarten For the Ontario Securities Commission
No one appearing for Nova Tech Ltd or Cynthia Petion

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REASONS AND DECISION

1. OVERVIEW

- [1] Investors who believed they would earn three percent every week by investing in a managed product offered by Nova Tech Ltd lost some or all their money. Nova Tech claimed it could achieve and pay these returns by trading in foreign exchange and crypto assets using pooled investor funds. For this service, Nova Tech charged account management fees and performance fees. Nova Tech and its principal Cynthia Petion promised passive returns to investors, but ultimately suspended withdrawals from investor accounts and stopped communicating with investors.
- [2] The Ontario Securities Commission alleges that Nova Tech breached the *Securities Act* (the **Act**)¹ through unregistered trading, illegal distribution of securities, and breaching the Tribunal's temporary cease trade order. The Commission alleges that Petion authorized, permitted, and acquiesced in Nova Tech's violations of the *Act*. Finally, the Commission claims that Nova Tech and Petion engaged in conduct contrary to the public interest by freezing investor withdrawals while continuing to accept new funds from investors. Neither Nova Tech nor Petion participated in this hearing.
- [3] For reasons that follow, we find that Nova Tech engaged in unregistered trading, an illegal distribution of securities, and breached the temporary cease trade order. We also find that Petion authorized Nova Tech's violations of the *Act*.

2. BACKGROUND

- [4] Petion incorporated Nova Tech under the laws of Saint Vincent and the Grenadines. Petion is the sole shareholder, sole director, and Chief Executive Officer of Nova Tech.
- [5] Nova Tech marketed and sold a passive investment opportunity based on its purported skill in foreign exchange (or forex) and crypto asset trading on a proprietary trading platform. Nova Tech's product was called PAMM – Percentage

¹ RSO 1990, c S.5

Allocation Management Module. According to Nova Tech, an investor who opened an account and invested in the PAMM product could expect to earn returns of approximately three percent per week.

- [6] Each dollar invested in the PAMM product was treated by Nova Tech as a new unit of investment in the pooled fund that Nova Tech purportedly traded. Nova Tech showed a pro rata return on investment for each investor, and that return increased proportionately with each new dollar invested.
- [7] The evidence included videos posted on Nova Tech's YouTube channel. Petion was typically the star of those videos, touting the wealth that would be generated with Nova Tech's PAMM product. In one video, she boasted: "I have people who started with \$99 accounts and are now buying Mercedes and living in nice houses they would have never lived in."
- [8] To invest in the PAMM product, an investor opened an account with Nova Tech, bought and deposited crypto assets into that account, and used a web-based portal to watch their returns accumulate in a connected "bonus" account. Investors had the option to automatically move investment returns from their bonus accounts to their trading accounts for reinvestment, or to manually reinvest the bonus whenever they chose to do so. Nova Tech told investors, and the investors who testified understood, that their returns would compound this way.
- [9] Nova Tech's marketing and sales efforts increased the amount of pooled funds under management. Nova Tech also: provided sales support; maintained a website; operated a YouTube channel; opened an account with an instant messaging service, Telegram, that ultimately had over 30,000 subscribers; and performed back-office functions (including distributing earnings to account holders and processing deposits and withdrawals by investors).
- [10] For its efforts, Nova Tech was entitled to a \$25 per month fee from each investor's account, as well as a 30 percent performance fee on Nova Tech's purported trading profits.
- [11] The evidence showed that PAMM products were sold to thousands of Ontario investors. Specifically, there were 8,571 PAMM accounts registered to Ontario investors.

