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

Citation: Re Morabito, 2023 BCSECCOM 405 Date: 20230817

Global Crossing Airlines Group Inc. (formerly known as Canada Jetlines Ltd.) and Mark Morabito

Panel	Judith Downes	Commissioner
	James Kershaw	Commissioner
	Marion Shaw	Commissioner
Submissions completed	July 17, 2023	
Ruling date	August 17, 2023	

Counsel

James Torrance	For the Executive Director
Sean K. Boyle Jenna Green	For Global Crossing Airlines Group Inc.
Robert J.C. Deane Paige Burnham	For Mark Morabito

Ruling and Reasons for Ruling

I. Introduction

[1] On October 7, 2021, the executive director issued a Notice of Hearing, 2021 BCSECCOM 397, containing allegations under the *Securities Act*, RSBC 1996, c. 418 (Act) against Mark Morabito (Morabito) and Global Crossing Airlines Inc., formerly known as Canada Jetlines Ltd. and now known as Global Crossing Airlines Group Inc. (Global).

[2] On February 15, 2023, Morabito applied to the Commission for an order that the proceedings arising from the Notice of Hearing be permanently stayed against him as an abuse of process (Morabito Stay Application).

[3] On March 2, 2023, Global applied to the Commission for an order that the proceedings arising from the Notice of Hearing be permanently stayed against it as an abuse of process (Global Stay Application). In this decision, we have referred to Morabito and Global together as the Applicants and to their respective stay applications together as the Stay Applications.

[4] For reasons explained more fully below, this panel determined that it would be better placed to decide the Stay Applications after hearing the executive director's case regarding the liability of the Applicants for the conduct alleged in the Notice of Hearing,

but that the Applicants would not be required to present their cases unless and until the panel had dismissed the Stay Applications.

[5] Accordingly, on June 23 and 27, 2023, the executive director presented his case and the Applicants had an opportunity to cross-examine the executive director's witness. The Applicants had made fulsome written submissions in the Stay Applications. After the oral hearing of the executive director's liability case, the executive director filed his written submissions on the Stay Applications and each of Morabito and Global filed a written reply. This is the decision of the panel on the Stay Applications.

II. Background

A. The allegations of securities misconduct

[6] Between December 2017 and March 2018 (the Relevant Period as defined in the Notice of Hearing), Canada Jetlines Ltd. (Canada Jetlines) was a reporting issuer under the Act. Its shares traded on the TSX Venture Exchange under the symbol "JET".

[7] According to its financial statements, the principal business of Canada Jetlines during the Relevant Period was the start-up of an "ultra-low-cost" scheduled airline service.

[8] Morabito was the executive chairman and a director of Canada Jetlines until December 12, 2019.

[9] In June 2020, Canada Jetlines combined with Global Crossing Airlines Inc. and changed its name to Global Crossing Airlines Inc. Subsequently, its name was further changed to Global Crossing Airlines Group Inc. In this Ruling, we refer to Canada Jetlines when speaking of the issuer during the Relevant Period, and to Global when speaking of it in the context of the current proceedings.

[10] On September 7, 2017, Canada Jetlines issued a news release announcing that:

> "...it has entered into a letter of intent for two Boeing 737-800NG aircraft with a major U.S. based aircraft leasing firm for delivery in April 2018"; and
>
> "Jetlines is planning to begin ticket sales in Spring 2018 and is targeting start of flight operations for summer 2018, subject to government approval."

[11] In a number of subsequent news releases and presentations, Canada Jetlines publicized June 1, 2018 as the date it intended to start flight operations.

[12] In the Notice of Hearing, the executive director alleges that:

(a) the letter of intent announced by Canada Jetlines in September 2017 (LOI) was terminated in December 2017;
(b) the termination of the LOI contributed to a delay to the start of flight operations;

(c) the termination of the LOI and the delay to the start of flight operations, individually or in combination, were material changes and material facts for Canada Jetlines (Material Information);
(d) the Material Information was not publicly disclosed until Canada Jetlines issued a news release after the market closed on March 13, 2018 (March News Release);
(e) following the March News Release, Canada Jetlines' share price decreased 38% from $1.42 on March 13, 2018 to $0.87 on March 15, 2018, and its daily trading volume increased 126% from approximately 8.3 million shares on March 13, 2018 to approximately 18.7 million shares on March 14, 2018;
(f) Canada Jetlines contravened section 85(b) of the Act by failing to file a Material Change Report disclosing the Material Information;
(g) Canada Jetlines contravened section 7.1(1) of part 7 of National Instrument 51-102 by failing to immediately issue and file a news release disclosing the Material Information;
(h) pursuant to section 168.2(1) of the Act, Morabito contravened the same provisions as Canada Jetlines by authorizing, permitting or acquiescing in its contraventions;
(i) during the Relevant Period, Morabito was the executive chairman and a director of Canada Jetlines and was therefore in a "special relationship", as that term is used in the Act, with Canada Jetlines;
(j) on February 23, 2018, prior to the issuance of the March News Release, Morabito transferred 352,945 Canada Jetlines shares to his spouse, with the knowledge that his spouse would sell the shares; and
(k) by transferring these shares for sale, when he knew the undisclosed Material Information, Morabito contravened section 57.2(2) of the Act.

B. The procedural history

[13] The proceedings arising from the Notice of Hearing originated from an investigation order issued by the Commission on August 14, 2018, directing Commission staff to undertake an investigation into alleged insider trading by Morabito and his spouse.

[14] On January 7, 2021, the Morabitos applied to the Commission for an order under section 171 of the Act revoking the investigation order, on the basis that investigators had abused their powers in a way that brought Commission processes into disrepute.

[15] On October 6, 2021, after a hearing, the panel dismissed the Morabitos' application on the basis that the onus was on the Morabitos to establish that terminating the investigation would not be prejudicial to the public interest, and they had failed to do so.

[16] On October 7, 2021, the executive director issued the Notice of Hearing.

[17] On December 10, 2021, the British Columbia Court of Appeal heard an application by the Morabitos for leave to appeal the panel's dismissal of the Morabitos' application for revocation of the investigation order.

[18] Leave was granted, with the sole question to be determined being whether the panel erred in placing the onus on the Morabitos in an application under section 171 of the Act to establish that revoking the investigation order would not be prejudicial to the public interest.

