

BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Wang, 2020 BCSECCOM 504

Date: 20201209

Hunter Wei-Shun Wang (aka Hunter Wei Shun Wang) and Jing “Janet” Zhang

Panel	Judith Downes	Commissioner
	Deborah Abbey	Commissioner
	Deborah Armour, QC	Commissioner

Hearing dates March 6, March 9 to 12, and September 29, 2020

Submissions Completed September 29, 2020

Decision date December 9, 2020

Appearing

Derek Chapman For the Executive Director

Lisa Ridgedale For Hunter Wei-Shun Wang
Khalil Jessa (aka Hunter Wei Shun Wang)

Jing “Janet” Zhang For herself

Findings

I. Introduction

- [1] This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.
- [2] In a notice of hearing issued October 7, 2019 (2019 BCSECCOM 355), the executive director alleged that:
- In March 2014, Hunter Wei-Shun Wang (Wang) and Jing “Janet” Zhang (Zhang) convinced a person to invest in a company that Wang and Zhang worked for. A few days later, the investor informed Wang that he regretted making the investment and wanted his money back. The investor’s mother then complained to Commission staff about his investment. Wang and Zhang learned that the investor’s mother spoke to Commission staff.
 - Wang and Zhang offered to refund the investor’s money if he lied to Commission staff about his investment by stating that his mother was confused when she complained to Commission staff as she was thinking about a different investment when, in fact, he had no complaints about his investment in the company. Wang and Zhang coached the investor about the false information he was to provide to Commission staff. After the investor phoned Commission staff in front of Wang

and Zhang and relayed the false information, Zhang reimbursed the investor's money.

- By engaging in this conduct, the respondents contravened section 57.5 of the Act or, in the alternative, engaged in conduct that is abusive to the capital markets and it is in the public interest to issue orders against them.

- [3] The relevant period in this matter is March 24, 2014 to April 4, 2014 (the relevant period).
- [4] During the hearing, the executive director called three witnesses: a Commission investigator (investigator), the investor and the investor's mother. The executive director also tendered documentary evidence and made written and oral submissions.
- [5] The respondent Wang testified in his own defence. He also tendered documentary evidence and made written and oral submissions.
- [6] The respondent Zhang attended the hearing but did not testify or call any witnesses. She also did not tender any documentary evidence or make written or oral submissions.

II. Background

The respondents and witnesses

- [7] Wang has been a resident of British Columbia since 2007. He holds a bachelor of arts degree in business administration from the University of California Riverside. He became an insurance licensee in 2010 and worked in the insurance industry as a financial advisor until 2017. He obtained his certified financial planner designation in 2015 and was studying for this designation during the relevant period. He also became a chartered life underwriter in 2016. During the relevant period, he was employed as lead strategist for the TFSA project at FS Financial Strategies Inc. (FS).
- [8] Zhang is a resident of Burnaby, British Columbia. During the relevant period, she was the marketing director for FS. She was not licensed to sell insurance. Wang testified that Zhang was a telemarketer for one of the founders of FS. She would cold call potential insurance clients on behalf of that founder. Over time, Zhang started to provide similar services to Wang. He said that when Zhang found a client for him, he would do the insurance work and pay Zhang 10% to 20% of the commission as a marketing fee.
- [9] The investor lived with his mother in Burnaby, British Columbia during the relevant period. He holds a diploma in civil engineering from BCIT.
- [10] The investor's mother obtained a number of post-secondary degrees before the relevant period. She was working as a residential care aide at seniors facilities during the relevant period.
- [11] As at the date of the hearing, the investigator had been an investigator with the Commission for almost 19 years. He worked most of that time with the case assessment branch of the enforcement division.

The investment

- [12] The investor first learned about FS when he received a phone call from Zhang introducing him to FS and inviting him to a meeting at the FS office in Burnaby. The investor and Zhang had that meeting on March 24, 2014. At the meeting, Zhang introduced him to the investment and described its terms. Zhang told him that if he invested a minimum of \$25,000, he would be guaranteed a 10% return for three years risk-free. The investor testified he decided to invest after this first meeting.
- [13] The investor and his mother met with Zhang at the FS Burnaby office on March 29, 2014 to formalize the investment. Wang also attended the meeting. The investor testified he did not know Wang at the time of the meeting.
- [14] Wang testified that he had been assigned to work with Zhang by one of the principals of FS to help her with her needs relating to her clients which included paperwork, anything involving English and administrative tasks such as witnessing signatures.
- [15] At the meeting, Zhang gave the investor a form of agreement (FS Investment Agreement). The parties to the FS Investment Agreement were FS, the two principals of FS and the investor. Under its terms, the investor invested \$25,000 in FS for three years at which time the investment would be repaid. The investor was to receive monthly interest payments of \$209 over the term of the investment. The investor signed the agreement in the presence of Zhang and Wang. Wang interpreted the agreement and witnessed the investor's signature. The investor paid for the investment by way of bank draft which he delivered to Zhang at the meeting.
- [16] The investor was 28 years old at the time of his investment. The monies for his investment came from savings he built over a period of about nine years. During the relevant period, he was earning \$75,000 annually.