- [12] On February 5, 2023, Nova Tech sent an announcement to investors explaining that it was imposing a 60-day temporary freeze on account withdrawals. Nova Tech said that withdrawals would be permitted beginning on April 1, 2023. This did not happen. Petion posted a YouTube video on March 31, 2023, imposing further restrictions on withdrawals and saying that she refused to have April 1 become “D-Day” for Nova Tech. Investor witnesses testified to the difficulty or impossibility of withdrawing funds starting as early as December 2022.
- [13] The Tribunal made a temporary cease trade order on February 16, 2023, against Nova Tech. The cease trade order prevented Nova Tech from selling or buying securities and made Nova Tech ineligible to claim exemptions under the *Act*. That order was extended twice and remains in effect until replaced by a further order of the Tribunal. After that temporary cease trade order was made, Nova Tech continued to sell the PAMM product to Ontario investors as described further below.
- [14] Nova Tech was not registered in any capacity with the Commission and did not file a prospectus for the PAMM product.

3. ISSUES AND ANALYSIS

3.1 Introduction

- [15] The issues before us are:
- a. Is the PAMM product a security?
 - b. Did Nova Tech engage in unregistered trading of securities?
 - c. Did Nova Tech engage in an illegal distribution of securities?
 - d. Did Nova Tech breach the temporary cease trade order?
 - e. Did Petion authorize, permit, or acquiesce in Nova Tech’s breaches of Ontario securities law?
 - f. Did Nova Tech and Petion engage the Tribunal’s public interest jurisdiction?
- [16] In addressing the issues, the Commission presented extensive video evidence downloaded from Nova Tech’s YouTube channel. It submits that this evidence is hearsay because it involves out-of-court statements and that it should be

admitted for the truth of its contents. The Commission also asserts that the videos contain admissions by Nova Tech and Petion.

[17] We are comfortable relying on, and giving full weight to, the content of these videos for the following reasons:

- a. The Commission authenticated the videos adequately by describing how the videos were identified during the investigation and how the videos were downloaded from Nova Tech’s YouTube channel.
- b. The videos were clearly prepared to support Nova Tech’s marketing and investor relations efforts. As such, the videos show exactly what Nova Tech told investors both before they invested and during their time with Nova Tech.
- c. Investors who testified at this hearing described some of these videos and confirmed that they had seen and relied on those videos while investing with Nova Tech. We note that, in general, an authenticated video is more reliable proof of its contents than any witness’ recollection of that video.

[18] We now turn to our analysis of the issues.

3.2 Is the PAMM product a security?

[19] The *Act* defines a “security” to include sixteen categories of instruments. The Commission submits that the PAMM product is a security because it is an “investment contract”.² In deciding whether an instrument is a security, we must take a broad and purposive approach to interpreting the *Act*, guided by the investor protection mandate of the *Act*.³

[20] The test for the existence of an “investment contract” comes from the Supreme Court of Canada’s decision in *Pacific Coast Coin Exchange v. Ontario Securities Commission*.⁴ An investment contract has four elements:

- a. an investment of money;
- b. with an intention or expectation of profit;

² *Act*, s 1(1), “security” para (n)

³ *VRK Forex & Investments Inc (Re)*, 2022 ONSEC 1 at para 22

⁴ 1977 CanLII 37 (SCC) (***Pacific Coast Coin***)

- c. in a common enterprise where the success or failure of the enterprise is interwoven with, and dependent on, the efforts of persons other than the investors; and
- d. the efforts made by those others significantly affect the success or failure of the enterprise.

[21] The Commission's investigator presented videos and other content from Nova Tech's website, YouTube channel and Telegram account where Nova Tech described the PAMM product, showed investors how to invest, and described earnings of about three percent each week. Petion featured prominently in these videos and emphasized that Nova Tech offered a passive investment opportunity since Nova Tech traded investors' pooled funds on global forex markets. The videos presented multi-level marketing earning opportunities for investors who successfully recruited new investors to the PAMM product.

[22] Three Ontario investors testified about Nova Tech and the PAMM product. We found their testimony to be clear and credible. Below we summarize each investor's understanding of the PAMM product.