[19] On August 12, 2022, the Court of Appeal issued its decision in *Morabito v. British Columbia (Securities Commission),* 2022 BCCA 279, ruling that the onus lies on an applicant under section 171 to show that the public interest will not be prejudiced by the revocation of the investigation order.

C. Applications regarding disclosure issues

[20] On October 19, 2021, following the issuance of the Notice of Hearing, counsel for Morabito requested that the executive director disclose all of the relevant information gathered by staff in the course of the investigation.

[21] On October 22, 2021, the executive director disclosed 449 documents listed in a List of Documents dated June 4, 2021, and eight documents listed in a Supplemental List of Documents dated October 21, 2021.

[22] Based on what they regarded as apparent gaps in the executive director's initial disclosure, on February 11, 2022, counsel for Morabito made a further request for specific information relating to Canada Jetlines personnel that was obtained by the executive director in the course of the investigation.

[23] On March 18, 2022, the executive director responded that none of the undisclosed documents in his possession was relevant to the allegations in the Notice of Hearing.

[24] On March 24, 2022, Morabito applied to the Commission for further and better disclosure, seeking all documents relating to a former officer of Global (Former CEO), who was the chief executive officer of Canada Jetlines during the Relevant Period, or any other then existing or former Canada Jetlines personnel. Global made a parallel application on April 19, 2022.

[25] On April 21, 2022, in his submissions in response to that application, the executive director advised that counsel for the executive director had communicated with the Former CEO prior to the Former CEO's death in August 2021, that records existed with respect to those communications, and that the executive director claimed settlement privilege over them.

[26] On April 29, 2022, Morabito filed a reply in which he sought an additional order that the executive director produce the referral from The Investment Industry Regulatory Organization of Canada (IIROC) referenced in a disclosure list previously provided by the executive director, together with related documents.

[27] On June 22, 2022, the executive director provided the Applicants with a supplemental disclosure list that contained the requested IIROC documents. On June 30, 2022, the executive director produced a further affidavit of an investigator setting out the rationale

for not disclosing certain categories of documents. The Applicants applied for an order allowing them to cross-examine the affiant. The panel declined to grant the order for cross-examination.

[28] On October 18, 2022, following oral submissions by the parties, this panel issued *Re Morabito,* 2022 BCSECCOM 433 (First Ruling), requiring that the executive director provide lists of certain documents and categories of documents not disclosed by the executive director, describing those documents and categories of documents in sufficient detail so that the grounds upon which the executive director had not disclosed them could be assessed by the panel.

[29] In response to the First Ruling, the executive director provided additional disclosure to the Applicants, as well as reasons for non-disclosure of certain documents and categories of documents. That disclosure included descriptions of 12 documents relating to communications with the Former CEO, which communications had not been disclosed by the executive director. The basis asserted for non-disclosure with respect to four of those documents was a claim of settlement privilege and, for the balance, an assertion that they were not relevant.

[30] After considerable back and forth between the executive director and the Applicants, in which the executive director provided certain additional material in redacted form and Morabito disputed that the executive director had established the settlement privilege he had asserted, the panel advised that it would consider submissions on settlement privilege.

[31] After considering the correspondence between the parties and their submissions, on February 17, 2023, this panel issued *Re Morabito,* 2023 BCSECCOM 83 (Supplemental Ruling), requiring that the executive director file with the hearing office and provide to the Applicants further information with respect to the grounds on which the executive director had not disclosed the redacted portions of certain categories of documents, and to file with the hearing office certain redacted and unredacted documents, so that the panel could decide whether those documents should be disclosed to the Applicants.

[32] Having considered the material provided by the executive director in response to the Supplemental Ruling, on April 3, 2023, this panel issued *Re Morabito,* 2023 BCSECCOM 150 (Second Supplemental Ruling), ruling that the executive director had established his claim for settlement privilege over the redacted portions of the settlement documents and otherwise met his disclosure obligations with respect to the balance of the disputed material, and that the redacted portions within that material need not be disclosed.

D. The panel's decision to hear the executive director's evidence

[33] The executive director proposed that since a central aspect of the Stay Applications relates to the Applicants' position that the death of the Former CEO deprived them of key evidence essential to their defence, the panel would be in the best position to consider the Stay Applications after hearing all the evidence at the liability hearing.

[34] The panel agreed that it would be better placed to decide the Stay Applications after hearing the executive director's evidence, on the basis that the question whether the ability of the Applicants to defend themselves against the allegations in the Notice of Hearing has been irremediably prejudiced must be rooted in the evidence relating to the allegations.

[35] Morabito took the position that the Stay Applications must be heard and determined before further proceedings unfold.

[36] After considering the positions of the parties and the general principle in BC Policy 15-601 – *Hearings* that the Commission's goal is to conduct its proceedings fairly, flexibly and efficiently, this panel determined that it would hear the executive director's evidence before it decided the Stay Applications, but that the Applicants would not be required to present their cases unless and until the panel dismissed the Stay Applications.

III. Applicable law

[37] The Stay Applications require this panel to determine whether there has been an abuse of process that requires a stay of these proceedings. The Applicants argue that a stay is the only fair result and that moving forward with a hearing on the merits would be unfair and contrary to the public interest. To determine whether a stay is indeed the only option that is fair to the Applicants, the panel must consider the allegations in the Notice of Hearing, the relevant securities law that underlies those allegations, and the law applicable to abuse of process generally, all in light of the evidence and arguments the parties have tendered in the Stay Applications.

A. Securities law

Material information not disclosed

[38] During the Relevant Period, section 85(b) of the Act stated:

> **Continuous disclosure**
> A reporting issuer must, in accordance with the regulations…
>
> (b) provide disclosure of a material change…

[39] Section 1(1) of the Act stated:

> **"material change"** means,
>
> (a) if used in relation to an issuer other than an investment fund,
>
> (i) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of a security of the issuer, or
> (ii) a decision to implement a change referred to in subparagraph (i) made by
> (A) the directors of the issuer, or
> (B) senior management of the issuer who believe that confirmation of the decision by the directors is probable…

[40] Section 7.1(1) of part 7 of National Instrument 51-102 stated:

> **7.1 Publication of Material Change**
> (1) Subject to subsection (2), if a material change occurs in the affairs of a reporting issuer, the reporting issuer must
>
> (a) immediately issue and file a news release authorized by an executive officer disclosing the nature and substance of the change; and
>
> (b) as soon as practicable, and in any event within 10 days of the date on which the change occurs, file a Form 51-102F3 Material Change Report with respect to the material change.

