

CANADA / JUDGMENT

British Columbia (Securities Commission) v. Liu

2020 BCCA 338

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 338 British Columbia (Securities Commission) v. Liu

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

British Columbia (Securities Commission) v. Liu,

2020 BCCA 338

Date: 20201105

Dockets: CA46957; CA46958

Docket: CA46957

Between:

British Columbia Securities Commission

Respondent

And

The Executive Director of the British Columbia Securities Commission

Respondent

And

Justin Edgar Liu and Lukor Capital Corp.

Appellants

And

BridgeMark Financial Corp., Jackson & Company Professional Corp.

and Anthony Kevin Jackson

Respondents

- and -

Docket: CA46958

Between:

British Columbia Securities Commission

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And

BridgeMark Financial Corp., Jackson & Company Professional Corp.

and Anthony Kevin Jackson

Appellants

And

Justin Edgar Liu and Lukor Capital Corp.

Respondents

SEALED FILES

Before:

The Honourable Madam Justice Bennett

(In Chambers)

On appeal from: A decision of the British Columbia Securities Commission, dated July 10, 2020 (Re BridgeMark, 2020 BCSECCOM 254).

Oral Reasons for Judgment

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Justin Edgar Liu and Lukor Capital Corp.

(via teleconference):

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BridgeMark Financial Corp., Jackson &

Company Professional Corp. and

Anthony Kevin Jackson

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British Columbia Securities Commission

and the Executive Director of the British

Columbia Securities Commission

(via teleconference):

G.R. MacLennan

Place and Date of Hearing:

Vancouver, British Columbia

October 30, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 5, 2020

Summary:

The applicant seeks leave to appeal a decision of the British Columbia Securities Commission dismissing the applicant's application to set aside or vary freeze orders issued against the applicant's real and personal property. On appeal, the applicant would argue that the Commission erred in law in (1) maintaining the freeze orders in the absence of evidence and (2) failing to correctly apply the test to revoke or vary a freeze order. The applicant also applied for a sealing order and to hear the CA46957 and CA46958 appeals together. Held: The appeals will be heard together, the uncontested application for a sealing order is granted, and the application for leave to appeal is granted. The issues in the appeal have significance to the parties and to the practice, and the appeal has merit despite the high degree of deference afforded to the Commission. It is in the interests of justice to grant leave to appeal.

BENNETT J.A.:

Nature of the Application

- [1] Justin Edgar Liu, Lukor Capital Corp. ("Lukor"), BridgeMark Financial Corp. ("BridgeMark"), Jackson & Company Professional Corp., and Anthony Kevin Jackson (together, the "Applicants"), seek leave to appeal the decision of a statutory body, the British Columbia Securities Commission (the "Commission"), pronounced on July 10, 2019 (the "Decision").
- [2] The reasons for the Decision are indexed at 2020 BCSECCOM 254 (the "Reasons"). The applications of BridgeMark and Mr. Liu were heard together before the Commission. I grant leave to appeal for the following reasons.
- [3] In the Decision, the Hearing Panel of the Commission (the "Panel") dismissed the Applicants' application to set aside or vary the freeze orders issued pursuant to s. 151 of the Securities Act, R.S.B.C. 1996, c. 418 [Act]. The freeze orders were issued as against the Applicants' bank accounts, brokerage accounts, and real property (collectively, the "Freeze Orders").

Background

Overview

- [4] On September 14, 2018, the Commission issued an investigation order against the Applicants under s. 142 of the Act.
- [5] On November 26, 2018, the Executive Director issued a notice of hearing against 62 respondents, including the Applicants. In the notice of hearing, the Applicants were alleged to have engaged in conduct that is abusive to the capital markets. There was no allegation of any specific breach of the Act.
- [6] The investigation was amended on January 4, 2019 to add new subjects to the investigation and to broaden the time period of the investigation.
- [7] Between September 2018 and February 2019, the Executive Director applied for, and the Commission issued, a large number of freeze orders.
- [8] On February 15, 2019, the Commission issued the Freeze Orders, which also authorized the filing of charges under the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], against real property in which some of the Applicants have an interest: Reasons at para. 20.
- [9] The Applicants applied to the Commission under ss. 165 and 171 of the Act to revoke or vary the Freeze Orders: Reasons at para. 21.
- [10] The Executive Director opposed the applications, requesting that they be dismissed in their entirety: Reasons at para. 3. In declining the request to vary the Freeze Orders, the Executive Director stated, at para. 22:

the Freeze Orders are in place to maintain the status quo, and it would not be in the public interest to vary them to permit any amount of the funds to be withdrawn or used to purchase securities that would remain in the frozen accounts.