- a. Investor A testified that she understood Nova Tech had a trading platform with expert investors working to invest money on behalf of account holders. She opened an account, invested \$2,000, watched her returns accumulate, and reinvested her earnings using the automatic compounding feature.
- b. Investor B found the PAMM product appealing because he had no knowledge of investments – he and his wife thought they would benefit from Nova Tech making investments on their behalf. They expected to earn between one to three percent each week on their \$20,000 investment.
- c. Investor C said that the allure of passive investment was extremely attractive to him. He understood that Nova Tech would use professional traders across the globe to trade on his behalf. He invested \$9,000. He understood that the PAMM product was yielding an average of three percent weekly. About 7-10 of his Ontario work colleagues were involved with Nova Tech and had received strong returns for two years.

[23] We conclude that the PAMM product sold by Nova Tech has all the characteristics of an investment contract and is therefore a security. Parts three and four of the test are frequently considered together. Based on the facts of this case we consider them separately. We conclude the PAMM product is a security because:

- a. individuals invested their money with Nova Tech for the PAMM product;
- b. they invested with the intention and an expectation of profit – this profit would be paid from Nova Tech’s returns from foreign exchange and crypto trading using pooled investor funds and from potential compounding of returns through reinvestment;
- c. they invested in a “common enterprise” in which the investors supplied capital and Nova Tech traded on their behalf. Nova Tech’s trading efforts were essential to the success of the PAMM accounts. The PAMM product was marketed as a passive investment opportunity where Nova Tech did all the work to generate returns for investors; and
- d. the arrangement depended on the essential managerial efforts of Nova Tech for the success of the enterprise. In addition to trading, Nova Tech provided marketing and sales support, maintained a website, offered social media channels for communicating with investors and performed back-office functions including automating reinvestment of returns, distributing earnings to PAMM account holders and processing deposits and withdrawals by investors.

[24] The decision in *New Found Freedom Financial (Re)*⁵ (**New Found**) supports our conclusion that the PAMM product is an investment contract under the *Act*. The product in *New Found* was strikingly similar to the PAMM product. Investors paid money to New Found and New Found pooled the funds and transferred them to forex traders. Under New Found’s program, the forex traders provided New Found with a monthly return of 10 percent and New Found gave investors a monthly return of 5.28 percent. The Tribunal found that New Found sold investment contracts.⁶

⁵ 2012 ONSEC 46 (**New Found**)

⁶ *New Found* at paras 7-12, 175-180

3.3 Did Nova Tech engage in unregistered trading of securities?

- [25] Subsection 25(1) of the *Act* requires that a company must be registered to engage in, or hold itself out to be engaged in, the business of trading in securities unless an exemption applies.
- [26] Registration is one of the cornerstones of the *Act's* regulatory framework. Registrants serve an important gate-keeping function and protect investors and the capital markets because they must comply with proficiency, integrity, and solvency obligations.⁷
- [27] To find a breach of s. 25(1) of the *Act*, the Commission must establish that the respondents engaged in the business of trading. The onus then shifts to the respondents to identify an exemption and demonstrate their entitlement to rely on it.⁸
- [28] For a registration requirement to apply, there is a “business trigger” test. Companion Policy 31-103CP, *Registration Requirements, Exemptions and Ongoing Registrant Obligations* identifies factors relevant to determining whether a company is engaged in the business of trading in securities. This Tribunal has previously applied the Companion Policy's non-exhaustive list of factors.⁹ These factors include whether:
- a. the respondent undertook activities similar to a registrant;
 - b. the respondent directly or indirectly solicited securities transactions;
 - c. the respondent received or expected to receive compensation for the activity; and
 - d. the respondent continued these activities with repetition or regularity.
- [29] For Nova Tech, each of these factors are present and we find that Nova Tech was in the business of selling securities because:
- a. Similar to a registrant, Nova Tech sold the PAMM product to Ontario investors so that they could earn returns. The Commission's investigator

⁷ *Stinson (Re)*, 2023 ONCMT 26 (***Stinson***) at para 32

⁸ *Black Panther Trading Corp (Re)*, 2017 ONSEC 1 at para 95

⁹ *Stinson* at para 37

presented a detailed video recording of the Commission opening an account, transferring a small amount of crypto assets into it, and topping up the account after the Tribunal's cease trade order was in effect. Investors A and B described a similar process for opening and funding an account. We find that to an investor the process might seem like setting up an online account with a registrant.

