

CANADA / JUDGMENT

United States Securities and Exchange Commission v. Sharp

2023 BCSC 425

COURT

Supreme Court of British Columbia

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2023 BCSC 425 United States Securities and Exchange Commission v. Sharp

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States Securities and Exchange Commission v. Sharp,

2023 BCSC 425

Date: 20230321

Docket: S226494

Registry: Vancouver

Between:

United States Securities and Exchange Commission

Plaintiff

And

Frederick L. Sharp, Zhiying Yvonne Gasarch,

Courtney Kelln, Mike K. Veldhuis, Paul Sexton,

Jackson T. Friesen, and Graham R. Taylor

Defendants

Before: The Honourable Justice Francis

Reasons for Judgment

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(February 6, 2023)

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Place and Date of Trial/Hearing:

Vancouver, B.C.

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I. introduction

- [1] In this application, the United States Securities and Exchange Commission (the "SEC") seeks a Mareva injunction in aid of civil proceedings presently pending in the United States.
- [2] This action is related to a proceeding (the "U.S. Proceeding") before the United States District Court, District of Massachusetts (the "U.S. Court") in which the SEC filed a complaint against the defendants (the "Complaint") alleging that the defendants were involved in a fraudulent scheme to circumvent a number of provisions of U.S. securities legislation. In the Complaint, the SEC alleges that the defendants were involved in a "pump and dump" scheme, in which the defendants acted in concert to raise the share prices of public companies that were controlled by their affiliates and then to sell their shares at an artificially inflated price. The defendants are all residents of British Columbia.
- [3] In the Complaint, the SEC seeks disgorgement remedies from the defendants as well as civil monetary penalties. The SEC has obtained a temporary restraining order in the U.S. Proceeding, freezing the assets of the defendants (the "TRO") and preliminary injunction orders against certain defendants (the "Injunctions"). Additionally, the British Columbia Securities Commission has issued preservation orders against the defendants (the "Preservation Orders").
- [4] Notwithstanding the security that the SEC has successfully obtained from the U.S. Court and from the B.C. Securities Commission, the SEC submits that it is under-secured with respect to its claim for disgorgement against the defendants. The SEC points out that the existing orders in place do not cover all of the assets presently held by the defendants.

- [5] Due to scheduling challenges, the plaintiff's application as it pertains to an order freezing the assets of Frederick Sharp and Graham Taylor was not heard at the same time as the application with respect to the other defendants; the applications for injunctive relief pertaining to Mr. Sharp and Mr. Taylor have been scheduled for dates later this year. Therefore, these reasons for judgment only pertain to the Mareva injunction that the plaintiff seeks with respect to the defendants Zhiying Yvonne Gasarch, Courtney Kelln, Mike Veldhuis, Paul Sexton, and Jackson Friesen (the "Application Defendants").

II. Relevant Facts

A. Note on Hearsay and Quality of Evidence

- [6] The Application Defendants raise a number of admissibility issues with respect to the plaintiff's evidence. Hearsay is a significant concern. The defendants submit that the affidavits of the plaintiff's primary witness, Trevor Donelan, are problematic because Mr. Donelan deposes to facts that are based on his review of documents and communications that are not before the Court.
- [7] An application for a Mareva injunction is an interlocutory application. Hearsay is not per se inadmissible. Further, I find that many of the concerns the defendants have about the quality of Mr. Donelan's evidence are not well founded. While it is true that Mr. Donelan does not consistently state the source of his information and belief, a reading of the whole of his affidavit makes it clear that his evidence comes from his lengthy review and investigation of the relevant documents.
- [8] This application must be considered in the context of the test that must be met by the plaintiff. On a Mareva application, the Court is not being asked to find facts on the civil standard of balance of probabilities. Rather, the Court is tasked with reviewing a body of evidence and determining whether it is satisfied that the plaintiff has a good arguable case, such that it is appropriate to tie up the assets of the defendant pending judgment. The authorities are clear that this calls for a flexible approach that is not unduly rigid or compartmentalized.
- [9] In *Silver Standard Resources Inc. v. Joint Stock Co.* (1998), 59 B.C.L.R. (3d) 196, 168 D.L.R. (4th) 309 (C.A.), the Court of Appeal endorsed the flexible approach to Mareva injunctions set out by Justice Huddart in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335, 33 C.P.C. (3d) 31 (S.C.):
- [19] By taking a flexible approach, the court may take account of a wide variety of circumstances, including "the relative strengths of the parties' cases, evidence of irreparable harm one way or the other, potential effects on third parties, and factors affecting the public interest." (at 349) Further, Huddart J. said, such an approach:

... prevents the judge from becoming a prisoner of a fixed formula and places the emphasis where it belongs, on the justice and fairness of the order inter partes. It is fair to both sides, because, while maintaining the burden on the plaintiff to establish grounds for the application, it justifies calling upon the defendant to meet the case brought by the plaintiff, by putting forth evidence to support his position.

[10] Applying the flexible approach, and being mindful that it would not be practical or proportional for the record to include all of the documents Mr. Donelan reviewed in his multi-year investigation, I find that the evidence tendered by the plaintiff is of a sufficient quality for me to fairly consider and determine the question of whether the plaintiff has established a strong prima facie case against the defendants.

B. The SEC Investigation

[11] The first affidavit of Mr. Donelan attaches, among other things, the Complaint filed in the U.S. Court as well as the declaration that Mr. Donelan swore in support of that proceeding.

[12] Mr. Donelan is an enforcement accountant with the SEC in Boston. His duties include conducting investigations relating to potential violations of U.S. securities law. In 2017, he became involved in the SEC's investigation into possible violations of U.S. securities law by the defendants.

[13] Mr. Donelan's evidence focusses primarily on the defendants' activities surrounding two companies, a company called "Stevia First", which later changed its name to "Vitality," and a company called "Arch". Mr. Donelan's affidavit and declaration provide a fairly detailed description of the defendants' actions relating to Stevia First/Vitality and Arch, and how those actions are alleged to be fraudulent and in violation of U.S. securities legislation.