[41] Section 1(1) of the Act stated:

> **"material fact"** means, when used in relation to securities issued or proposed to be issued, a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

[42] The executive director alleges that pursuant to section 168.2(1) of the Act, Morabito contravened the same provisions as Global. That sub-section of the Act stated:

> **Contraventions attributable to employees, officers, directors and agents**
> **168.2** (1) If a person, other than an individual, contravenes a provision of this Act or of the regulations, or fails to comply with a decision, an employee, officer, director or agent of the person who authorizes, permits or acquiesces in the contravention or non-compliance also contravenes the provision or fails to comply with the decision, as the case may be.

Insider trading

[43] Section 57.2(2) of the Act stated:

> **Insider trading, tipping and recommending**
> A person must not enter into a transaction involving a security of an issuer, or a related financial instrument of a security of an issuer, if the person
>
> (a) is in a special relationship with the issuer, and
>
> (b) knows of a material fact or material change with respect to the issuer, which material fact or material change has not been generally disclosed.

[44] Section 3 of the Act stated:

> For the purposes of sections 57.2 and 136, a person is in a special relationship with an issuer if the person
>
> (a) is an insider, affiliate or associate of
>
> (i) the issuer,

(b) …

(c) is a director, officer or employee of the issuer…

Abuse of process

[45] As set out in the Commission's Hearings Policy 15-601:

> The Commission holds administrative hearings, which are less formal than the courts. The Commission's goal is to conduct its proceedings fairly, flexibly and efficiently.

[46] In *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, and *R. v. Power* [1994] 1 S.C.R. 601, the Supreme Court of Canada considered, among other things, whether delay in the administrative process had resulted in an abuse of process such that a stay of proceedings was the only just remedy. At paragraph 102 of *Blencoe*, Bastarache J., writing for the majority, said:

> There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding.

[47] In *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, the Supreme Court of Canada's most recent consideration of the concept of abuse of process in administrative proceedings resulting from delay, the Court distinguished between two situations: first, where delay impairs a party's ability to answer the allegations against him at a hearing, such as where essential witnesses are unavailable or evidence has been lost as a result of the delay; and second, where the fairness of the hearing has not been prejudiced but inordinate delay has caused some other significant prejudice to the party.

[48] Having found that the first situation did not exist in the case before it, the Court focused on the second. In the event, it found that it had no basis to set aside the decision of the hearing committee of the Law Society that there was neither inordinate delay nor significant prejudice to Mr. Abrametz, and therefore no abuse of process.

[49] Rowe J., writing for the majority of the Court, confirmed at paragraphs 33 to 36 that the doctrine of abuse of process:

(a) is a broad concept that applies in various contexts;
(b) is rooted in a court's inherent and residual discretion to prevent abuse and engages the inherent power of the court to prevent the misuse of its procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute;
(c) is characterized by its flexibility;
(d) is concerned primarily with the integrity of courts' adjudicative functions, and less with the interests of the parties; and
(e) aims to prevent unfairness by precluding abuse of the decision-making process.

[50] With respect to remedies where abuse of process is found, the Court in *Abrametz* said this at paragraphs 83 to 85:

> A stay of proceedings is the ultimate remedy for abuse of process. It is "ultimate" because it is "final": the process will be permanently stayed. In disciplinary matters, that means that charges will not be dealt with, any complaint will go unheard and the public will not be protected. Given these consequences, a stay should be granted in only the 'clearest of cases', when the abuse falls at the high end of the spectrum of seriousness [citations omitted].
>
> The decision whether to grant a stay involves a balancing of public interests. On the one hand, the public has an interest in ensuring that a tribunal established for its protection follows fair procedures, untainted by an abuse of process. On the other hand, the public has an interest in the resolution of administrative cases on the merits. A balance must be struck between the public interest in a *fair administrative process untainted by abuse* and the competing public interest in having the *complaint decided on its merits*… [citations omitted; emphasis in original].
>
> When faced with a proceeding that has resulted in abuse, the court or tribunal must ask itself: would going ahead with the proceeding result in more harm to the public interest than if the proceedings were permanently halted? If the answer is yes, than a stay of proceeding should be ordered. Otherwise, the application for a stay should be dismissed. In conducting this inquiry, the court or tribunal may have regard to whether other available remedies for abuse of process, short of a stay, would adequately protect the public's interest in the administration of justice.

IV. Parties' submissions

A. The Applicants

[51] The Applicants submit that the conduct of Commission staff in this matter has been such that it is not possible to have a fair hearing on the merits of the allegations set out in the Notice of Hearing and, accordingly, that the proceedings must be stayed in their entirety as an abuse of process.

[52] In the Morabito Stay Application, which was adopted by Global in the Global Stay Application, Morabito asserts at paragraphs 3 and 4 that:

> From the unexplained, inordinate delays in the investigation, to the persistent failures to timely make full and complete disclosure, to the apparent targeting of Mr. Morabito individually (and, evidently, much of his family) rather than the impugned conduct, Mr. Morabito's position is that the Executive Director has regrettably abused the powerful authorities entrusted to him.
>
> What takes this case over the line from merely an over-zealous yet still delayed investigation, or a problematic approach to withholding documents, though, is the Executive Director's failure or refusal – at a time when he had already resolved to issue the Notice of Hearing – to tell the respondents that the central witness and the person responsible for the activities which are the subject of the Notice of Hearing – the Chief Executive Officer of Jetlines, [the Former CEO] – was terminally ill and about to die.

[53] At paragraphs 7 and 8 of the Morabito Stay Application, Morabito says that "[the Former CEO]'s evidence is lost forever. … The prejudice to Mr. Morabito is irremediable. [The Former CEO] is dead, and his evidence will never be available to anyone. It is impossible to do justice in this case. A stay of proceeding is the only available remedy. Nothing short of a stay is possible, and nothing short of a stay is in the public interest."

[54] At paragraph 55, Morabito says that "[t]he importance of [the Former CEO's] evidence cannot be overstated."