- b. Nova Tech's continuous and aggressive promotion of the PAMM product as an investment opportunity over social media (YouTube and Telegram) and on its website shows its broad-based solicitation of investors. Investor C described direct contact with a Nova Tech representative to invest. Nova Tech's multi-level marketing initiative brought each of Investors A, B and C to Nova Tech.
- c. Nova Tech engaged in a for-profit business and received management and performance fees.
- d. The evidence establishes that Nova Tech solicited investors over a period of at least 2 years. The regularity of its efforts brought in 8,571 Ontario investors.

[30] Nova Tech was not registered with the Commission and did not take part in this hearing to claim any entitlement to an exemption from registration.

[31] In summary, Nova Tech was in the business of selling securities – specifically the PAMM product. As such, we find that Nova Tech violated s. 25(1) of the *Act* by engaging in the business of trading in securities without being registered with the Commission.

3.4 Did Nova Tech engage in an illegal distribution of securities?

[32] Nova Tech did not file a prospectus with the Commission. As described below, none of the three investors who testified qualified as accredited investors, and it did not appear that Nova Tech asked investors questions directed at whether they qualified for that exemption from the prospectus requirement.

[33] Investors A, B and C are Ontario residents who did not meet the individual income, family income, or financial asset thresholds to qualify as accredited

investors. They would have benefitted from a prospectus, just as they would have benefitted from a knowledgeable registrant to guide them. In particular:

- a. Investor A is a retired teacher who learned about Nova Tech from a former colleague. She was interested because her colleague showed her the returns that were possible. Investor A had minimal investment knowledge and no forex or crypto investing experience.
- b. Investor B is an IT consultant with no investment knowledge and no experience in forex or crypto trading. He learned about Nova Tech from a relative who would receive a bonus from Nova Tech for signing up other investors. Nova Tech did not ask him for any Know Your Client information and did not provide any cautions about risks involved in the investment.
- c. Investor C has a background as an insurance advisor. He described his investment knowledge as “better than most.” He learned about the Nova Tech opportunity from work colleagues who became his “upline” in Nova Tech’s multi-level marketing structure. He asked for a great deal of assistance from a Nova Tech representative in setting up his account.

[34] The prospectus requirement is another cornerstone of the Ontario securities regulatory regime. A prospectus ensures that investors have full, true, and plain disclosure of all material facts concerning the securities being offered for investment. When investors have this disclosure, they are properly equipped to assess the risks of an investment and to make informed investment decisions.¹⁰

[35] A person or company must not distribute a security without a prospectus unless an exemption applies.¹¹ Section 1(1) of the *Act* defines “distribution” as including “a trade in securities of an issuer that have not been previously issued.”

[36] The onus is on the Commission to show that a prospectus is required. Then, the burden shifts to the respondents to show an entitlement to an exemption.¹² We also considered the Commission’s evidence about the accredited investor exemption.

¹⁰ *Limelight Entertainment Inc (Re) (Limelight)*, 2008 ONSEC 4 at para 139

¹¹ *Act*, s 53(1)

¹² *Meharchand (Re)*, 2018 ONSEC 51 at para 95; see also *Limelight* at para 142.

[37] The PAMM products sold to Ontario investors were securities that were not previously issued. Nova Tech treated each dollar invested as a new unit of investment in the pool fund that Nova Tech purportedly traded. Each investor saw a pro rata return on investment in their bonus account and saw that return increase proportionately with each new dollar invested.

[38] Because the PAMM products were not previously issued securities, this trading qualifies as a distribution of securities requiring a prospectus. As stated previously, the accredited investor exemption did not apply to the three witness investors. Not having filed a prospectus, and not having availed itself of an exemption, Nova Tech has breached s. 53(1) of the *Act*.