Refund request

- [17] The day after the March 29 meeting, the investor and his mother became concerned about the investment.
- [18] On April 1, 2014, the investor emailed the respondents saying that he regretted his investment and requesting a refund. He copied his mother on the email.
- [19] His mother continued to be concerned about her son's investment. She expressed those concerns at a meeting on April 2, 2014 at her bank regarding another matter. She was put in touch with a senior person at the bank who questioned whether an investment could guarantee a 10% return. He suggested she contact the Commission.
- [20] On April 2, 2014, Wang replied to the investor's email acknowledging his request for a refund and commenting that it was unfortunate. Wang said he had forwarded the investor's request to Zhang and she would be in touch with him that day. The investor testified that Zhang did not call on that day. His mother testified that she thinks Zhang did call but could not remember what was said.

Investor's mother contacts Commission

[21] On April 3, 2014, the investor's mother called the inquiries number at the Commission. She was put through to the investigator. She said that she wanted to complain about a \$25,000 investment she had made (Complaint). She said that she did not understand what she had invested in. Later that same day, she emailed a number of documents to the investigator including a copy of the FS Investment Agreement, business cards for each of the respondents and a copy of the email correspondence between Wang and her son regarding her son's refund request.

[22] On that same day, the investigator called Wang to discuss the investor's FS investment. Wang said he would call the investigator the next day. The investigator then sent Wang an email asking him to provide details of the investor's FS investment. The signature line identified him as "Investigator, Case Assessment Branch, Enforcement Division" of the Commission.

April 3, 2014 meeting with the respondents

[23] On April 3, 2014, Zhang contacted the investor and his mother to set up a meeting (April 3 meeting) at the FS office on Broadway later that evening. The investor's mother recorded the meeting. A certified translation of the recording was entered as evidence.

[24] Zhang led the discussion at the meeting. The main topic was concerns raised by the call made by the investor's mother to the Commission. Zhang wanted to know everything that was said in that call. Zhang said that before the call was made, she could have made the decision on her own to refund the investment but now the refund would depend on how the investor and his mother handled the matter with the Commission. Zhang wanted the investor to promise that his mother would not say anything in further dealings with the Commission.

[25] Both respondents expressed their irritation and frustration with the call made by the investor's mother to the Commission. Wang said to the investor and his mother:

The thing, you guys, such a small thing, why do you report? Why talk, right?

We're gonna work on there [sic], right? Did I not say that? Did I say no, no refund?

Request is being acknowledged, right? That is how it is. Or I need to write in Chinese?

What did we not do right?"¹

[26] At the April 3 meeting, Zhang used the example of the Canada Revenue Agency as an illustration of the undesirability of a government investigation:

[Zhang]: Say if you didn't pay tax in full, you don't want the government to check you.

[Investor]: Mm.

[Zhang]: You don't want *CRA* to check you. Am I right?

[Investor]: Mm

¹ The quotes in paragraphs 25 to 28, 31 and 40 are from the certified translations of the transcripts of the April 3 and April 4 meetings and the April 3 telephone call. The quotes have been translated from Chinese except where asterisks designate words that were spoken in English.

[Zhang]: But you can't stop it from investigating you. Once being investigated, ...
[Investor]: Mm.
[Investor]: Mm.
[Zhang]: You don't want it to check you. You can't stop it from investigating you either.
But, what do you do? You try your best to look after your affairs.

[27] Zhang also said at that meeting she did not want any trouble with the Commission:

[Zhang]: But I don't want any trouble, you know? I have already ... the Securities Commission ... I don't want to play this game. I don't have time. I want the company listed in '17.
[Investor]: Mm.
[Zhang]: I have many things to attend to. I don't want to play with this thing ... I want to climb up.

[28] Zhang asked the investor and his mother to give her some time to think about the issues created by the Complaint and not to call the Commission until after they heard from her. She said:

[Zhang]: Listen to what I have to say, after I talk to you, let me tell you, don't say 123, you have to say 321 or say 231, you *follow* me, take the initiative to call the Securities Commission, return their call. ... We take this initiative. This initiative ...
[Investor]: Mm hm. Sure.