[14] According to Mr. Donelan, Mr. Sharp and his employees offered a suite of services to their clients that served to conceal the clients' identities. This allowed clients to avoid reporting and disclosure requirements applicable to large share sales and allowed them to anonymously hire stock promoters. Some of the services offered by Mr. Sharp and his associates, Ms. Gasarch and Ms. Kelln, included encrypted communication devices called xPhones, and servers located in Curacao through which Mr. Sharp maintained the encrypted communications, as well as an accounting system referred to as "Q". Mr. Sharp also offered clients the use of offshore nominee companies that could be used to hold shares.

[15] Mr. Donelan has provided evidence with respect to the role that each of Mr. Sharp, Ms. Gasarch, and Ms. Kelln (the "Sharp Defendants") are alleged to have played in the illegal activity described in the Complaint. This evidence supports the inference that the Sharp Defendants helped clients hide their identities for the purposes of circumventing securities law. According to Mr. Donelan, Mr. Sharp was primarily responsible for client relationships, Ms. Gasarch facilitated wire transfers and prepared counterfeit invoices, and Ms. Kelln facilitated the transfer and deposit of shares held by various companies administered by the Sharp Defendants.

- [16] According to Mr. Donelan's evidence, Mr. Veldhuis, Mr. Sexton, and Mr. Friesen (the "Veldhuis Defendants") were clients of Mr. Sharp, who, acting in concert, orchestrated the Stevia First/Vitality and Arch transactions.
- [17] With respect to both Stevia First/Vitality and Arch, Mr. Donelan has attached documentary evidence to support the plaintiff's allegation that the Veldhuis Defendants, using the services of the Sharp Defendants, successfully inflated the share price of these two public companies in which they held substantial positions, and then rapidly sold those shares at an inflated value. This activity forms the basis for the allegations of wrongdoing against the Sharp Defendants and the Veldhuis Defendants that are set out in the Complaint. The pattern of alleged fraudulent activity is similar in the cases of Stevia First/Vitality and Arch and is described in some detail by Mr. Donelan in his affidavit and declaration.
- [18] Copies of messages, taken from the Sharp Defendants' encrypted communication network, form a significant part of the supporting documentary evidence appended to Mr. Donelan's declaration. These messages support an inference that the individuals on the network were engaged in fraudulent activity intended to circumvent securities legislation, and that they openly discussed fraudulent activity on the encrypted communication network.
- [19] Mr. Donelan deposed that he reviewed thousands of encrypted communications and has discerned which code name and code number is associated with each of the defendants. He has attached to his declaration copies of encrypted messages that either specifically identify a particular defendant with a code name or number, or which provide some other evidence that connects an individual defendant to a code name or number.

III. Issues

- [20] Counsel for Mr. Friesen, on the one hand, and counsel for Ms. Gasarch, Ms. Kelln, Mr. Veldhuis, and Mr. Sexton, on the other, have advanced a number of arguments as to why they say a Mareva injunction should not be granted. Some of the matters raised--such as the question of jurisdiction raised by Mr. Friesen, and the constitutional issues raised by Ms. Gasarch, Ms. Kelln, Mr. Veldhuis, and Mr. Sexton--are threshold issues. Therefore, I have departed in these reasons from the order in which submissions were made by counsel. For clarity, I have re-ordered and re-framed the material issues raised for determination as follows:
- a) Does the Court have jurisdiction to grant injunctive relief where no substantive relief is being sought in British Columbia, and the injunction sought is ancillary to a foreign proceeding asserting foreign law?
 - b) Should the application be denied on the basis that a Mareva injunction would violate the defendants' U.S. constitutional protections under the Fifth Amendment?
 - c) Has there been a warrantless search that invokes the defendants' rights under the Canadian Charter of Rights and Freedoms and if so, should portions of the evidence be excised?

- d) Are the defendants' rights against self-incrimination, protected under ss. 7 and 13 of the Charter, engaged and if so, should the application be denied because the relief sought would violate those rights?
- e) If the Court has jurisdiction to hear the application, and the relief sought does not violate the Application Defendant's constitutionally protected rights, can the plaintiff meet the first requirement for a Mareva injunction, namely a strong prima facie case on the evidence, in the absence of expert evidence tendered to prove U.S. securities law? If so, is the evidence tendered sufficient to establish a strong prima facie case?
- f) With respect to the balance of convenience:
 - i. Is the plaintiff under-secured with respect to the Application Defendants?
 - ii. Is there a risk of dissipation of assets?
 - iii. Should the delay in the plaintiff bringing this application disentitle it from the relief sought?
 - iv. Is there a risk of inconsistent orders from different courts?
- g) Weighing all the relevant factors, should a Mareva injunction be ordered, and if so, what terms should it contain?

IV. Does this Court have Jurisdiction to Make the Order Sought?

- [21] The only relief sought by the plaintiff in this action is the Mareva injunction itself. This British Columbia lawsuit is ancillary to the Complaint before the U.S. Court, and its sole purpose is to provide additional security for the SEC in the pending claims that will be adjudicated by the U.S. Court.
- [22] While the parties agree that this Court has jurisdiction in some circumstances to grant a free-standing Mareva injunction in support of a foreign proceeding, they disagree as to whether this is a case in which the Court may assert jurisdiction. The defendant Mr. Friesen argues that this Court may only grant a free-standing Mareva injunction in circumstances where the dispute between the parties in the foreign proceeding is justiciable in this Court. Because the U.S. Proceeding is grounded in alleged breaches of U.S. statutes (specifically, the Securities Act of 1933 and Securities Exchange Act of 1934), he argues that the substantive dispute between the parties is not justiciable before this Court. As such, Mr. Friesen submits that this Court lacks jurisdiction to issue a Mareva injunction. He argues that the Supreme Court of Canada's decision in *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495, 136 D.L.R. (4th) 289 (S.C.C.) [BMWE] supports this conclusion.
- [23] The plaintiff submits that Mr. Friesen takes an overly narrow view of BMWE, and submits that it need not establish that it has asserted rights in the U.S. Proceeding that are justiciable in this Court in order to be entitled to a Mareva injunction.