3.5 Did Nova Tech breach the temporary cease trade order?

[39] The Commission alleges that Nova Tech has also breached Ontario securities laws by breaching the cease trade order. The *Act's* definition of Ontario securities law includes an order of the Tribunal that a person or company is subject to.¹³ Thus if the Commission establishes that Nova Tech has breached the cease trade order, it will also establish a breach of Ontario securities law.

[40] Since February 16, 2023, there has been a cease trade order against Nova Tech, providing that:

- a. all trading in any securities by Nova Tech, or any person on their behalf, shall cease;
- b. the acquisition of any securities by Nova Tech, shall cease; and
- c. any exemption contained in Ontario securities law does not apply to Nova Tech.

[41] To establish a breach of the cease trade order, the Commission must prove on a balance of probabilities that Nova Tech traded in securities while the temporary cease trade order was in effect.¹⁴

[42] On April 24, 2023, a Commission investigator added additional funds to the Commission's PAMM account. We find that this transaction was a trade in the

¹³ *Act*, s 1(1) "Ontario securities law", "decision"

¹⁴ *MOAG Copper Gold Resources Inc (Re)*, 2020 ONSEC 3 at para 33

PAMM security because, after the deposit, the Commission owned more of the PAMM product. This trade happened more than three months after the date of the temporary cease trade order.

- [43] Initially, the correct geographic option for an Ontario investor to select when opening an account was “Canada”. In 2023, “Canada” was no longer available in the Nova Tech drop down address menu, so the investigator selected a US address to make this deposit. We do not find this significant because the Commission’s account profile remained an Ontario address and because Nova Tech sent a confirmation listing the Ontario address to acknowledge the deposit.
- [44] Investor C testified that he was directed to use a different address to get around the temporary cease trade order. A corroborating January 2023 Nova Tech YouTube video showed a Nova Tech representative recommending address changes to investors in Canada so that they could continue to invest in Nova Tech.
- [45] We find that Nova Tech’s removal of Canada as an address option for investors did not prevent Ontario investors from investing funds in Nova Tech while the temporary cease trade order was in place. Without additional controls, this effort to comply with the temporary cease trade order was illusory at best.
- [46] Nova Tech also continued to permit Ontario investors to transfer accumulated returns from their bonus accounts to their PAMM trading accounts after the temporary cease trade order was in place.
- [47] A Commission investigator switched the Commission’s account to automatically transfer weekly bonus earnings to its trading account while the temporary cease trade order was in effect.
- [48] Investor B continued to manually reinvest bonus amounts after Nova Tech’s February 2023 notification that it had suspended withdrawals. He produced a receipt for the reinvestment of his bonus amount dated February 24, 2023 (eight days after the temporary cease trade order) and testified that he also reinvested additional bonus amounts after that.
- [49] Investor C used automatic deposit for his bonus account after Nova Tech’s withdrawal freeze because he understood that was the only way to keep his

account active and continue to receive bonus payments. His reinvestment period stretched beyond the date of the temporary cease trade order.

[50] Since each of these transfers from a bonus account to a trading account was a new investment in the PAMM product, we find that these reinvestments were trades in newly issued securities after the temporary cease trade order was in place.

[51] We are satisfied that these examples show that Nova Tech breached the temporary cease trade order and accordingly violated Ontario securities law.

3.6 Did Petion authorize, permit, or acquiesce in Nova Tech's breaches of Ontario securities law?

[52] As the founder, sole director and CEO of Nova Tech, Petion was credited with "creating, planning, implementing and integrating the strategic direction" of Nova Tech and for overseeing the operations of the company. She was the online face of Nova Tech. She appeared in videos promoting investments in the PAMM product and made representations about every aspect of that security. She proudly described the riches that were available from an investment in the PAMM product.

[53] Section 129.2 of the *Act* provides that if a director or officer authorized, permitted, or acquiesced in a company's non-compliance with Ontario securities law, the director or officer shall be deemed to have also not complied with Ontario securities law. The threshold for liability under s. 129.2 is a low one.¹⁵

[54] We find that Petion, as the sole director and CEO of Nova Tech, authorized Nova Tech's breaches of Ontario securities law.