.....
[Zhang]:... explain it clearly. I teach you, tell you what to say. You say it clearly. Then the government is *okay*, the boss is *okay*, the company is *okay*, I am *okay*, you are *okay*, your mom is *okay*.
[Investor]: Mm.

[29] At the end of the April 3 meeting, Zhang suggested that she and the investor help each other out and have the matter resolved "fully and satisfactorily".

[30] Later in the evening of April 3, 2014, Zhang called the investor and his mother to set up a meeting for the next day at the FS Broadway office. The investor's mother recorded the call. A certified translation of the recording was entered as evidence.

[31] During that call, Zhang said:

[Zhang]: Let me tell you. You just tell *Bob* not to sign anything for me. As for other things, I tell *Bob* what to say, I tell him to say one, then he says one. I tell him to say two, he says two. Don't say at one side not to say one when he should say one, not to say two when he should say two.
[Investor's mother]: I understand. I guarantee this.
[Zhang]: Right. Don't participate in anything that I have with the Securities Commission. What you can participate is the money matter that I have with your son. Don't participate in anything else.

[32] Zhang told the investor and his mother that after things were settled they would go to her bank to deal with the refund of the investment.

[33] The investor testified that during the call Zhang told him she would give him his money back but that he had to tell the Commission exactly what he was told. His mother testified she could remember little of what was said in the call other than her son had to do something to get their money back.

[34] On April 4, 2014 at about 10:30am, the investor and his mother met with the investigator at the Commission. The investor told the investigator about all their dealings with the respondents including the meeting scheduled for the next day at the FS Broadway office.

April 4, 2014 meeting with the respondents

[35] On April 4, 2014, the investor and his mother met with the respondents at the FS Broadway office at approximately 12:30pm (April 4 meeting). The investor's mother recorded the meeting. A certified translation of the recording was entered as evidence.

[36] Wang testified that his role in the April 4 meeting was simply to act as interpreter to translate for Zhang, as she did not speak English, and to help the investor express his thoughts in English as he and his mother were communicating with the investigator in English. He said he did not initiate anything that was said. He was simply interpreting what Zhang said.

[37] At the April 4 meeting, Zhang outlined for the investor and his mother her proposal for ending further inquiries by the Commission related to the Complaint. What Zhang proposed was that the investor would call the investigator and tell him that, at the same time the investor made his FS investment for \$25,000, Wang had introduced him to another \$25,000 investment which involved borrowing to invest. The investor was to say that he had not explained to his mother there were two separate investments of the same amount and that his mother was unhappy with the idea of borrowing to invest. As a result, he had not proceeded with that investment. The investor was to say that when his mother complained to the Commission, she was confusing the two agreements. He was to confirm that he had since explained the difference to his mother and they were now both "okay" with the FS investment.

[38] The investor testified that there was no investment in the same amount called "borrow to invest" or any confusion on the part of his mother. He said he made the call because he wanted to get his money back.

[39] Zhang initially coached the investor on the story in Chinese. Wang then took over for over half an hour coaching the investor in English on exactly what he was to say to the Commission. The coaching included role-playing where Wang pretended to be the investigator taking the investor's call. The investor ultimately wrote down the script for the call.

[40] Wang explained the rationale for the investor making the call was that the Commission was now looking into the Complaint and that was trouble. Wang said:

[Wang]: Because they, they, well, obviously the reason that you called them because they are now, they are looking into it. So, it's trouble, right?

[Investor]: Mm, mm.

[Wang]: They don't have to look into it-

[Investor]: Right.

[Wang]: if you didn't, you didn't make the mistake, right?

[Investor]: Yeah.

[Wang]: So you call ... clarify a few things.

[41] When questioned as to his role in coaching the investor on the false story, Wang acknowledged that he could have refused to go along with it but that he didn't. He said he was just an administrative person. He said Zhang was dealing with the matter and there was nothing much he could do.

The investor's call to the investigator

[42] After rehearsing the call repeatedly, the investor called the investigator in the presence of the respondents and read the script with the false story. The investor testified that after the call, the respondents were really happy and satisfied with the outcome.

[43] The investigator recorded the call.

[44] After the call, the respondents then coached the investor's mother on what to say if the investigator made a follow-up call to her. She was to say that her son had not explained the investment clearly and now everything was okay.

Zhang refunds investment

[45] The investor's mother testified that after the call, she drove Zhang to her bank where Zhang gave the investor a bank draft in the amount of \$25,000 as a refund of his FS investment.