- [24] In considering these competing readings of BMW, it is helpful to review the jurisprudential development of stand-alone Mareva injunctions in the U.K. and Canadian courts. Historically, our common law did not allow a party to a foreign proceeding to seek a Mareva injunction for the purpose of securing a future judgment in the foreign case. In *Siskina (Cargo Owners) v. Distos Compania Naviera S.A.*, [1977] 3 All E.R. 803 at 825 (H.L.), the House of Lords refused to grant an injunction that was ancillary to a foreign proceeding and held that in order for an injunction to be granted, it must be ancillary to a cause of action before the issuing court.
- [25] In *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] 1 All E.R. 664 (H.L.), the House of Lords revisited its approach to stand-alone injunctions. Channel Tunnel involved a claim for a Mareva injunction in aid of a foreign arbitration. The House of Lords held that, so long as a substantive right was "justiciable" in England, an injunction could be granted by the English court, even if that right was not asserted in the proceeding in which the injunction was sought. In determining whether or not a court has jurisdiction to grant an injunction ancillary to a foreign proceeding, the relevant question was whether the issuing court "has power to grant the substantive relief, not whether it will in fact do so": Channel Tunnel at 669.
- [26] The Supreme Court of Canada considered the application of the principles in Channel Tunnel to Canadian law in BMW. That case considered whether the Supreme Court of British Columbia could issue an injunction in a labour dispute governed by the Canada Labour Code. On the question of whether this Court could grant an injunction ancillary to a matter within the exclusive jurisdiction of a labour arbitrator, the Court cited Channel Tunnel as "categorically rejecting the submission that to grant interim relief, the courts must have jurisdiction over the cause of action": at para. 15.
- [27] Justice McLachlin (as she then was) went on to summarize the Canadian authorities which have permitted the granting of stand-alone injunctions:
- 16 Canadian courts since Channel Tunnel have applied it for the proposition that the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined. . .
- [28] The Court ultimately concluded at para. 17 that "the absence of a cause of action claiming final relief in the Supreme Court of British Columbia did not deprive the court of jurisdiction to grant an interim injunction."
- [29] There are two British Columbia cases, relied on by the plaintiff, that consider BMW in the context of applications analogous to the one before me. In *United States of America v. Friedland*, [1996] B.C.J. No. 2845 (S.C.), Justice Spencer considered an ex parte injunction application in B.C. that was ancillary to a U.S. proceeding in which the U.S. government had sued the defendant for costs associated with environmental cleanup. The Court noted, at para. 18, that

there is strong authority for the proposition that this [C]ourt has jurisdiction to grant a Mareva style of injunction to protect the plaintiff from the removal of assets from British Columbia so that they may be available for a judgment to be obtained in the state of Colorado.

- [30] In *Mishkin (Trustee of) v. Roddy DiPrima Ltd.*, [1996] B.C.J. No. 2660 (S.C.), the plaintiff obtained an ex parte Mareva injunction, and the defendant applied to set it aside. The underlying proceeding in that case was a New York action in which Mr. DiPrimo was found liable for violating federal securities law and for common law fraud and deception. At the time the Mareva injunction was sought, the defendant had already been found liable in the foreign proceeding. Mr. Justice Harvey relied on *Friedland* and *BMWE* for the proposition that "an interim injunction may be granted to prevent removal of assets so that they are available for execution in a foreign judgment": at para. 7.
- [31] In his textbook, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, 2022), Justice Sharpe considers the academic commentary and notes, at § 2:35.50, that "it has been forcefully argued that Canadian law should favour injunctive relief in aid of a foreign proceeding." The rationale for this was in part expressed by Spencer J. in *Friedland* when he noted, at para. 16, that "[i]n the modern age of easily transportable assets and international commerce entailing liability in foreign states the court should be empowered to protect serious claims." *Friedland* was decided in 1996. The policy imperative to protect claims in the face of an increasingly borderless electronic world of commerce has only become more pressing since that time.
- [32] *Channel Tunnel* is not the most recent appellate authority from the U.K. on this issue. In *Broad Idea International Ltd. v. Convoy Collateral Ltd.*, [2021] UKPC 24, the Privy Council was asked to expressly depart from the decision of the House of Lords in *Siskina*. Lord Leggatt noted that "fundamental changes in commercial and financial practices, driven in large part by the revolution in information technology" necessitated the expansion of freezing injunctions beyond their prior confines: *Broad Idea* at para. 59.
- [33] In *Broad Idea*, the Privy Council discussed the "enforcement principle", which acknowledges that the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or other order to pay a sum of money by preventing dissipation of assets against which such a judgment could be enforced. The Court held:
92. In applying for a freezing injunction, the relevance of a cause of action, where there is one, is evidential: in showing that there is a sufficient basis for anticipating that a judgment will be obtained to justify the exercise of the court's power to freeze assets against which such a judgment, when obtained, can be enforced. That is the rationale for requiring the applicant to show a good arguable case; but there is no reason why the good arguable case need be that the applicant is entitled to substantive relief from the court which is asked to grant a freezing injunction. What in principle matters is that the applicant has a good arguable case for being granted substantive relief in the form of a judgment that will be enforceable by the court from which a freezing injunction is sought. . .