3.7 Did Nova Tech and Petion's conduct engage the Tribunal's public interest jurisdiction?

[55] The Commission submits that the respondents' conduct in continuing to accept investments in the PAMM product while simultaneously freezing investor withdrawals was contrary to the public interest.

¹⁵ *Momentas Corporation (Re)*, 2006 ONSEC 15 at para 118

- [56] The phrase “contrary to the public interest” does not appear in the *Act*. It is rooted in the opening words of s. 127: “The Tribunal may make...orders if in its opinion it is in the public interest to make the...orders.” It refers to those instances where the Tribunal finds it to be in the public interest to issue an order under s. 127 for conduct, even where the Tribunal has not found that the conduct specifically breaches Ontario securities law. In those instances the conduct in question must be clearly abusive of the capital markets or it must violate an animating principle of the *Act*.
- [57] On February 5, 2023, in the face of a surge in investor withdrawal requests, Petion announced that Nova Tech was suspending withdrawals for 60 days. She said that Nova Tech would continue to post returns in investor accounts during the freeze period. She explained that investors with pending withdrawal requests could keep their place in the queue until withdrawals resumed on April 1, 2023, or reinvest their continuing returns in their accounts.
- [58] On March 31, 2023, one day before the withdrawal freeze was supposed to end, Nova Tech announced further restrictions. Petion said in a video that she was not prepared to have April 1 become “D-Day” for Nova Tech. The effect of the restrictions, based on the testimony of the investigator and investors, was to make it highly unlikely for investors to be able to withdraw funds.
- [59] Despite the freeze and subsequent further restrictions, Nova Tech continued to accept investments in the PAMM product. The Commission’s investigator opened an account and purchased units of the PAMM product during this period. Investor B testified that during the freeze period he manually moved funds from his bonus account to his PAMM account because he had no other option for those funds.
- [60] Attempts by Investors A and B to withdraw their funds during the freeze period were unsuccessful. After several attempts, Investor C succeeded in withdrawing only \$17 from a balance of about \$21,000.
- [61] The Commission clarified that not all account freezes would be considered abusive. They say that different considerations may apply to those operating in compliance with the registration and prospectus requirements of the *Act* or in consultation with a securities regulator.

[62] The Commission also sought to reframe the allegation as Nova Tech and Petion making misrepresentations to investors, particularly about when and on what terms withdrawals could be made. The Commission did not include the necessary supporting facts or allegation in the Statement of Allegations for this submission and we are therefore unable to make a ruling on it.

[63] Nova Tech's conduct in continuing to accept deposits while freezing withdrawals is troubling. However, we decline to make a finding in the public interest in these circumstances. As stated above, public interest orders are generally made for conduct that is not otherwise a breach of the *Act*. We found that the act of continuing to accept deposits in the face of the temporary cease trade order is a violation of the *Act*. Therefore, the requested public interest finding is not appropriate in this instance.

4. CONCLUSION

[64] For the reasons above, we find that:

- a. Nova Tech engaged in the business of trading without being registered in breach of s. 25(1) of the *Act*;
- b. Nova Tech distributed securities without a prospectus, and without any applicable exemptions from the prospectus requirement, contrary to s. 53(1) of the *Act*;
- c. Nova Tech breached a temporary cease trade order and therefore breached Ontario securities law; and
- d. Petion is deemed under s. 129.2 of the *Act* to have not complied with Ontario securities law in relation to each of Nova Tech's breaches.

[65] We therefore require that the Commission contact the Registrar by 4:30 p.m. on August 6, 2024, to arrange an attendance, to schedule a hearing regarding sanctions and costs, and the delivery of materials in advance of that hearing. The attendance is to take place on a mutually convenient date that is fixed by the Governance & Tribunal Secretariat, and that is no later than August 23, 2024.

Dated at Toronto this 19th day of July, 2024

"M. Cecilia Williams"

M. Cecilia Williams

"Sandra Blake"

Sandra Blake

"Jane Waechter"

Jane Waechter