[11] On May 8, 2019, the Attorney General of British Columbia requested that the Commission refer a stated case to the Supreme Court of British Columbia pursuant to s. 43(5) of the Administrative Tribunals Act, S.B.C. 2004, c. 45 (the "Charter Case"), regarding the constitutionality of s. 151 of the Act under the Canadian Charter of Rights and Freedoms, Part of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 ["Charter"].

The Proceedings Below

[12] The Panel began by canvassing the applicable law and policy, and the respective positions of the parties.

[13] The Panel noted that since the parties had made their submissions, significant amendments had taken place, under the Securities Amendment Act, S.B.C. 2019, c. 383 [Amendment Act]. Section 151 of the Act was repealed on March 27, 2020 and the Commission's freeze order powers under that section were replaced by new preservation order powers under ss. 164.04 to 164.08 of the Act.

[14] The Panel noted that the "purpose and application of the Commission's freeze order power under the Act is to 'regulate trading in securities and protect the public interest': Reasons at para. 30. In doing so, the Panel cites to *Amswiss Scientific Inc.*, [1992], COR #92/026, in which the Commission wrote, at pp. 34-35:

[31]

Considering the paramountcy of the public interest in securities regulation, we conclude on balance that the legitimate expectations of the public [i.e. for the Commission to have and use its discretionary powers to protect the public interest] are more compelling than any expectation of undisturbed possession of property which the Respondents may have had.

[15] The holding in *Amswiss* as to the purpose of the freeze order provision was "quoted with approval by [this Court] in *Exchange Bank & Trust [Inc. v. British Columbia Securities Commission]*, 2000 BCCA 389": Reasons at para. 32.

[16] Importantly, the Panel emphasized, at para. 33:

[33] The courts recognize that freeze orders are often made at a very early stage of an investigation. They are not determinative of the facts in issue; they are made to preserve property until the facts can be established, either through investigation or through a hearing before the Commission. ...

- [17] In their written submissions before the Panel, the Applicants argued that it was "not prejudicial to the public interest to revoke freeze orders issued in relation to allegations that do not involve a contravention of the Act": Reasons at para. 35. The Applicants argued that there is no allegation of a breach of the Act that would entitle the Commission to issue monetary orders against them. The Applicants argued that if the allegations in the notice of hearing are proven to be true, the remedy afforded to the Commission does not include the authority to issue monetary orders against the Applicants: Reasons at para. 36.
- [18] The thrust of the Applicants' argument before the Panel was that there was no purpose to the freeze orders and therefore no prejudice to the public in their revocation: Reasons at para. 36.
- [19] On other grounds, the Applicants submitted that there have been significant changes in circumstances since the issuance of the Freeze Orders that warrants their variation. The Applicants also submitted that the position of the Executive Director was "arbitrary and unreasonable". Finally, the Applicants submitted that there was "no basis on which the Commission could freeze the assets of a person not subject to an investigation order made in this proceeding": Reasons at paras. 37-39.
- [20] The Executive Director simply argued that "it is irrelevant that the [notice of hearing] does not allege any specific breach of the Act by the Joint Applicants. He pointed to the fact that freeze orders can be issued in the absence of any allegations against the investigation subjects (i.e. when a freeze order is issued in the absence of a notice of hearing)". It was submitted that as the investigation is ongoing, the notice of hearing could be later amended: Reasons at paras. 40-41.
- [21] The Executive Director tendered "extensive evidence" to show that it would be "demonstrably dangerous to [the] capital markets" to revoke or vary the Freeze Orders "in any way": Reasons at para. 43.
- [22] In beginning the analysis, the Panel noted that the "applicable test in a section 171 application is whether it would be prejudicial to the public interest to revoke or vary the freeze orders in question", and that the "applicants bear the burden of proof": Reasons at paras. 45-46.
- [23] The Panel found that the words of s. 151 "are precise and unequivocal such that their ordinary meaning should play a dominant role in the interpretive process". Indeed, s. 151 "does not stipulate that a freeze order may be issued or maintained only in circumstances where a breach of a specific provision of the Act was being investigated, alleged or contemplated to be investigated or alleged": Reasons at para. 48.
- [24] The Panel concluded that the wording of s. 151 did not support the argument of the Applicants as to the asserted prerequisite of a specific provision of the Act being investigated.