[55] At paragraph 10 of the Global Stay Application**,** Global states that "[The Former CEO] died with evidence that could have helped Global Crossing's defence" and that "had Global Crossing known about [the Former CEO]'s impending death and the impending issuance of the Notice of Hearing, the Company could have taken steps to preserve [the Former CEO]'s evidence."

[56] At paragraph 95 of the Morabito Stay Application, Morabito asserts that the failure of the executive director to inform Morabito of the Former CEO's impending death "is the final element that renders this proceeding an abuse of process."

[57] In the following paragraphs, he refers to two Alberta cases, both in the context of criminal proceedings. He cites *R. v. Davydov*, 1992 CanLII 6262 (ABQB) for the proposition that "the Crown's failure to inform the defence of a key material witness before that witness died is an example of a 'most extreme circumstance' that would justify a stay of proceedings on the basis that they have become an abuse of process, quoting the court's reference at paragraph 3 to another case:

> …ordering a stay would surely be a remedy of last resort, reserved only for the most extreme circumstances, as, for example, when the failure to disclose the evidence has made it impossible for the defence to obtain evidence which would support the defence – for example, when a witness has died whose evidence could have been preserved if the defence had known of its availability.

[58] He submits that the Alberta Court of Appeal pointed to a similar example in *R. v. Dias,* 2010 ABCA 382 at paragraph 35:

> If the police concealed the existence of an important favourable defence witness until the witness died, or they shredded all methods of learning the witness' name or contact information, that would impair conduct of the defence at trial, and quite possibly work permanent significant prejudice.

[59] In the Global Stay Application, Global also argued, with reference to a further Alberta criminal case, *R. v. Barros,* 2014 ABCA 367, that an unfair hearing may result if the death of an essential witness has impaired a party's ability to answer the complaint against him.

[60] As is clear from the extracts from the Stay Applications quoted above, the Applicants' initial focus was on the failure of the executive director to disclose the Former CEO's

impending death, which, the Applicants said, prevents them from making full answer and defence to the allegations in the Notice of Hearing.

[61] Following the presentation of the executive director's evidence, the Applicants in their reply submissions have shifted their focus somewhat, to assert that in order to redress the public interest, this panel must not condone, but ought to distance itself from, the executive director's conduct throughout this proceeding, which must be viewed as a whole. They emphasize that only in that way can the panel discharge its overriding obligation to protect its processes from being abused or otherwise being used unfairly.

[62] In Morabito's reply, which was adopted by Global, the Applicants list a significant number of specific concerns about the way in which the investigation was conducted. Some relate to interactions between the investigative team and the Morabito family. Morabito describes the sweeping scope of the investigation, which evidently sought and gathered extensive information from Morabito's spouse, teenage daughter and parent and from several financial institutions and other advisors to Morabito, notes what he regards as certain invasions of his and his family's privacy, and describes a visit to the Morabito family home by a Commission investigator, accompanied by "a burly RCMP officer".

[63] Several concerns relate to decisions made by investigative staff regarding the persons to be interviewed in the matter. The Applicants object that Commission staff, "apparently intent on remaining willfully blind to any facts inconsistent with their pre-determined theory," chose not to interview any of the directors or employees of Canada Jetlines, even though all were well-experienced in the aviation industry. They note also that staff chose not to interview any of the individuals responsible for or directly involved with Canada Jetlines' disclosure obligations and regular communications with IIROC, even though the IIROC documents indicated that two officers of Global had been in regular contact with IIROC during the Relevant Period and had confirmed to IIROC that Global was "fully disclosed". They add that staff "never considered nor made any inquiries" of Canada Jetlines about whether there was a trading blackout in place during the Relevant Period.

[64] The Applicants assert that the executive director "repeatedly failed to make full and timely disclosure and took shifting and inconsistent positions about the documents being withheld, resulting in a disclosure application which dragged on for close to a year, at significant expense to the respondents…".

[65] The Applicants say that staff "never bothered to interview [the Former CEO] even though he was initially named as a respondent in the Notice of Hearing and counsel for the Executive Director contacted him in the summer of 2021…".

[66] The Applicants say that staff "made an evidently deliberate decision not to disclose to the respondents their knowledge that [the Former CEO] was dying, and only issued the Notice of Hearing after he was dead." They add that because in his submissions, the executive director did "not deny that the decision to conceal the fact of [the Former CEO]'s impending death was deliberate or otherwise wrong", the panel ought to proceed on the basis that it was in fact a deliberate, "indefensible" decision.

[67] The Applicants also list as problematic the prosecution by staff of a claim for insider trading in circumstances where Morabito had self-reported the trade.

[68] Finally, the Applicants describe as a "craven affront to Mr. Morabito's right to make full answer and defence and to hold the Executive Director accountable for his conduct" the executive director's decision to present his evidentiary case through a single witness, a Commission investigator who was assigned to this matter only after the investigation was complete and the Notice of Hearing had been issued.

[69] The Applicants say that the executive director's refusal to address allegations made by the Applicants and his decision to deny to the Applicants the opportunity to confront those who engaged in the investigation risk compromising the integrity of the regulatory system.

[70] The Applicants argue that proceeding with the hearing at this stage would result in more harm to the public interest than if the proceedings were permanently halted. They say that the panel should not condone the executive director's pattern of conduct, but should instead disassociate itself from it. They say that staying the proceeding would send a salutary message and be in the best interests of the regulatory system's integrity as a whole.

[71] The Applicants say that while the executive director's "concealing from the respondents the fact of [the Former CEO]'s impending death … is particularly egregious, the allegations of abuse set out in the [Morabito Stay Application] engage the proceeding as a whole." They invite the panel to "return to the first principles [enunciated in *Abrametz*], which the Executive Director ignores entirely."

[72] The Applicants argue that the doctrine of abuse of process is concerned with the fairness of a proceeding taken as a whole and not whether discrete facts of the abuse can be compartmentalized and remediated in isolation.

[73] With reference to the balancing exercise that a decision-maker, in this case this panel, must make on a stay application, as described by Rowe J. in *Abrametz*, the Applicants argue that the public's interest in having cases resolved on their merits is attenuated in this case because of the executive director's conduct. They submit that a fair hearing on the merits is no longer possible as a direct consequence of the choices that were made by the executive director.