[46] Later that day, the investigator called the investor and his mother and they told him that they had received the refund and had deposited the funds in their bank account.

[47] Zhang was later reimbursed by FS for \$25,000.

[48] The investor and his mother subsequently provided the investigator with additional evidence with respect to their dealings with the respondents including the secret recordings of their meetings with the respondents.

Wang's compelled interview

[49] In February 2017, the Commission issued a news release announcing an investigation of FS and also issued a temporary order. Wang was one of the persons named in the order.

[50] At a compelled interview at the Commission in 2018, Wang testified he "vaguely" remembered that the investor made a \$25,000 investment in 2014 in FS, the investor had complained, the investor's mother was involved and the investment was returned. He said he had no memory of Zhang reimbursing the money only after he and Zhang made the investor phone the investigator to tell him that the investment was okay. He also said that he did not remember coaching the investor on what to say to the investigator.

[51] Wang testified at the hearing that at the compelled interview he denied recalling coaching the investor because the investor was not his client. He said he only remembered things about his clients.

III. Applicable law

Interpretation of the Act

- [52] In *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario Securities Commission*, 1977 CanLII 37(SCC), [1978 2 S.C.R. 112 (CanLII)] p.114, the Supreme Court of Canada confirmed that the Act is remedial legislation and must be construed broadly.
- [53] In *Re Wong*, 2016 BCSECCOM 208 when considering an issue of statutory interpretation, the panel cited the following quote from *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para 219:

It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see 65302 British Columbia v. Canada, 1999 CanLII 639(SCC), [1999] 3 S.C.R. 804 at para 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words play a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

Burden of proof

- [54] In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), the Supreme Court of Canada stated that there is only one civil standard of proof in Canada and that is proof on a balance of probabilities. The Court rejected the suggestion that depending on the seriousness of the allegations, the evidence must be scrutinized with greater care. The Court acknowledged that context is all important and said that a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. The Court noted, however, that these considerations do not change the standard of proof.
- [55] The Court said there is only one legal rule and that is, in all cases, evidence must be scrutinized with care by the trial judge. The Court stated that evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.
- [56] Wang cited *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3. This decision involved access to information requests relating to two new drug submissions made by Merck and a third party to the request. Disputes arose between the parties about what information had to be disclosed and what was exempt from disclosure under the *Access to Information Act*, RSC 1985, c.A-1. Exemptions available included trade secrets or information the disclosure of which could cause economic harm to a third party.
- [57] The Court in *Merck Frosst* confirmed that there is only one civil standard of proof, proof on the balance of probabilities. They said, however, that it is important to differentiate between the standard of proof and how it may be achieved in any given case. The Court referred to the comment in *F.H. McDougall* that “context was all important” and stated that, in the case before

them, proof of risk of economic harm was not always easy. The Court concluded that while the party seeking the economic harm exemption must establish that the exemption applies on the balance of probabilities, the evidence required to meet that standard will be affected by the nature of the proposition the party seeks to establish and the particular context of the case.

Section 57.5

[58] Section 57.5 of the Act states:

Obstruction of justice

57.5 (1) A person must not

(a) refuse to give any information or produce any record or thing, or

(b) destroy, conceal or withhold, or attempt to destroy, conceal or withhold, any information, record or thing reasonably required for a hearing, review, investigation, examination or inspection under this Act.

(2) A person contravenes subsection (1) if the person knows or reasonably should know that a hearing, review, investigation, examination or inspection is to be conducted and the person takes any action referred to in subsection (1) before the hearing, review, investigation, examination or inspection.

Conduct abusive to the capital markets

[59] There is no dispute about the general law as it relates to the Commission's authority to use its public interest jurisdiction to make orders without finding a specific contravention of the Act. This authority stems from the decision of the Supreme Court of Canada in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 SCR 132 and has been applied and expanded upon in various decisions of the court and securities regulators across Canada, including the Commission.

[60] As noted in *Re Hamilton*, 2018 BCSECCOM 290 (CanLII), several principles emerge from a review of those cases:

- In using and defining the scope of the public interest jurisdiction, panels must tie their analysis to the twin mandates of the Act, which are investor protection and ensuring fair and efficient capital markets,
- Any analysis should focus on the totality of the respondent's conduct, rather than just specific aspects of that conduct, and
- The public interest jurisdiction must be exercised cautiously as any orders that flow from its use serve to restrain conduct that is otherwise not expressly prohibited by statute or regulation.