- [25] The Panel turned their mind to the inherent limits within s. 151, noting that "while the discretion in section 151 is necessarily broad and flexible, we are of the view that the power should only be exercised in keeping with its purpose, consistent with a contextual and purposive approach to find meaning that is harmonious with the objectives of the Act": Reasons at para. 50.
- [26] Therefore, the Panel held at para. 52:
- ... if and when we can be certain that there are no persons who may have common law or statutory claims to or interests in the assets preserved under the Act, a freeze order under section 151 would no longer serve its intended purpose. ...
- [27] The Panel noted that the investigation has been extensive, and that there "is no indication that the executive director is not pursuing the investigation diligently": Reasons at para. 54. The investigation was ongoing, which means there was no basis upon which to conclude that the Executive Director was pursuing the investigation in relation only to the conduct contrary to the public interest.
- [28] The Panel concluded at paras. 58 and 60:
- [58] In the context of an active and ongoing investigation, it is premature to make a determination that this investigation will not give rise to claims on the Joint Applicants' frozen assets that are not apparent at this time. In summary, we find that these proceedings are not at a point when we can be certain that there are no persons who may have common law or statutory claims to or interests in the Joint Applicants' frozen assets under the Act.
- [60] Considering the paramountcy of the public interest in securities regulation, the continued preservation of assets in the public interest is more compelling than the continued impact of the freeze orders in question on the [Applicants].
- [29] The Panel concluded, on all other arguments, that "there is no new and compelling evidence or evidence of any significant change in circumstances that would warrant revoking the Freeze Orders": Reasons at para. 66.
- [30] Accordingly, the Panel dismissed the applications to revoke or vary the Freeze Orders, finding that to do so would be prejudicial to the public interest: Reasons at paras. 67 and 72.

Law

Consolidate/Hear Appeals Together

- [31] The parties agree that the appeals in Liu and in BridgeMark should be heard together. Additionally, there is no objection to the application to extend the time to file the Applicants' motion book which was filed one day out of time.

Application for a Sealing Order

- [32] A sealing order prohibits access to all or part of the record. Section 10(2)(a) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 allows a single justice to "make an order incidental to the appeal or matter not involving a decision of the appeal on the merits". Section 10(2)(b) of the Court of Appeal Act permits a single justice to "make an interim order to prevent prejudice to any person".
- [33] In *Sahlin v. The Nature Trust of British Columbia*, 2010 BCCA 516, Tysoe J.A. granted an order sealing certain files. He set out the test for "confidentiality orders" as such:
- [6] The Supreme Court of Canada dealt with an application for a confidentiality order in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Mr. Justice Iacobucci expressed the test for a confidentiality order as follows at para. 53

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
 - (b) The salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
- [7] In *Blue Line Hockey Acquisition Co v. Orca Bay Hockey Limited Partnership*, 2007 BCSC 1483, 78 B.C.L.R. (4th) 100, Madam Justice Wedge considered an application by the media for access to an exhibit in litigation between private parties in relation to private interests. She noted that the balancing of competing interests is somewhat different in such litigation as a result of reasonable expectations of privacy. Madam Justice Wedge discussed how the balancing of those interests should be determined in terms of the opening words of the reasons in *[Toronto Star Newspapers Ltd. v. Ontario]*, 2005 SCC 41, [2005] 2 S.C.R. 188]:
- [49] I return then to the words of Fish J. in *Toronto Star*. Will a balancing of the competing interests in this case create a "cloud of secrecy" under which justice will wither? The answer must be "no".

I agree with the way in which Madam Justice Wedge has framed the issue.

- [34] In *C.S. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCCA 406, a division of this Court noted that this framework as set out in *Sahlin* guides applications for non-statutory confidentiality orders, such as sealing orders and anonymity orders.
- [35] The onus is on the party seeking a sealing order to demonstrate the necessity of such an order. The applicant must demonstrate that a superordinate public interest prevails over the public's interest in open court proceedings.

[36] In *Party A v. British Columbia (Securities Commission)*, 2020 BCCA 88, Saunders J.A. ordered a sealing order on March 4, 2020. In my view, the reasoning in that decision applies in this case, and I would, therefore, grant the sealing order as requested.