- [34] Ultimately, the Privy Council held that where a court has personal jurisdiction over a party, it has the power to grant a freezing injunction.
- [35] In accordance with the reasoning of the Privy Council in *Broad Idea*, and this Court in *Friedland and Roddy DiPrima*, it appears to me that this Court has jurisdiction to grant a Mareva injunction in aid of a foreign proceeding, even where the issue between the parties in the foreign proceeding is not justiciable before this Court.
- [36] I therefore find that this Court has jurisdiction to issue the injunction sought by the plaintiff, irrespective of whether the causes of action pursued by the SEC in the Complaint could be adjudicated in British Columbia.

V. Constitutional Issues

- [37] Counsel for Mr. Veldhuis, Ms. Gasarch, Mr. Sexton, and Ms. Kelln has made a number of submissions on constitutional law which, if accepted, could lead the Court to deny the relief sought by the plaintiff irrespective of whether the common law test for a Mareva injunction is met.

A. Fifth Amendment of the United States Constitution

- [38] Counsel for Mr. Veldhuis, Ms. Gasarch, Mr. Sexton, and Ms. Kelln submits that a Mareva injunction would result in an "end-run" around their Fifth Amendment Constitutional protections. This is because these defendants have invoked the Fifth Amendment in the U.S. Proceeding in refusing to answer interrogatories issued in that proceeding that called for them to make financial disclosure. Counsel argues that requiring these parties to produce an asset list, a standard component of a Mareva injunction, could be used against his clients in the U.S. Proceeding, which would result in their constitutional rights being violated.
- [39] I agree with the plaintiff that this submission is misconceived. There is no criminal proceeding in the U.S. The sole concern expressed by these defendants is that they could be found civilly liable in the U.S. Proceeding as a result of information obtained ancillary to the Mareva injunction in British Columbia. The Fifth Amendment protects a party from self-incrimination; it does not protect against civil liability. Therefore, there is no risk of violation of the rights of the defendants under the Fifth Amendment of the U.S. Constitution as a consequence of evidence being disclosed in a civil proceeding in Canada that might be used in a civil proceeding in the U.S.

B. Canadian Charter of Rights and Freedoms

- [40] Counsel for Mr. Veldhuis, Ms. Gasarch, Mr. Sexton, and Ms. Kelln submits that evidence shared by the B.C. Securities Commission with the SEC was the product of warrantless searches. As I understand the argument made by counsel, it is that the B.C. Securities Commission's gathering of information and sharing it with the SEC amounted to a warrantless search. This, according to these defendants, gives rise to a "matrix that engages the defendants' section 7, 8 and 13 Charter rights."
- [41] There appear to be two distinct submissions made by these defendants with respect to their Charter rights. One relates to an alleged violation of these defendants' protection from self-incrimination under the Charter. The other relates to the s. 8 rights of these defendants with respect to an alleged warrantless search and seizure.
1. Right Against Self-Incrimination
- [42] In oral submissions, Mr. Veldhuis, Ms. Gasarch, Mr. Sexton, and Ms. Kelln invoked their rights against self-incrimination protected by ss. 7 and 13 of the Charter. Their argument in this regard is similar to their argument that the injunction sought by the plaintiff would undermine their right against self-incrimination protected by the Fifth Amendment of the U.S. Constitution, discussed above. This argument was not well-developed.
- [43] It is important to note that this action was brought only to obtain a Mareva injunction in support of the U.S. Proceeding. There is no prospect that the defendants will be compelled to give viva voce or documentary evidence in this proceeding, either through discovery or at a trial, that could be used against them in a future Canadian or U.S. proceeding. The only evidence that will be compellable, if the plaintiff is successful in this action, is a list of the defendants' assets which is a customary element of a Mareva injunction.
- [44] Under Canadian law, the right against self-incrimination, protected under ss. 7 and 13 of the Charter, does not give rise to a general right to refuse to give evidence in the course of a civil proceeding. A witness is not permitted to be excused from answering questions on the ground that the answer may tend to incriminate them: Canada Evidence Act, R.S.C. 1985, c. C-5, s. 5(1). However, where witnesses are compelled to testify, they have protections regarding the use and derivative use of their testimony under ss. 7 and 13 of the Charter: *Tak v. British Columbia (Securities Commission)*, 2023 BCCA 76 at para. 15 [Tak (CA)].
- [45] These defendants invoked, and sought to distinguish, my decision in *British Columbia (Securities Commission) v. Tak*, 2021 BCSC 2283 [Tak (SC)], the appeal of which was dismissed by the Court of Appeal in *Tak (CA)* subsequent to the hearing of this application. While I agree with these defendants that *Tak (SC)* is factually distinguishable from this case, those factual distinctions do not assist the defendants in advancing their position that the Mareva application should be dismissed on the basis of a risk to their ss. 7 and 13 Charter rights.

[46] In this case, in which the plaintiff has sued for a civil injunction in aid of a U.S. civil proceeding, the derivative use immunity provided under ss. 7 and 13 is not engaged. To the extent that these defendants are concerned about a possible future U.S. criminal proceeding against them, the draft orders contemplate the SEC undertaking that the information disclosed will only be used for the purposes of this action in British Columbia and the civil U.S. Proceeding. In my view, this resolves any concerns that may arise about derivative use immunity with respect to evidence compelled as a result of the injunction. There is therefore no basis for denying the injunction in order to protect the ss. 7 and 13 Charter rights of these defendants.

2. Excision Argument

[47] Mr. Veldhuis, Ms. Gasarch, Mr. Sexton and Ms. Kelln submit in their written argument that "the information, documents or data obtained from the warrantless seizures should be excised" from the affidavits before me.

[48] Relying on *Hunter et. al. v. Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 (S.C.C.), these defendants submit that the plaintiff has the burden of demonstrating that the process by which the B.C. Securities Commission obtained and shared documents and information with the SEC was lawful, because a warrantless search is *prima facie* unreasonable. Since the plaintiff has not provided evidence of the lawfulness of this information sharing, these defendants submit that all the evidence relied on by the plaintiff is constitutionally tainted and must be excised from the record.