[74] Finally, the Applicants assert that although other remedies for an abuse of process may theoretically be possible, a stay is the only available remedy in the circumstances, and is the remedy that the public interest in a fair and reasonable regulatory enforcement system demands.

B. The executive director

[75] The executive director's submissions address two principal potential bases for a stay of proceedings: (1) the executive director's failure to inform the Applicants of the impending death of the Former CEO; and (2) the executive director's disclosure process.

[76] The executive director argues that at issue in the hearing of the allegations in the Notice of Hearing will be the knowledge of Global and Morabito during the Relevant Period about the termination of the previously announced LOI to lease aircraft and the consequent delay to the expected start of flight operations. In his submissions, the executive director summarized at length the evidence on liability tendered at the oral hearing on the Stay Applications with respect to the extent of their knowledge in that regard.

[77] The executive director says that the Former CEO was but one source of evidence, and there are many other witnesses available to the Applicants, including directors and employees of Global and various airplane vendors.

[78] He notes that the Former CEO reported to Morabito and the Global board, and that the documentary evidence demonstrates that Morabito was fully informed regarding the status of the Former CEO's efforts to secure airplanes and the effect of the delay in doing so on the expected start of flight operations. He adds that the best source of evidence of what Morabito knew about the relevant issues is Morabito himself, not the Former CEO.

[79] The executive director submits that the cases put forward by the Applicants in support of the proposition that the death of a key witness works a significant prejudice warranting a stay of proceedings do not assist the panel.

[80] With respect to *Davydov*, he says that it cannot be "impossible" for the Applicants to obtain evidence in this case as they already had the Former CEO's evidence in the form of emails and other documents, Morabito had frequent contact with the Former CEO, and there are numerous other potential witnesses.

[81] With respect to *Dias*, he says that the court was speaking of a favourable defence witness whose existence was not known to the accused, whereas Morabito worked closely with the Former CEO.

[82] With respect to *Barros*, the executive director notes that the court concluded that a stay was not appropriate, in large part because other evidence capable of establishing the defence theory remained available despite the death of a witness.

[83] With respect to two other cases on which Global relied for the proposition that prejudice arises from the death of a key witness, *Nanak Homes v. Arora et al,* 2019 ONSC 6654 and *R. v. CIP Inc.* [1992] 1 SCR 823, the executive director submits that they do not assist the panel because they do not address the test for a stay of proceedings on the "clearest of cases", that is, on the test enunciated in *Abrametz*.

[84] Turning to the disclosure issues as a basis for a stay of proceedings, the executive director responds to the assertion in the Morabito Stay Application that hearing fairness has been prejudiced as a result of "multiple applications to fight for full and fair disclosure" by submitting that neither Applicant has identified specific prejudice to the defence of the allegations in the Notice of Hearing that arises from the conduct of the executive director

in relation to disclosure, that the panel has ruled that the executive director has complied with his disclosure obligations, and that, therefore, the Applicants' submissions on disclosure are not relevant to the abuse of process application.

[85] Finally, the executive director submits that the leading cases on abuse of process distinguish between stays of proceedings – the most extreme response to an abuse of process – and other potential remedies. Noting that in this case the Applicants seek a stay of proceedings, he relies on *Blencoe* and *Abrametz* and the earlier authorities cited in those cases to emphasize that a stay of proceedings can only be granted in the "clearest of cases", where the proceedings are unfair to the point that they are contrary to the interests of justice.

V. Analysis

[86] The Applicants do not dispute that it is the executive director's role to investigate potential misconduct and to allege in a notice of hearing and seek to prove misconduct. Rather, the Stay Applications ask this panel to determine whether in this particular case the executive director has abused his role in the securities regulatory process and, if we find that he has, whether a stay of the proceedings arising from the Notice of Hearing is the appropriate remedy. To make that determination, we examine below the specific complaints of the Applicants as well as the actions of the executive director both in the investigatory stage and in attempting to prove the allegations in the Notice of Hearing before this panel.

[87] After establishing who bears the onus of proof, we focus our examination on two areas: (1) complaints relating to the death of the Former CEO; and (2) the applicants' assertions that the executive director's behaviour and tactics during both the investigation and this hearing process before the panel have otherwise rendered the entire proceeding irretrievably unfair.

A. Onus of proof

[88] In *Blencoe*, the Court addressed the grant of a stay of proceedings in the context of administrative delay.

[89] As stated by the Court of Appeal in *Morabito*, at paragraph 94, referring to the onus of proof where a party asserts abuse of process:

> The Court in *Blencoe* had left no doubt on the point: it was for Mr. Blencoe to discharge the "heavy burden" of showing a stay was the appropriate remedy. (See paras. 117 and 180.)

[90] Accordingly, the onus in the Stay Applications rests on the Applicants.

B. The executive director's failure to disclose initially the illness and death of the former CEO

[91] In a hearing on the merits of the allegations set out in the Notice of Hearing, the questions that will arise for decision by the panel will turn on whether the information relating to the termination of the LOI and the resulting delay in the anticipated start of flight

operations was material within the meaning of the Act, and accordingly was required to have been publicly disclosed by Canada Jetlines when it arose.

[92] Section 85(b) of the Act requires each reporting issuer to make immediate disclosure of material changes in its business, operations or capital. A material change is one that would reasonably be expected to have a significant effect on the market price or value of a security of the issuer.