Leave to Appeal

[37] The governing authority on leave applications from statutory tribunals is *Queens Plate Development Ltd. v. Vancouver Assessor*, Area 09 (1987), 16 B.C.L.R. (2d) 104, 22 C.P.C. (2d) 265 at 109-110; see also *British Columbia Securities Commission v. McLean*, 2010 BCCA 454 at para. 4. In *Queens Plate*, Taggart J.A. (in Chambers) outlined the following factors which may be considered in determining leave in statutory appeals:

- (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from ;
- (b) whether the appeal is limited to questions of law involving:
 - (i) the application of statutory provisions ...;
 - (ii) statutory interpretation that was particularly important to the litigant ...; or,
 - (iii) interpretation of standard wording which appears in many statutes ;
- (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...;
- (d) whether there is some prospect of the appeal succeeding on its merits ... although there is no need for a Justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;
- (e) whether there is any clear benefit to be derived from the appeal ...; and
- (f) whether the issue on appeal has been considered by a number of appellate bodies

[Internal citations omitted.]

[38] In *Smolensky v. British Columbia Securities Commission*, 2006 BCCA 254 at para. 9, Finch C.J.B.C. added that leave applications from statutory tribunals also engage the standard factors for leave, as articulated in *Hockin v. Bank of British Columbia* (1989), 37 B.C.L.R. (2d) 139 at 143 (Wallace J.A. in C.A. Chambers):

- (1) whether the point on appeal is of significance both to the litigation before the court and to practice in general;
- (2) whether the appellant has an arguable case of sufficient merit;
- (3) the benefit to the parties of an appellate decision in practical terms; and
- (4) most importantly, whether the appeal will unduly hinder the progress of the action.

- [39] This "extra" step has been followed in a number of decisions, most frequently with respect to appeals from the Commission: *Botha v. British Columbia (Securities Commission)*, 2009 BCCA 214 at paras. 4–7 (Chiasson J.A. in Chambers, discussing an order made under the Act); *Sihota v. British Columbia Securities Commission*, 2013 BCCA 473 at para. 12 (Tysoe J.A. in Chambers, discussing an order made under the Act).
- [40] A justice may grant leave to appeal on only part of the decision below, or may limit the issues on appeal: see *Huber v. British Columbia (Securities Commission)* (1994), 3 C.C.L.S. 98 (B.C.C.A., in Chambers), where Hinds J.A. denied leave to appeal the impugned decision, but granted leave to appeal the related penalty.
- [41] In *Smith v. Global Plastics*, 2001 BCCA 152, Hall J.A. (in Chambers) noted that other matters may be relevant to the determination, including whether it would be likely to "cause great injustice to a party if leave was not granted": at para. 6. As Saunders J.A. has observed, the listed factors are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (in Chambers). The "overarching concern is the interests of justice": *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538.

Positions of the Parties

Appellant/Applicant

- [42] The Applicants seek leave to appeal and costs in the event of an appeal.
- [43] The Applicants state that the "issue in this case is whether the Commission erred in maintaining freeze orders over the appellants' property in the absence of any allegation or evidence of such claims and on the basis of speculation that it cannot be certain that such claims would not arise".
- [44] The Applicants submit that the Panel:
- (1) erred in law in maintaining an order under s. 151 in the absence of any other allegation or evidence engaging the purpose of the section to preserve property for claims arising from breaches of the Act; and
 - (2) failed to apprehend the test under s. 171 for revoking or varying an order issued under s. 151.
- [45] The Applicants submit that the appeal is meritorious as there are substantial questions to be argued. The Applicant submits that the proposed appeal raises the issue of the "interpretation and interrelation" of ss. 151 and 171 of the Act.
- [46] The Applicants argued that, in maintaining the Freeze Orders despite a nearly two-year investigation, the Panel "thereby asserts a jurisdiction to continue a freeze order over a person's property in the absence of any present allegation or evidence that the property may be required for the public interest purposes underlying the section". The Applicants argue this creates an "impossible standard".

- [47] As such, the Applicants argue this Court must consider the precise nature and scope of the public interest features of ss. 151 and 171.
- [48] The Applicants submit that the proposed appeal will raise questions of significance and benefit to the practice and the action. In the Applicants' submission, it presents an opportunity to consider tests under ss. 151 and 171, particularly with reference to a jurisdictional comparison to Ontario.
- [49] Finally, the Applicants argue that the appeal will not hinder the progress of the underlying proceedings as granting leave, and the appeal itself, will not affect the ongoing investigation. The Applicants point to the fact that various other freeze orders have been granted, varied, or rescinded without hindering the ongoing investigation.

Respondents -- BridgeMark, Jackson & Company, and Anthony Kevin Jackson

- [50] The Respondents, BridgeMark, Jackson & Company, and Anthony Kevin Jackson, adopt and incorporate the submissions of the Applicants, Mr. Liu and Lukor.