[61] The panel went on to confirm that, in the enforcement context, the Commission's public interest jurisdiction should only be used where the conduct in issue is clearly abusive to the capital markets. While not attempting to define conduct "abusive to the capital markets" (which the panel thought might inadvertently restrict the interpretation in future cases), the panel stated that the threshold was high and connotes as least one of the following concepts:

- Serious behavior that is outside the ordinary course of conduct in the capital markets, and
- Either risk, or actual harm, to the capital markets arising from the conduct.

[62] The panel also stated that a useful check on whether conduct is abusive to the capital markets is whether the reasonable expectations of participants in the capital markets would be met with the exercise of the Commission's public interest jurisdiction in the given circumstances.

IV. Preliminary application

No evidence motion

[63] On March 10, 2020, at the conclusion of the executive director's case, Wang made a no evidence motion.

[64] Wang and the executive director filed written submissions and made oral submissions. Zhang did not make any submissions on the motion.

[65] On March 11, 2020, we dismissed the no evidence motion with reasons to follow. These are our reasons.

Test on no evidence motion

[66] The parties agreed that the test on a no evidence motion is set out in *Re Bezzaz Holdings*, 2019 BCSECCOM 415, paras. 145 to 147:

- The panel determines only whether there is any evidence *capable of* supporting the executive director's allegations, without evaluating the quality of the evidence,
- The relevant question is whether a reasonable panel *could* find in the executive director's favour, not whether the panel *would* do so,
- Even if there is some circumstantial evidence, to defeat a no evidence motion, the evidence must be *reasonably capable* of supporting the inferences that are necessary to prove the executive director's case. This may require the panel to engage in a limited weighing of the evidence, and
- When considering the evidence on a no evidence motion, the panel should give the evidence the *most favourable meaning* in determining whether it is capable of supporting the inferences of fact required for the executive director to prove his case, without determining whether the competing inferences available to the respondent do in fact rebut the executive director's case.

[67] While in his written submissions, Wang cited the test in *Bezzaz* as the test on a no evidence motion, he then said the question for the panel on his motion was whether the executive director had proved on a balance of probabilities that he had engaged in the alleged misconduct. The executive director submitted Wang had misconstrued the test. In his oral submissions, Wang acknowledged that the balance of probabilities test only comes into play in the liability phase of the hearing and that the test on his no evidence motion was as set out in *Bezzaz*.

[68] We agree that the question for the panel on the no evidence motion is whether the executive director tendered any evidence capable of supporting his allegations applying the factors outlined in *Bezzaz*.

Wang's submissions

[69] Wang submitted that, in order to prove obstruction of justice under section 57.5 of the Act, the executive director must prove the following statutory elements:

- He destroyed, concealed or withheld, or attempted to destroy, conceal or withhold, any information, record or thing reasonably required for a hearing, review, investigation, examination or inspection under the Act,
- He knew or ought reasonably to have known that a hearing, review, investigation, examination or inspection was to be conducted, and
- He took any such action before the hearing, review, investigation, examination or inspection.

[70] Wang submitted that in order to establish that he engaged in conduct abusive to the capital markets, the executive director must prove at least the following:

- Serious behavior that is outside the ordinary course of conduct in the capital markets, and
- Either risk, or actual harm, to the capital markets arising from such conduct.

[71] Wang submitted that the executive director had not tendered evidence capable of supporting the required elements of either section 57.5 of the Act or conduct abusive to the capital markets.

Executive director's submissions

[72] The executive director submitted he had tendered compelling, direct evidence capable of supporting the allegations against Wang that he had contravened section 57.5 or, in the alternative, engaged in conduct that was abusive to the capital markets.

Analysis and ruling on the no evidence motion

Section 57.5

[73] Wang submitted it is trite law that when dealing with penal legislation, statutory provisions should be strictly construed.

[74] Wang argued that, given the seriousness of the obstruction of justice allegation, the interpretation of section 57.5 of the Act should be similarly strictly construed. While incarceration is not one of the possible outcomes in this case, he said that a significant obstacle to future employment and career advancement was at play.

[75] The executive director submitted that section 57.5 should be construed broadly as, contrary to the submissions of Wang, the Act is not penal legislation, rather it is remedial legislation.

Required elements of section 57.5

Was there an "investigation"

[76] Wang submitted the evidence did not establish that the investigator conducted an "investigation" or any of the other processes listed in section 57.5(1)(b) of the Act. He said that the investigator testified he conducted an inquiry and not a full investigation and that section 57.5(1)(b) does not include an "inquiry".