[49] In their written and oral submissions, these defendants invoke the doctrine of excision which has been developed in the criminal law context, particularly in applications based on *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161 (S.C.C.), in which investigative information obtained in breach of an accused's Charter rights may be excised from the evidence the Court considers in reviewing a search warrant. The doctrine was recently described by Justice Ker in *R. v. Kang*, 2020 BCSC 1151 (a case relied on by these defendants):

[82] The noun "excision" used in its ordinary, grammatical sense describes the act of cutting out or erasing a passage from a book, a clause from a bill, etc. In the jurisprudential sense, employed in the context of reviewing judicial authorizations such as production orders, search warrants and Part VI wiretap authorizations, excision refers to the process of editing or removing "tainted" or questionable information contained in the ITO from the reviewing judge's consideration of the sufficiency of the application materials. Once those passages are removed, the question becomes whether there remains in the affidavit at least some reasonably believable evidence that could have formed a basis for issuing the authorization. To this end then, excision is more akin to a mechanism or instrument than a remedy. It is but one procedural step in the *Garofoli* review of the materials placed before an authorizing judge or justice in the prior authorization process.

[Citations removed; emphasis in original.]

- [50] I am doubtful that the doctrine of excision has any bearing on a civil case of this nature. However, I am in no position to analyze this novel argument in circumstances in which these defendants have failed to establish that a warrantless search and seizure ever took place. Nor have these defendants specified which evidence they say ought to be excised on the basis that it is alleged to be tainted by a Charter violation.
- [51] While these defendants did not articulate precisely which actions they say amounted to a warrantless search and seizure, to the extent their position is that the B.C. Securities Commission acted unconstitutionally in compelling evidence from them in the course of its investigation, I note that the commission has the authority to compel documents and information in the course of an investigation pursuant to s. 144 of the Securities Act, R.S.B.C. 1996, c. 418. I was provided with no authority for the proposition that statutorily authorized steps taken in an investigation by a Canadian securities regulator amount to state action infringing on a reasonably held expectation of privacy, which would be a threshold requirement in order for s. 8 of the Charter to be invoked.
- [52] In my view, these defendants' excision argument is misconceived. To the extent that they seek to have a portion of the evidentiary record before me excised as a result of a violation of their Charter rights, I decline to do so.

3. Section 24(2) of the Charter

- [53] In the amended response to application, these defendants sought to have evidence excluded pursuant to s. 24(2) of the Charter on the basis that evidence was obtained in violation of their Charter rights. This argument was not made in oral submissions nor was it mentioned in these defendants' written argument.
- [54] Upon reviewing the amended response to application, and the written submissions of these defendants, it is not clear to me whether the defendant's submission regarding exclusion of evidence under s. 24(2) is a separate argument from the excision argument, or whether these defendants have erroneously used the terms "exclusion" and "excision" interchangeably. If it is the case that these defendants wish to have certain evidence excluded pursuant to s. 24(2) of the Charter, I decline to do so on the basis that no Charter violation has been particularized, nor evidence identified that would allow me to evaluate such a submission.

VI. Application of legal test for a Mareva Injunction

- [55] The objective of a Mareva injunction is to mitigate the risk of harm to a plaintiff in collecting on a judgment debt by preventing dissipation or removal of assets, pending judgment: *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at para. 45.
- [56] The two-part test for granting a Mareva injunction was succinctly described by our Court of Appeal in *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 at para. 18:

The legal test requires an applicant to establish: (1) the threshold issue of a strong prima facie or good arguable case; and (2) in balancing the interests of the parties, to consider all the relevant factors, including (i) the existence of exigible assets by the defendant both inside and outside the jurisdiction, and (ii) whether there is evidence of a real risk of disposal or dissipation of those assets that would impede the enforcement of any favourable judgment to the plaintiff.

[57] The test is to be applied flexibly. There is no strict list of factors that enter into the two-part analysis. Rather, each case is decided on its own factual matrix: *Fernandes v. Legacy Financial Systems, Inc.*, 2020 BCSC 885 at para. 11.

A. Strong Prima Facie Case

[58] In *Shakeri-Saleh v. Estate of Ahmadi-Niri*, 2022 BCSC 700, Justice Matthews described the flexible approach to determining whether the plaintiff has established a strong prima facie case:

[16] The applicant defendants have not cited any case for the proposition that the threshold must be met for each element of a cause of action. The jurisprudence does not fairly admit to such a finely parsed analysis. It is true that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he or she may never obtain. Courts will be reluctant to interfere with a party's normal business arrangements and affect the rights of its other creditors, merely on the speculation that the plaintiff will ultimately succeed on its claim and have difficulty collecting this judgment if the injunction is not granted: *Fernandes* at para. 9, citing *Kepis* and *Silver Standard Resources Inc.*

[17] However, that does not translate to an inviolable rule that the plaintiff must establish a good arguable case / strong prima facie case for each element of the cause of action. In British Columbia, the Court of Appeal has stipulated that the test is to be applied flexibly, with a focus on what is just and convenient, considering the balance of convenience and justice between the parties, so long as the applicant has established a good arguable / strong prima facie case: *Kepis* at paras. 10, 12, 18. Rather, if the threshold is met pertaining to the claim overall, relative weakness in an element of a cause of action should be taken into account when considering the balance of convenience.

[59] In *Tracy*, our Court of Appeal considered what is meant by the terms "strong prima facie case" and "good arguable case":

[54] The chambers judge used the test of "good arguable case". I do not consider that a strict formula should be applied. Whereas, the Supreme Court of Canada in *Aetna* appeared to favour "strong prima facie case", that Court also appeared to leave considerable room for courts to frame the test as fits the nature of the case before them. *Mooney No. 2* recognized both standards, "strong prima facie case" and "good arguable case," as formulations that have been used. I expect that the difference in words is a difference without practical consequence. In either case, it is more than an arguable case, and may be met by an

assessment that does not reach the "bound to succeed" threshold.