Respondent -- Commission and Executive Director

- [51] For clarity, any reference herein to "Respondent" is a reference to the Commission or the Executive Director. It is not a reference to BridgeMark, Jackson & Company, or Anthony Kevin Jackson.
- [52] The Respondent opposes granting leave to appeal the Decision, submitting that the Panel committed no reviewable error in its exercise of its discretion.
- [53] The Respondent submits that the Applicants raise issues that were not argued by the parties on the underlying application and thus cannot form the basis of an appeal. Namely, the issues alleged to be raised for the first time on appeal are: (1) the argument that an allegation of a specific breach is required to maintain a freeze order; and (2) the proposed appeal provides an opportunity to assess the interpretation of ss. 151 and 171 of the Act.
- [54] The Respondent argues that s. 171 affords the Commission broad discretion, that was affirmed by this Court in *Zhu v. British Columbia (Securities Commission)*, 2013 BCCA 248 at paras. 48 and 58. The Respondent submits that an application of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, entitles the Commission to significant deference. Thus, the Respondent submits that the standard of review militates against granting leave.
- [55] The Respondent submits that no allegation of specific breach is required to maintain a freeze order under the Act.

[56] The Respondent submits that the discretionary decision of the Panel not to revoke the Freeze Orders, based in the preliminary evidence of potential misconduct that the Applicants were "major actor[s]" and "significant participants" in the alleged wrongdoing, is one that is entitled to deference.

[57] The Respondent submits that the Charter Case (that is, the case mentioned above in which the Attorney General of British Columbia, has referred a constitutional question respecting the constitutionality of s. 151 to the Supreme Court of British Columbia, set for the week of November 16, 2020) is the more appropriate forum for the Applicants' arguments. Thus, the Respondent submits that "absent a constitutional challenge to [ss. 151 and 171], this Court is limited to reviewing the Decision for errors of law".

The Current State of the Act

Section 151

[58] As referenced above, significant amendments to the Act came into force on March 27, 2020. Section 151, reproduced below, is the version in force during the relevant time.

Order to freeze property

151 (1) The commission may make a direction under subsection (2) if

- (a) it proposes to order an investigation in respect of a person under section 142 or during or after an investigation in respect of a person under section 142 or 147,
 - (b) it or the executive director proposes to make or has made an order under section 161 in respect of a person,
 - (c) criminal proceedings or proceedings in respect of a contravention of this Act or the regulations are about to be or have been instituted against a person and the commission considers the proceedings to be connected with or to arise out of a security or exchange contract or a matter relating to trading in securities or exchange contracts, or out of any business conducted by the person,
 - (d) a person fails or neglects to comply with financial conditions applicable to the person under this Act, or
 - (e) it proposes to apply or has applied to the Supreme Court for an order under section 157, or the Supreme Court has made an order under section 157.
- (2) In the circumstances described in subsection (1), the commission may direct, in writing,
- (a) a person having on deposit, under control or for safekeeping any funds, securities, exchange contracts or other property of the person referred to in subsection (1), to hold those funds, securities, exchange contracts or other property, and
 - (b) a person referred to in subsection (1)

- (i) to refrain from withdrawing any funds, securities, exchange contracts or other property from any person having them on deposit, under control or for safekeeping, or
- (ii) to hold all funds, securities, exchange contracts or other property of clients or others in the person's possession or control in trust for an interim receiver, custodian, trustee, receiver manager, receiver or liquidator appointed under the Bankruptcy Act (Canada), the Company Act, the Business Corporations Act, the Law and Equity Act, the Personal Property Security Act, the Winding-up Act (Canada), the Supreme Court Act or this Act
- (5) In any of the circumstances referred to in subsection (1), the commission may, in writing, notify a land title office that proceedings are being or are about to be taken that may affect land belonging to the affected person.

Section 171

[59] Section 171 of the Act sets out that the Commission may revoke or vary, in whole or in part, a decision that the Commission has made when it considers that to do so would not be prejudicial to the public interest.

[60] 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.

[61] Commission Policy 15-601 (the "Hearings Policy") on s. 171 applications makes clear that before the Commission changes a decision, "it must consider that it would not be prejudicial to the public interest to revoke or vary a previous decision": Reasons at para. 29. This usually means that the party "must establish that they have new and compelling evidence, or that there has been a significant change in circumstances since the decision": s. 8.10; Reasons at para. 29.