- [77] The executive director submitted that “investigation” is not defined in the Act and should be construed broadly. He said that limiting investigations in section 57.5 by the Commission’s internal organizational nomenclature so that section 57.5 only applies to “investigations” by the investigations branch and not to “inquiries” by the case assessment branch would suggest to the public that they only need to deal honestly with certain branches of the Commission. He also said that a narrow definition of “investigation” would fail to take into account the early stages of the investigative process when the scope of inquiry to be undertaken by the executive director is not yet known with any certainty. He argued that an investigator’s ability to assess the merits of a complaint is dependent upon his or her ability to gather reliable information at all stages of the investigative process in order to determine whether there is evidence to support the allegation being investigated.
- [78] We agree with the executive director that the term “investigation” should be broadly construed.
- [79] As noted in *Pacific Coast Coin*, the Act is remedial legislation. It is a regulatory statute with a public interest mandate. Its over-arching purpose is to ensure investor protection and fair and efficient capital markets. The meaning of “investigation” should be examined in the light of this context and purpose.
- [80] As noted above, “investigation” is not defined in the Act. The ordinary meaning of the word is fairly broad. The *Canadian Oxford Dictionary*, 2nd ed. (2004) definition of “investigate” incorporates the concept of an “inquiry”. “Investigate” is defined in part as “inquire into”, “examine”, “study carefully” or “make an official inquiry into”.
- [81] In our view, given the legislature did not define “investigation” to limit the nature of the inquiries that would be subject to section 57.5 and given the context and purpose of the Act, “investigation” should be broadly construed. What should be determinative is the substance of the activities undertaken by the investigator, not the label attributed to those activities as a result of the Commission’s internal organization. Investor protection mandates that persons be required to be truthful with Commission investigators at all stages of an investigation, including those preliminary steps.
- [82] The executive director tendered evidence that the investigator undertook a series of inquiries including the following. When he received the Complaint, he asked the investor’s mother to send him copies of the relevant documents. He reviewed the documents and called Wang, who had been named in one of the emails provided by the investor’s mother, to inquire about the FS investment. He met with the investor and his mother to discuss particulars of the Complaint. He reviewed audio recordings of the April 3 and the April 4 meetings provided by the investor and his mother. He reviewed the transcript of a compelled interview with Zhang conducted in connection with a Commission investigation of Zhang.
- [83] The investigator testified that the difference between an inquiry and a full investigation was the amount of work involved, with an inquiry being generally less work.
- [84] The fact that the investigative procedures carried out by the investigator did not result in the issuance of a formal investigation order does not mean that an investigation was not undertaken

within the meaning of section 57.5. It is the nature of the activities undertaken, rather than the result, that is determinative.

- [85] We find that the procedures carried out by the investigator in connection with the Complaint constituted an “investigation” within the meaning of section 57.5 of the Act.

Was the Complaint reasonably required for the investigation

- [86] Wang submitted the executive director did not establish that the Complaint was required for an investigation. He said the investigator did not state that the Complaint was required for any of the processes listed in section 57.5(1)(b). He said that the investigator testified he was conducting a small inquiry in response to the Complaint and his role was to help the investor obtain a refund on their investment.
- [87] The executive director submitted the Complaint was reasonably required for an investigation. He said the investigator only began undertaking investigatory activities after he received the Complaint and he would not have done so otherwise. The executive director said the investigator did not testify to this as it was obvious from the circumstances.
- [88] We agree with the executive director. The timeline of receipt by the investigator of the Complaint and the subsequent initiation of investigative procedures by the investigator is evidence that the Complaint was reasonably required for the investigation.
- [89] We find that the executive director adduced evidence reasonably capable of supporting a finding that the Complaint was required for an investigation within the meaning of section 57.5.

Did Wang attempt to conceal or withhold the Complaint

- [90] Wang submitted there was no evidence that he concealed or withheld, or attempted to conceal or withhold, the Complaint. He said that the evidence adduced by the executive director showed that Zhang directed the investor and his mother to withdraw the Complaint and that it was the investor who then called the investigator to say that his mother had been confused and the Complaint had been made erroneously. He said the transcripts of the April 3 and 4 meetings made it clear that anything he said was merely a repeat or translation of what Zhang had already said in her coaching of the investor and his mother.
- [91] The executive director submitted evidence had been tendered that showed Wang concealed or withheld, or had attempted to conceal or withhold, the Complaint. The recording of the April 4 meeting showed that Wang coached the investor in English for more than one-half an hour about how to lie to the investigator about the Complaint. The investor and his mother testified that Wang was present during the investor’s call to the investigator to relay the false story.
- [92] We agree with the executive director. The recording of the Wang’s extensive coaching session with the investor and the testimony of the investor and his mother regarding Wang’s presence during the call to the investigator is evidence that Wang attempted to withhold or conceal the Complaint.