[93] In *Canaco Resources Inc.,* 2013 BCSECCOM 310, the Commission considered an alleged breach of section 85 of the Act and provided, at paragraph 84, the following principles for determining materiality in that context:

> In *Cornish v. Ontario (Securities Commission)*, 2013 ONSC 1310, the Ontario Superior Court of Justice (Divisional Court) summarized the current case law relevant to determinations of material fact and material change, including *YBM Magnex International Inc.* (2003) OSCB 5285; *AiT Advanced Information Technologies Corp.* (2008) 2008 ONSEC 3 (CanLII), 31 OSCB 712; *Kerr v. Danier Leather* 2007 SCC 44 (CanLII), [2007] 3 SCR 331; *Rex Diamond Mining Corp.* (2008) 2008 ONSEC 18 (CanLII), 31 OSCB 8337 (OSC); 2010 ONSC 3926 (Ont. Div. Ct); and *Biovail Corporation* (2010) 2010 ONSEC 21 (CanLII), 33 OSCB 8914. These are the principles that follow from these cases:
>
> 1. The test for materiality is objective – would the fact or event reasonably be expected to significantly affect the market price or value of the securities?
>
> 2. The test for materiality is a market impact test. As stated in *YBM*, "The investor is an economic being and materiality must be viewed from the perspective of the trading markets, that is, the buying, selling or holding of securities."
>
> 3. The reasonableness of market impact is assessed from the point of view of the reasonable investor, that is, would a reasonable investor expect that the market price or value of the securities would be affected by the fact or event? (*Cornish*)
>
> 4. It is noteworthy that in some jurisdictions, the test for materiality is whether the fact or event is something that a reasonable investor would want to know. This is not the test under the Act. Information can be important to a reasonable investor without being "material". As stated in *Biovail*:
>
>> "If a statement would be reasonably expected to have a significant effect on the market price or value of a security, then that statement would clearly be important to an investor in making an investment decision. However, it does not necessarily follow that a statement that is important to an investor in making an investment decision would reasonably be expected to have a significant effect on the market price or value of a security."

5. Materiality is assessed in the context of the issuer's industry and the market. (*Cornish*).

6. Issuers are not held to perfection nor is the expectation of the market impact assessed with the benefit of hindsight. As stated in *AiT*:

> "Instead we must objectively assess the facts that were available to the AiT board during the relevant period, to determine in all the circumstances whether the three events constituted a material change . . . . It is important, therefore, to recognize the dangers of hindsight in coming to this conclusion and to be careful not to look at the situation based on what subsequently happened."

7. The test, being objective, neither defers to the business judgement of management" (*Danier Leather*) nor depends "on the subjective assessment or optimistic personal views of company executives." (*Cornish*, citing *Rex Diamond*)

[94] At paragraph 100, the panel stated that issuers need to consider if information will change investor perception about the market price of their company:

> The analysis of the impact of a fact or event on market price requires the issuer to consider whether the information will change existing investor perception to an extent sufficient to significantly affect market price. The questions the issuer needs to consider are: What is current investor perception of our business and prospects now? Would this information reasonably be expected to change that perception? If so, would the information reasonably be expected to change the perception to an extent sufficient to significantly affect market price?

[95] For the purposes of the Stay Applications, we are not in a position to make, and have not made, any determinations on the allegations set out in the Notice of Hearing. What we can do, and have done, is to consider whether any evidence that the Former CEO may have given, had he been interviewed, would have afforded Morabito and/or Global defences to those allegations that would not be available without it.

[96] During the Relevant Period, Canada Jetlines' principal business was its planned scheduled ultra-low-cost airline service. In September 2017, Canada Jetlines announced that it had signed a letter of intent to acquire two airplanes for delivery in Spring 2018, and that it expected to begin flight operations in June 2018.

[97] By December 2017, the LOI announced in September 2017 had been terminated and it had become clear to Canada Jetlines that flight operations could not begin as expected in June 2018. The executive director relies on the fact that this information was not made public until March of 2018 in making the allegations he does in the Notice of Hearing.

[98] The Applicants have sought to establish that the Former CEO's evidence was essential for their defence. With respect, we disagree. The materiality of the undisclosed information underlies the allegations of both the disclosure failure by Global (and by

extension, by Morabito) and the insider trading by Morabito. The determination of materiality involves an objective, market impact-based assessment. Against that legal framework, we do not see how any evidence that the Former CEO may have supplied regarding his perceptions or opinions on the materiality of the information or the need to disclose it could be determinative.

[99] The Applicants say also that the Former CEO was in the best position to provide factual information regarding his efforts to secure airplanes and obtain government approval, as well as regarding the disclosure processes and practices of Canada Jetlines. That may or may not be so, but given the considerable body of evidence available in the form of email and other records and the availability of other persons who could provide evidence of the Former CEO's actions, if such were relevant and necessary, we conclude that the ability of the Applicants to make full answer and defence to the allegations in the Notice of Hearing regarding the failure to disclose a material change in the affairs of Canada Jetlines is not prejudiced by their inability to obtain the Former CEO's evidence.

[100] The Former CEO appears to have kept extensive records of his activities and their status. In addition, the email records show that Global personnel other than the Former CEO, including Morabito, were also engaged in the discussions with Transport Canada related to obtaining its approval. To the extent that the status of those discussions is relevant to the issues on the merits, it was not known only to the Former CEO.

[101] In its response to a production order issued in the course of the investigation, Global indicated that it believed that by February 15, 2018, Morabito "had knowledge of the Company's inability to obtain aircraft in time to achieve the then-targeted June start-up date, as announced in" the March News Release.

[102] Morabito was executive chairman of Canada Jetlines during the Relevant Period. There is on the record at this preliminary stage ample evidence that in that capacity, Morabito worked together and communicated regularly with the Former CEO, who kept him up to date on his efforts to secure both the airplanes necessary to begin flight operations and Transport Canada approval, and on the outcome of those efforts. The best source of evidence on what Morabito knew is Morabito. Accordingly, the inability to obtain the Former CEO's evidence should not prevent Morabito from mounting a defence to the allegations of failing to disclose material information and insider trading.

[103] Given the specific allegations in the Notice of Hearing, we do not see how any testimony that the Former CEO may have given would have afforded Morabito or Global a defence against those allegations that would not otherwise be available to him or it. The facts are as they are, and there are people other than the Former CEO who can attest to them. The test for materiality is objective. Neither the opinions, nor the hopes, nor the business judgement of the issuer's executives, affects the determination whether information was material and should have been disclosed. Accordingly, we find that the lack of the Former CEO's testimony cannot be said to create significant prejudice to the Applicants.

[104] We turn now to the case authorities adduced by the Applicants in support of the assertion that the executive director's failure to inform Morabito of the Former CEO's impending death "is the final element that renders this proceeding an abuse of process."

[105] We note that in both *Davydov* and *Dias*, the courts were imagining scenarios that were not before them where the situation might be so extreme as to justify a stay of proceedings on the basis of an abuse of process.

[106] The court in *Davydov* referred to a situation where it was impossible for the defence to obtain favourable evidence because a witness died before the defence was aware of his existence. Here we agree with the executive director that in this case, where considerable evidence is available in the issuer's own records and from other witnesses, it cannot be said to be impossible for the Applicants to obtain evidence to support their defence.