[60] In this case, the plaintiff points to the evidence in the record that establishes a strong prima facie case that the defendants engaged in fraudulent activities. The evidence particularly relied on by the plaintiff in this regard includes:

- a) The TRO and Injunctions which were granted on the basis of the same evidence that is before this Court. These orders were predicated on a determination that the defendants had each violated U.S. securities law and were reasonably likely to repeat their violations; and
- b) The exhibits to the first affidavit of Trevor Donelan, which include evidence of at least one detailed fraudulent transaction involving each defendant.

[61] The Application Defendants argue that the plaintiff has failed to meet the threshold of establishing a strong prima facie or good arguable case, because the plaintiff has failed to tender expert evidence with respect to U.S. securities law. They further argue that, when analyzing the strength of the plaintiff's case in the U.S. Proceeding, it is improper for the Court to consider the fact that the TRO, an ex parte order, was issued. The defendant Mr. Friesen also argues that there is a dearth of evidence linking him personally to any alleged wrongful acts.

1. Expert Evidence of U.S. Securities Law

[62] The plaintiff frames its submission on the basis that a good arguable case has been established that each of the defendants engaged in fraud. However, fraud is not the cause of action pleaded in the U.S. Proceeding. Rather, the plaintiff has pursued the defendants in the U.S. for violations of specific sections of U.S. securities legislation. The Application Defendants argue that, in order for this Court to adjudicate whether there is a strong prima facie case against them in the U.S. Proceeding, the Court needs to know the law the defendants are alleged to have broken, which must be proven by expert evidence.

[63] In order to meet its burden on this application, the plaintiff must show that it has a good arguable case in the U.S. Proceeding. It is a potential future judgment in the U.S. Proceeding that will be secured in the event that this Court issues the Mareva injunction sought by the plaintiff. The likelihood of the plaintiff obtaining that judgment ought to be the focus of the first branch of the test for issuing a Mareva injunction.

[64] The U.S. Proceeding will stand to be determined on the basis of U.S. law. It is a well accepted principle that, for the purposes of applying foreign law, a B.C. court must rely on the evidence of an expert competent to explain and interpret the foreign law, and the judge's conclusion on the foreign law is a finding of fact: *Friedl v. Friedl*, 2009 BCCA 314 at para. 20.

[65] In my view, it would have assisted the Court greatly, in considering whether a strong prima facie case was made out by the plaintiff, if the plaintiff had submitted evidence of the U.S. securities law that will apply in the U.S. Proceeding.

- [66] Nevertheless, I am not satisfied that the defendants are correct that expert evidence of foreign law is always required in an application for a Mareva injunction in aid of a foreign proceeding.
- [67] There is a distinction between applying foreign law, which this Court is sometimes called upon to do, and evaluating a plaintiff's prospects of success in a foreign jurisdiction. In this case, I am not being asked to apply U.S. securities law, as I am not adjudicating the U.S. Proceeding. Rather, I am asked to consider the plaintiff's case in the U.S. Proceeding as one element of the test in determining whether to exercise my discretion in favour of injunctive relief. In my view, this distinction is important. In a case such as this one, in which the alleged behaviour is clearly and manifestly fraudulent, to require expert evidence that such behavior violates U.S. law would be to create a technical impediment to injunctive relief that is inconsistent with the flexible and discretionary nature of the Mareva injunction.
- [68] I am mindful of the facial similarities between the U.S. securities legislation at play in the Complaint and the B.C. Securities Act with respect to fraudulent schemes of the kind alleged against the defendants. These provisions, in both jurisdictions, are neither ambiguous nor complex. I have also considered the seriousness of the fraudulent activity alleged to have occurred. In my view, it is simply not necessary for me to have the assistance of an expert in U.S. securities law to know that, if proven, the alleged activities of the defendants were unlawful.
- [69] I am therefore prepared to consider whether the plaintiff has a good arguable case in the absence of expert evidence of U.S. securities law.
2. Evidentiary Value of the TRO
- [70] The defendants submit that the TRO cannot be relied on by the plaintiff in establishing a strong prima facie case. They point out that the TRO was issued on an ex parte, emergency basis and does not represent a considered opinion on the likelihood of the plaintiff's success in the U.S. Proceeding.
- [71] I agree with this submission. The nature of the application for the TRO was such that the judge did not have the benefit of full submissions from all parties. While the TRO was the product of an emergency ex parte application, the application before me was on notice to the defendants, with three days of argument from the plaintiff and the Application Defendants. I have no doubt that the evidence has been canvassed and argued more fully before me than it could have been in front of Judge Gorton of the U.S. Court, given the exigencies of the application before him. Therefore, I do not find the fact that the TRO was issued of particular assistance in evaluating whether the plaintiff has met the first branch of the test for a Mareva injunction and demonstrated a strong prima facie case. Rather, I have looked at the evidence filed in this Court and the U.S. Court in assessing the merits of the plaintiff's case.
3. Has a Strong Prima Facie Case Been Made Out on the Evidence?

- [72] Many of the arguments made by the Application Defendants with respect to this branch of the test are arguments about the sufficiency of the evidence. For example, the defendants argue that the evidence linking particular defendants to particular code names on the Q system is tenuous. The difficulty with many of the defendants' submissions in this regard is that the alleged weaknesses in the plaintiff's evidence would only be determinative if the Court were undertaking a fact-finding exercise on a balance of probabilities. This is not the exercise that the Court undertakes in considering whether the plaintiff has established a strong *prima facie* case for the purposes of a Mareva injunction.
- [73] Injunction applicants are not required to demonstrate that they are bound to succeed: Tracy at para. 54. As Matthews J. noted in *Shakeri-Saleh*, the test is satisfied if either side might win. If it were not so, the word "arguable" in the descriptor of the test would be oxymoronic: *Shakeri-Saleh* at para. 227.
- [74] The exhibits attached to the first affidavit of Trevor Donelan include evidence of at least one detailed fraudulent transaction involving each defendant, including Mr. Friesen. There are records in the evidence that arguably establish that Mr. Friesen used the encrypted communication system to communicate with other Veldhuis Defendants about the pump and dump scheme, and that he benefitted from the sale of the inflated shares into the public market.
- [75] This is not to say that Mr. Donelan's affidavit proves on a balance of probabilities that each defendant engaged in a fraudulent transaction. However, there is a good arguable case of this, and either side might win. I therefore find that the first part of the test for a Mareva injunction has been met.