Application

Sealing Order

[62] The application for a sealing order is put forward by both parties, and involves sensitive commercial interests in proceedings not typically accessible to the public. I see no reason to refuse the application for a sealing order. Details may be worked out with the Registrar if necessary.

Leave to Appeal

[63] The Act provides that a person directly affected by a decision made by the Commission may appeal to the Court of Appeal with leave. Section 167(1) reads:

- (1) A person directly affected by a decision of the commission, other than
 - (a) a decision under section 48 or 76,
 - (b) a decision under section 165 in connection with the review of a decision of the executive director under section 48 or 76, or
 - (c) a decision by a person acting under authority delegated by the commission under section 7

may appeal to the Court of Appeal with leave of a justice of that court.

[64] It is not contended that any of the specific limitations set out in paras. (a) to (c) apply in this case.

[65] This is a statutory appeal.

(1) Significance of Issues to the Practice

[66] A question of law dealing with the interpretation of a statute, particularly one as important as the Act, is of importance to the practice. Furthermore, the proposed appeal raises issues relevant to the scope of the Commission's jurisdiction. In my view, these are significant issues.

[67] One of the issues raised is whether the Panel erred in maintaining an order under s. 151 of the Act. As investigations by the Commission (evidently) last for years, it is presumable that consideration of this issue could impact the current practice maintaining a freeze order, despite the repeal of s. 151 in March. The issue of the scope of the Commission's powers with respect to freeze orders is an important question for the practice.

[68] As well, because the interpretation of s. 171 is also at issue, I am persuaded by the arguments of the Applicants on this point.

(2) Significance of Issue to the Action/Benefit to Be Derived

[69] In my view, the proposed appeal raises issues that are significant to the action as the appeal could bring answers to the parties with respect to the validity and status of the Freeze Orders.

[70] Additionally, the pecuniary and proprietary interests currently "frozen" render this a significant issue to the parties involved.

(3) Merits of the Appeal

- [71] In light of the low threshold for determining the merits of an appeal, in my view, this appeal has merit. At this point, I cannot conclude that the Panel committed no reviewable error in dismissing the applications to revoke or vary the Freeze Orders, such that would justify dismissing the application for leave to appeal.
- [72] In my view, the appeal has merit despite the high degree of deference afforded to the Commission. The fact that the "Commission is a highly specialized regulatory regime for the securities industry in respect to complex and essential capital markets", and that "it provides an expertise in interpreting and applying the Act, in policy development within the industry, and has a broad discretion to determine what is in the public interest in these matters" is simply the critical lens through which to apply Vavilov: Zhu at para. 47.
- [73] Furthermore, the fact that there is a statutory appeal mechanism in the Act signals legislative intent to have decisions of the Commission be subject to appellate oversight: Vavilov at para. 36. This Court hearing such appeals is "to apply appellate standards of review to the decision": Vavilov at para. 37.
- [74] In my view, the various legal issues raised by the Applicants relating to the maintenance of freeze orders under s. 151 and the test for revoking or varying freeze orders under s. 171 are meritorious such that it would be in the interests of justice to hear the appeal.
- (4) Whether the Appeal Would Unduly Hinder the Action
- [75] The investigation into the allegations against the Applicants is ongoing. Therefore, the Freeze Orders are not final.
- [76] However, there is no evidence, nor was there any argument by the Respondent, that if the Court were to hear the proposed appeal, it could interfere with either the investigation or with the Charter Case.
- (5) Interests of Justice
- [77] The Court will be slow to grant leave to appeal from decisions of the Commission that are not final decisions, although it may do so if it is in the interests of justice: Botha at para. 7, citing British Columbia (Securities Commission) v. Scharfe, 2002 BCCA 704 (Lambert J.A. in Chambers).
- [78] The Decision of the Commission not to revoke the Freeze Orders is not a final decision in the sense that it preserves the assets in question while an investigation is underway. It is not dispositive of the Applicants' entire case.
- [79] However, given my conclusions regarding the significance of the issues and the merit of the proposed appeal, I find that it is in the interests of justice to grant leave to appeal.

Disposition

[80] Considering the totality of the circumstances of this case, for the reasons above, I would order:

- (1) The appeals, CA46957 and CA46958, will be heard together;
- (2) The one-day extension to file the motion book such that the application for leave to appeal can continue is granted;
- (3) The uncontested application for a sealing order is granted; and
- (4) The application for leave to appeal is granted.

[81] I also direct the parties to arrange for a case management conference.

"The Honourable Madam Justice Bennett"

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