[93] We find the executive director adduced evidence reasonably capable of supporting a finding that Wang concealed or withheld, or attempted to conceal or withhold, the Complaint.

Did Wang know or reasonably should have known that an investigation was to be conducted

[94] Wang submitted there was no evidence he had actual knowledge that an investigation was being conducted or that he reasonably should have known that an investigation would be carried out in the future relating to the Complaint.

[95] He said the only conclusions that could be drawn from the evidence is he knew the investor's mother had contacted the Commission and she and her son wanted their money back.

[96] The executive director submitted that evidence had been adduced that Wang knew or ought reasonably to have known an investigation was to be conducted. He said there was evidence that Wang had been contacted by the investigator by phone and email asking for details of the investor's FS investment and that the signature line in the investigator's email identified him as an investigator with the case assessment branch of the enforcement division of the Commission.

[97] There was also evidence Wang knew that the Commission was acting on the Complaint. In the recording of the April 4 meeting, Wang said: "Because they, they, well obviously the reason that you called them because they are now, they are looking into it. So it's trouble, right?"

[98] We agree with the executive director. The receipt by Wang of a phone call and an email inquiry regarding the FS investment from an individual identified as an investigator for the Commission together with his comment at the April 4 meeting is evidence that Wang knew or reasonably should have known an investigation was to be conducted.

[99] We find the executive director adduced evidence reasonably capable of supporting a finding that Wang knew, or reasonably should have known, an investigation was to be conducted.

Is there evidence capable of supporting the section 57.5 allegation

[100] As stated above, the test on a no evidence motion as found in *Bezzaz* is whether there is any evidence reasonably capable of supporting the executive director's allegations without evaluating the quality of the evidence.

[101] We find that the executive director has adduced evidence reasonably capable of supporting the allegation that Wang contravened section 57.5. We make this finding giving the evidence an interpretation most favourable to the executive director and without evaluating the quality of the evidence.

Conduct abusive to the capital markets

[102] Wang submitted the executive director failed to adduce any evidence that his conduct was abusive of the capital markets. He said that any potential abuse or risk to the capital markets was eliminated when the investment funds were returned to the investor.

[103] Wang submitted the conduct primarily intended to be captured as abusive to the capital markets is real and direct abuse that affects the capital market and its operations. In support of his

submission, Wang cited *Re Canadian Tire Corp.*, 1987 LNONOSC 47. We note that case has limited application as the decision occurred in the context of the review and regulation of a capital market transaction and not in the context of an enforcement hearing as in the present case.

[104] The executive director submitted that evidence Wang coached the investor to lie to a Commission investigator is conduct capable of supporting the allegation that he engaged in conduct abusive to the capital markets. He said Wang's submission that any potential abuse or risk to the capital markets related to his conduct was eliminated with the return of the investor's fund was misconceived. The executive director said abusive conduct contrary to the public interest cannot be remedied by a private transaction between the parties.

[105] The executive director cited *Re Hamilton* where it was noted that in using and defining the scope of the public interest jurisdiction, panels must tie their analysis to the twin mandates of the Act which are investor protection and ensuring fair and efficient capital markets.

[106] The executive director said the Commission has held that truth is integral to the effective exercise of the Commission's investigative powers in cases dealing with section 168.1(1)(a) of the Act involving the making of false and misleading statements to Commission staff. The executive director argued the same principle is applicable to this case. He said that the effective and efficient regulation of the capital markets requires those within it to be honest and transparent and the integrity of the regulatory system is preserved by requiring those required to provide information to the Commission to do so truthfully. Moreover, he argued that the Commission's ability to detect misconduct in the capital markets is dependent on investors coming forward to make complaints. The executive director submitted permitting persons to obscure or hide information, or to instruct others to do so, hampers the Commission's ability to gather information to evaluate conduct, and impairs the Commission's ability to protect investors.

Is there evidence capable of supporting the allegation that Wang engaged in conduct abusive to the capital markets

[107] We agree with the executive director. Considering the evidence adduced by the executive director that Wang coached the investor to lie to the investigator, the guidance provided in *Re Hamilton* and the integral role that truth plays in the regulatory process and investor protection, we find the executive director adduced evidence reasonably capable of supporting a finding that Wang engaged in conduct abusive to the capital markets. We make this finding giving the evidence an interpretation most favourable to the executive director and without evaluating the quality of the evidence.

V. Liability issues

[108] Having found that the executive director tendered evidence capable of supporting the allegations against Wang that he had contravened section 57.5 or, in the alternative, engaged in conduct that was abusive to the capital markets, we now turn to consideration of whether the executive director has proved the allegations against Wang on the balance of probabilities.