B. Does the Balance of Convenience Favour the Granting of an Injunction?

- [76] In *Shakeri-Saleh* at para. 321, Matthews J. enumerated a number of relevant factors that may be considered on the balance of convenience analysis:
- a) the residency of the defendant;
 - b) enforcement rights of judgment creditors in the jurisdiction where the defendant's assets are located;
 - c) evidence showing the existence of assets within British Columbia or outside;
 - d) evidence showing a real risk of the disposal or dissipation of assets to render a judgment nugatory;
 - e) evidence of irreparable harm;
 - f) the strength of the plaintiff's case;
 - g) the nature of the transaction giving rise to the action;
 - h) the risks inherent in the transaction;

- i) the amount of the claim;
- j) the defendant's assets;
- k) evidence that the injunction would have a material adverse effect on an innocent third party; and
- l) the history of the defendant's conduct.

[77] Not all of these factors will apply in every case, and there is some overlap amongst the factors.

[78] In this case, I find that the following factors are of particular importance in weighing the balance of convenience: the presence of assets in British Columbia, the fact that the current freezing orders in place leave the plaintiff under-secured with respect to its disgorgement claim, and the risk of dissipation of assets.

1. B.C. Assets of the Application Defendants

[79] The plaintiff submits that the Application Defendants own moveable and immovable assets located in B.C. beyond the personal banking and investment accounts covered by the TRO and Preservation Orders. These primarily consist of real property and vehicles. However, the SEC also notes that it does not have full insight into the defendants' financial affairs and the whereabouts of their assets in Canada.

[80] The defendants do not deny that they own assets in British Columbia.

2. Is the Plaintiff Under-Secured?

[81] There is some dispute amongst the parties about the amount that the plaintiff is claiming in the U.S. Proceeding, and the consequent amount of assets for each defendant that ought to be secured pending determination of that claim. For each defendant in the U.S. Proceeding, the plaintiff seeks a disgorgement remedy, prejudgment interest, and a penalty. The plaintiff concedes that the penalty sought under U.S. securities law could not be the subject of a freezing order in B.C., so it seeks only to secure assets for each defendant equivalent to the amount of the disgorgement, plus prejudgment interest, it seeks in the U.S. Proceeding.

[82] The disgorgement amounts sought by the SEC in the U.S. Proceeding are set out by Mr. Donelan in his second affidavit. There, he deposes that the plaintiff seeks the following amounts from each of the Application Defendants:

Defendant

Disgorgement (USD)

Prejudgment Interest (USD)

Ms. Gasarch

\$2,136,385

\$498,081

Ms. Kelln

\$1,582,785

\$460,688

Mr. Veldhuis

\$12,327,562

\$3,989,130

Mr. Sexton

\$15,425,549

\$5,139,332

Mr. Friesen

\$9,787,574

\$3,604,255

[83] Mr. Donelan deposes that he calculated the disgorgement amounts set out above by using data contained in the Q accounting system. Each of the defendants had an account in the Q system into which they received proceeds generated by the alleged fraudulent trading. With respect to all the Application Defendants other than Ms. Gasarch, Mr. Donelan calculated the net amount received by each defendant in their personal Q accounts as the disgorgement amount. With respect to Ms. Gasarch, Mr. Donelan calculated her disgorgement amount as the sum of identifiable payments and cash withdrawals made for her benefit from her personal Q accounts.

[84] With respect to prejudgment interest, Mr. Donelan calculated this on an annual basis, assuming that each year's net proceeds were received on the last day of the year in which each defendant received it. He used the standard calculation tool established by the SEC.

[85] The Preservation Orders presently in place have frozen some accounts of the Application Defendants in the following amounts:

Defendant

Number of Accounts

Balance (CAD)

Ms. Gasarch

15

\$365,294

Ms. Kelln

3

\$584,417

Mr. Veldhuis

31

\$5,473,946

Mr. Sexton

34

\$18,711,119

Mr. Friesen

31

\$3,799,106

[86] On the basis of Mr. Donelan's calculations, it appears that the Preservation Orders are insufficient to secure the plaintiff's claim.

[87] Counsel for Mr. Friesen submits that, at least with respect to his client, the disgorgement amount sought by the SEC is untethered to any evidence before this Court about amounts alleged to have been improperly received by Mr. Friesen with respect to the two transactions about which detailed evidence is provided, namely the Stevia First/Vitality and Arch transactions. He notes that, even on Mr. Donelan's calculation (with which he disagrees), Mr. Friesen received net profits of \$2,300,000 USD from the Stevia First/Vitality transaction and \$1,500,000 USD from the Arch transaction, far less than the \$9,787,574 USD disgorgement amount sought in the Complaint.

[88] In reply, the plaintiff submits that the Stevia First/Vitality and Arch transactions were illustrations of the mechanics of how the defendants' "pump and dump" scheme worked. However, in the Complaint, the SEC seeks disgorgement of all the profits made by the defendants on transactions that were run through the Sharp Defendants' Q system because the SEC intends to prove that they were all illicit activities.

[89] As Matthews J. noted in Shakeri-Saleh at para. 16, a "finely parsed analysis" of the evidence is not called for in this type of application. The plaintiff has satisfied me that it has a good arguable case in the U.S. Proceeding for establishing liability on the part of the Application Defendants for disgorgement and prejudgment interest in the amounts calculated by Mr. Donelan. As such, I find that the current Preservation Orders do not secure the entirety of

the potential judgment that could be awarded in the SEC's favour if it is successful in the U.S. Proceeding.