[107] In *Dias*, the Alberta Court of Appeal, reversing a lower court decision that had granted a stay, contrasted the lack of prejudice in that case with a theoretical situation similar to that in *Davydov*:

> If the police concealed the existence of an important favourable defence witness until the witness died, or they shredded all methods of learning the witness' name or contact information, that would impair conduct of the defence at trial, and quite possibly work permanent significant prejudice. There was nothing like that here.

[108] We are of the view that there is also nothing like that in the matter before us. In the scenario envisaged by the court in *Dias*, the Crown actively sought to pervert the course of justice by preventing the accused from learning of a favourable defence witness and relying on that person's evidence.

[109] With respect to *Barros*, as was noted by the executive director, the court concluded that a stay was not appropriate, in large part because other evidence capable of establishing the defence theory remained available despite the death of a witness.

[110] In *Nanak*, the matter proceeded as a motion for dismissal for delay under Ontario's civil procedure rules. No reference was made by the parties or the court to the line of authorities discussed above regarding abuse of process. Rather, the matter was dismissed on the basis of years of inordinate, inexcusable delay, during which time a key witness for the defendant had died.

[111] In *R. v. CIP Inc.*, the issue was whether delay infringed the accused's right under section 11(b) of the *Canadian Charter of Rights and Freedoms* to be tried within a reasonable time. No reference was made by the parties or the court to the line of authorities discussed above regarding abuse of process.

[112] For the reasons noted above, we do not find those cases persuasive in the context of the Applicants' argument that the death of the Former CEO has deprived them of the right to a fair hearing.

C. Other alleged misconduct by the executive director

[113] In addition to arguing that the unavailability of the evidence of the Former CEO has prejudiced their rights to make full answer and defence to the allegations in the Notice of Hearing, the Applicants argue that the whole of the proceeding has been so tainted by unfairness on the part of the executive director as to make it an abuse of process.

[114] As described above, the Applicants have enumerated a significant number of specific concerns about the way in which the investigation was conducted, as well as concerns regarding the executive director's approach to disclosure. We analyze those concerns in the following paragraphs.

[115] Morabito's submissions indicate that he was troubled by the visit of a Commission investigator, together with a police officer, to his home at a time when it was probable that his spouse would be home alone. He was also troubled by what he characterized as aggressive communications by staff with his elderly father with respect to the production of documents. We share the view of the Court of Appeal in *Morabito* that those complaints were not without some justification.

[116] Regarding the Applicants' concerns relating to decisions made by investigative staff regarding the persons to be interviewed in the matter, we take a different view.

[117] In response to production orders requesting the identities of all individuals associated with Global who had knowledge or awareness of Global's inability to secure aircrafts and/or the delay in start-up that was disclosed in the March News Release and the date they first became aware of it, all documents and correspondence in relation to Global's progress in securing aircrafts, and a chronological listing of all events, including meetings, telephone conversations and all correspondence, relating to Global's progress in securing aircraft leading up to the March News Release, the Applicants provided over 1,500 documents to the executive director. The executive director stated in oral submissions that those documents included communications with Global's personnel, including the Former CEO, for the months both before and after the March News Release.

[118] The Applicants suggest that the failure to interview certain people was evidence of bias. In our view, given the specific allegations set out in the Notice of Hearing, the choice may simply reflect staff's assessment of who might have evidence relevant to those allegations.

[119] For example, Canada Jetlines' other directors and employees may be experts in the aviation industry, but the Notice of Hearing alleges that Global (and by extension, Morabito) failed to make required disclosure and that Morabito engaged in insider trading. It is not obvious how the expertise of others is relevant to what Morabito knew about the termination of the LOI and the resulting delay in the expected start of flight operations and when he knew it.

[120] Similarly, whether or not Canada Jetlines had a trading blackout policy and there was or was not a trading blackout in place during the Relevant Period is not determinative, or perhaps even relevant, to what Morabito knew about the termination of the LOI and the resulting delay in the expected start of flight operations and when he knew it. Even if Canada Jetlines had a trading blackout policy and no blackout was in place at the time of Morabito's transfer of Canada Jetlines shares to his spouse, those factors would not excuse from liability for insider trading a trade made by a person in a special relationship with the issuer who had knowledge of undisclosed material information at the time of the trade.

[121] We would add that given the objective test for materiality, the statement by officers of Global to IIROC that Global was "fully disclosed" does not make it so. We do not take the executive director's decision not to interview those officers as evidence of bias.

[122] Morabito asserts that the executive director's approach to document disclosure was "problematic." Certainly a more focused and transparent approach to disclosure by the executive director would have been more efficient, although we note that some of the delay and concomitant expense associated with document production was occasioned by what proved to be baseless speculation by the Applicants as to information they believed the executive director must have obtained and withheld.

[123] In that regard, the executive director asserts that because the panel has ruled that he has complied with his disclosure obligations, the Applicants' submissions on disclosure are not relevant to the abuse of process application.

[124] The Commission has issued four rulings that address the executive director's disclosure:

(a) the First Ruling;
(b) *Re Morabito*, 2022 BCSECCOM 440, which extended the deadline set in the First Ruling for the filing of certain documents and information;
(c) the Supplemental Ruling; and
(d) the Second Supplemental Ruling.

[125] By the time of the Second Supplemental Ruling, we had concluded that the executive director had met his disclosure obligations with respect to the matters raised by the Applicants in their disclosure applications. However, we are inclined to agree with the Applicants that the doctrine of abuse of process is concerned with the fairness of a proceeding taken as a whole and not whether discrete facets of the alleged abuse can be compartmentalized and remediated in isolation. Certainly the executive director's overall approach to disclosure in this case, and not simply our conclusion that he has now complied with his obligations, is one factor we weigh in our consideration of the Stay Applications.

[126] We take it that Morabito's assertion that staff "never bothered to interview" the Former CEO is meant to suggest bias on staff's part. There can be any number of reasons for deciding to interview a witness, or not. We have not seen anything to convince us that the

executive director's decision not to interview the Former CEO had an improper motivation.