3. Risk of Dissipation of Assets

[90] In cases alleging serious fraud, the risk that assets will be dissipated may be inferred from the evidence relating to the plaintiff's strong prima facie case. However, the inference is permissive and evidence of a strong prima facie case does not lead inevitably to a finding that there is a real risk of dissipation of assets: *ICBC v. Patko*, 2008 BCCA 65 [Patko (CA)] at paras. 28 and 29.

[91] In *Patko*, the chambers judge refused to grant a Mareva injunction in the face of a strong prima facie case in part because there was no risk of dissipation of assets. She found that, while Mr. Patko's conduct demonstrated a propensity for dishonesty, this was insufficient to support the inference of a real risk that the asset would be dissipated: *ICBC v. Patko et. al.*, 2007 BCSC 743 at para. 42 [Patko (BCSC)]. The Court of Appeal refused to interfere with the chambers judge's fact finding on this point: *Patko* (CA) at para. 32.

[92] As I have noted, the plaintiff has established a strong prima facie case that the defendants engaged in fraudulent activity. From this, it is open to me to infer that there is a risk that assets in British Columbia will be removed or dissipated. This conclusion is not mandatory, and I still must consider all of the factors in order to determine whether such an inference is appropriate. As Fisher J. (as she then was) noted in *Patko* (BCSC) at para. 38:

[T]o determine whether there is a real risk, it is necessary to look at all the circumstances, including the nature of the conduct alleged, the type of assets involved and the general circumstances. The court must assess whether in all of those circumstances the defendant will deal with the assets in a manner that will interfere with or defeat the plaintiff's attempts to realize on any judgment it might obtain.

[93] In *Patko* (BCSC), Fisher J. did not find that there was a real risk of the defendant dissipating assets to frustrate a judgment. There were two primary reasons for this, both unique to the *Patko* case: the nature of the fraudulent conduct, which involved dishonesty but not a fraudulent scheme, and the nature of the asset sought to be enjoined, being settlement funds that the plaintiff insurer had previously agreed to pay.

[94] Considering the conduct alleged, the type of assets involved, and the general circumstances, I find this case to be an appropriate one to draw the permissible inference that the alleged fraudulent activities of the defendants give rise to a risk of dissipation. The plaintiff has alleged, with some evidence in support, that the defendants were engaged in a complex securities fraud scheme that involved shell companies, secret encrypted communications, and a clear pattern of deceptive behaviour. In my view, this is precisely the kind of case in which it is appropriate for the Court to infer, on the basis of the fraudulent conduct alleged in the proceeding, that there is a real risk of asset dissipation in advance of judgment.

4. Delay

[95] The plaintiff waited approximately one year between the filing of the Complaint in the U.S. in August 2021, and the filing of the proceeding herein, seeking a Mareva injunction in British Columbia, in August 2022. The defendant Mr. Friesen submits that the plaintiff's delay in bringing this application undermines any claim it could make with respect to irreparable harm. In a case where a plaintiff has languished in seeking to freeze the assets of the defendant, an inference can often be drawn that assets that are the subject matter of the application are not at serious risk. However, each case must be decided on its own facts and the issue of delay must be considered in the context of the case as a whole. In the circumstances of this case, given the seriousness of the fraud alleged, I cannot find that the delay undermines the real risk that assets will be depleted such as to impair the ability of the plaintiff to collect on a future judgment in the U.S. Proceeding.

5. Concern re: Overlapping or Duplicative Orders

[96] The Application Defendants submit that this proceeding is an abuse of process because it is duplicative of the Complaint in the U.S. Proceeding. They also submit that it is not possible for them to comply with the TRO, the Injunctions, the Preservation Orders, and the proposed Mareva injunction at the same time, due to differences in the wording of the orders.

[97] I agree with the plaintiff that the proposed Mareva injunction has been drafted to be complimentary, not in conflict, with the existing TRO, Injunctions, and Preservations Orders. The terms comply with the model order, but are drafted on the basis that they are deemed to be satisfied in respect of all assets covered by the TRO, Injunctions, and Preservation Orders, so long as those orders are in place. In this way, the plaintiff avoids any overlap between the freezing orders already in place and the order it seeks from this Court in this application.

VII. Conclusion

[98] I am satisfied on the basis of all the evidence before me that the plaintiff has demonstrated that it has a strong prima facie case and that the balance of convenience favours the plaintiff. As such, I am prepared to grant the injunction sought by the plaintiff on the terms set out in the draft order with respect to each of the Application Defendants, with the exception of Schedule "A", which is the provision in the draft order that sets out the plaintiff's undertaking.

[99] Pursuant to Rule 10-4(5) of the Supreme Court Civil Rules, an undertaking as to damages must flow for an interim injunction, unless the Court otherwise orders.

- [100] The plaintiff submits that, because of its status as a U.S. government agency, it should not be required to give an undertaking as to damages. The plaintiff relies on U.K. case authority in which the SEC has been excused from providing an undertaking as to damages on this basis. I am unaware of any Canadian authority in which a successful Mareva applicant has been excused from an undertaking as to damages on the basis that it is a public entity.
- [101] No evidence has been provided to suggest that the SEC is incapable of giving an undertaking as to damages, although the plaintiff states in argument that the SEC is legally prevented from giving an unlimited undertaking because of its status as an independent agency of the U.S. federal government. No evidence or submissions were made about the precise contours of this legal prohibition and, more importantly, what form of undertaking the SEC is legally capable of making.
- [102] In my view, there is no basis to depart from the usual rule. If the SEC is indeed legally incapable of providing an unlimited undertaking, then the plaintiff has leave to appear before me, on notice to the defendants, to make submissions on the scope of a limited undertaking as to damages, in the event that the parties cannot agree on undertaking terms.

"Francis J."

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