[127] It is clear from the record that the executive director knew in June 2021, but did not tell Morabito or Global, that the Former CEO was terminally ill. It is also clear that the initial disclosure of documents by the executive director to the Applicants did not include any reference to discussions the executive director had had with the Former CEO before the Former CEO's death in August 2021. The Applicants invite us to conclude that the failure to make such disclosure while the Former CEO was alive was an improper tactical decision on the executive director's part. We find that we have no basis to make that conclusion, since it is also possible that the executive director regarded any information that could have been provided by the Former CEO as irrelevant to the allegations made against the Applicants in the Notice of Hearing.

[128] The Applicants complain that it is unheard-of to prosecute allegations of insider trading in respect of a self-reported trade. That an allegation is novel does not mean it cannot be made. The onus is on the executive director to prove the allegations in the Notice of Hearing. The executive director has presented his case to the panel. If this matter proceeds and the respondents put their cases before the panel in response, it will be open to Morabito to make submissions about the effect, if any, of the fact that he reported the trade.

[129] The Applicants suggest that the executive director's "striking" decision not to put the principal investigator forward for cross-examination was somehow improper or abusive. We would reject that characterization. In our view, the executive director is free to choose how he will present his case, and to take the risks attendant upon his choice. Either he will succeed in proving the allegations in the Notice of Hearing, or he will not.

[130] As discussed in more detail below, the executive director chose to put his liability case before the panel both to attempt to prove the allegations in the Notice of Hearing and to respond to the Stay Applications. We note that had the Stay Applications proceeded in writing, the executive director's evidence would have been entered by affidavit, with no automatic right of the Applicants to cross-examine the affiant, absent an order from the panel.

[131] In its reply to the executive director's submissions, Global speculates on the basis of certain answers given by the executive director's witness on cross-examination that there are additional relevant documents that have not been disclosed by the executive director. Global points in particular to the lack of disclosure of calendar appointments scheduling meetings between Commission investigators, of handwritten notes by investigators (typewritten copies of which were provided to the Applicants) and of an internal Commission email between investigators relating to a meeting to bring one of the investigators up to speed on the file. It is not clear from the witness' testimony that these documents exist and, to the extent that they do, that they are relevant and not subject to litigation privilege.

D. Abuse of process

[132] Both *Blencoe* and *Abrametz* dealt specifically with regulator-caused delay in an administrative proceeding. In *Abrametz*, the court identified two ways in which delay can constitute an abuse of process. First, delay can impact hearing fairness, and can compromise a party's ability to respond to a complaint. This can arise when memories have faded, essential witnesses are unavailable or evidence has been lost. Second, inordinate delay can cause prejudice to a party irrespective of hearing fairness.

[133] The Applicants sought to ground their argument for a stay on both their inability to obtain the evidence of the Former CEO and on what they describe as the unfairness of the proceedings as a whole, given the conduct of the executive director.

[134] Had we concluded that the Former CEO's evidence could have afforded the Applicants a defence at the merits hearing that is not otherwise available to them, we would have considered that a strong foundation for a claim of abuse of process. However, as discussed above, given the specific allegations made in the Notice of Hearing, the objective test applicable to the finding of materiality that underpins all of those allegations, and the other sources of evidence available for factual matters relating to the efforts to obtain both aircraft and Transport Canada approval, we do not find that to be the case.

[135] In addition, having considered carefully the concerns raised by the Applicants and all the circumstances relevant to the public interest in this context, we have concluded that although neither the conduct of the investigation nor the executive director's disclosure in this hearing process was perfect, the flaws did not individually or collectively constitute an abuse of process.

[136] Throughout their submissions, the Applicants speculate freely, draw inferences and make conclusions that paint the executive director's staff's intentions in the worst possible light**.** Without evidence of improper motives, we decline to do the same.

[137] We do not find that the executive director has acted in a way that is manifestly unfair to the Applicants or would in some other way bring the administration of justice into disrepute, or that would undermine the faith of the public in the fairness of the securities regulatory process, so as to constitute an abuse of process. That being so, we do not arrive at the need for the balancing of interests described in *Abrametz* in order to determine whether a stay of proceedings is necessary.

[138] In our deliberations, we bore in mind the reminder by the Court of Appeal in *Party A v. British Columbia (Securities Commission),* 2021 BCCA 358 at paragraph 186, dealing with freeze orders under the Act, that:

> Certainly, the Commission's primary concern will be the protection of those members of the investing public who might be harmed by wrongful conduct. But the persons affected by the Commission's orders, whether market participants or not, are part of the "public" as well, and their interests need to be considered so

> as to retain public confidence in the system – one of the three goals of securities legislation.

[139] In *Morabito* (where a stay of proceedings was not under consideration), the Court of Appeal offered this comment, at paragraph 93:

> [W]e need not consider the recent decision in *Abrametz* in detail. I note, however, that the Supreme Court confirmed the high standard of seriousness required to show that a stay of proceedings is appropriate where an abuse of process has been made out. A stay should be granted, the majority stated, only in the 'clearest of cases' where the abuse 'falls at the high end of the spectrum of seriousness'; or where the 'community's sense of fairness and decency' would be 'shocked' [citations omitted].

[140] Even if we were to find an abuse of process in this case, we would conclude that the very stringent test set by the Supreme Court of Canada in *Abrametz* for granting a stay of proceedings was not met. As Morabito himself said, insider trading is one of the most serious offences under the Act. The public interest in seeing that the allegations in the Notice of Hearing are tested on their merits is considerable.

[141] We emphasize that nothing in these reasons will have any bearing on the merits of the case alleged in the Notice of Hearing when it comes before the panel. At this stage, we can say only that the very high bar for establishing an abuse of process sufficient to justify a stay of proceedings in an administrative proceeding has not been met by the Applicants.

VI. Conclusion

[142] The onus is on the Applicants to prove that this is the "clearest of cases" requiring a stay. We conclude that the Applicants have failed to discharge their onus, and that the allegations in the Notice of Hearing should be tested on the merits at a liability hearing.

[143] Accordingly, we dismiss the Stay Applications.

August 17, 2023

For the Commission

Judith Downes
Commissioner

James Kershaw
Commissioner

Marion Shaw
Commissioner

**On August 22, 2023, the panel issued a correction to the Ruling and Reasons for Ruling. The revisions are incorporated in paragraph 5.*