[109] We also will consider the evidence tendered with respect to the allegations against Zhang to determine the same issue.

Analysis and findings relating to liability

Section 57.5

[110] As noted above, to establish that the respondents breached section 57.5 of the Act in these circumstances, the executive director must prove on a balance of probabilities that the respondents:

- Destroyed, concealed or withheld, or attempted to destroy, conceal or withhold, any information, record or thing reasonably required for a hearing, review, investigation, examination or inspection under the Act,
- Knew or ought reasonably to have known that a hearing, review, investigation, examination or inspection was to be conducted, and
- Took any such action before the hearing, review, investigation, examination or inspection.

[111] The executive director and Wang made a number of the same submissions in connection with the no evidence motion and the liability issues. Where we have dealt with an issue in connection with the no evidence motion, we will not repeat the analysis.

Were the procedures carried out by the investigator an “investigation”

[112] The evidence with respect to the investigative procedures carried out by the investigator was not contested. The point of contention was whether those activities constituted an “investigation” under section 57.5 of the Act. We considered this issue in connection with the no evidence motion and concluded that the investigative procedures carried out by the investigator in connection with the Complaint constituted an “investigation” under section 57.5 of the Act.

Was the Complaint reasonably required for the investigation

[113] The submissions on this point made by the executive director and Wang with respect to the no evidence motion and the liability issues were substantially the same. In the case of Wang, the submissions were primarily tied to the question of whether the investigator was conducting an “investigation”. Our findings on this issue are set out above.

[114] There is no dispute with respect to the evidence regarding the investigative procedures undertaken by the investigator or the timing of those procedures. Those procedures, which we have found constitute an “investigation”, were only undertaken after the investigator received the Complaint. The subject matter of the procedures was directly related to the Complaint. Had it not been for the Complaint, the investigation would not have occurred.

[115] We find that, in the circumstances, the Complaint was reasonably required for the “investigation”.

Did the respondents attempt to conceal or withhold the Complaint

[116] The first question is whether coaching someone to lie to a Commission investigator is conduct caught by section 57.5 of the Act.

[117] The executive director cited *Re Zhu*, 2014 BCSECCOM 325 in which the Commission held that when a respondent instructed its employees and investors to mislead or lie to Commission staff, the respondent attempted to conceal or withhold information reasonably required for

investigation contrary to section 57.5 of the Act. The executive director said that the conduct in this case is analogous.

[118] Wang submitted that there were two distinguishing factors in *Re Zhu*. It involved an ongoing investigation of which the respondent was aware and, in the course of the ongoing investigation, the respondent was asked to provide certain documents to the Commission and failed to do so.

[119] In *Re Zhu*, there were two separate allegations of breaches of section 57.5. One related to a failure by the respondent to provide certain information in response to a demand under section 144. The other related to instructions given by the respondents to its employees to mislead or lie to Commission staff. In both instances, the respondent was found to have breached section 57.5.

[120] The distinction made by Wang related to the fact that in *Re Zhu*, there was an ongoing investigation, appears to be tied to his submission that the investigative procedures carried out by the investigator did not constitute an “investigation”. We have found otherwise. Whether the respondents were aware, or reasonably should have been aware, of the investigation will be discussed below.

[121] The next question is whether, in these circumstances, in coaching the investor and his mother to lie to the investigator regarding the Complaint the respondents concealed or withheld, or attempted to conceal or withhold, information reasonably required for an investigation.

Zhang

[122] The evidence before us establishes that, in the communications between the respondents and the investor and his mother, it was Zhang who took the lead in proposing to them that they lie to the Commission. The investor testified that Zhang was in control of all of the meetings and he believed she was Wang’s boss.

[123] In the investor’s call with Zhang on April 3, Zhang said she would give the investor his money back but that he had to tell the Commission exactly what she said.

[124] The recording of the April 4 meeting establishes that it was Zhang who first outlined to the investor and his mother the false story to be relayed to the investigator. The recording also establishes that it was Zhang who initially coached the investor on the story in Chinese.

[125] The investor and his mother both testified that Zhang was present when the investor made the call to the investigator.

[126] None of this evidence was contested by Zhang.

[127] We find that, in engaging in this conduct, Zhang concealed or withheld, or attempted to conceal or withhold, information reasonably required for an investigation under the Act.

Wang

[128] Wang submitted the evidence was clear that Zhang was the person in charge of the FS investment, the relationship with the investor and his mother and the communications to be made

to the Commission. He said his testimony on these points had not been meaningfully challenged and was not contested by Zhang.

[129] Wang said this structure was illustrated by his April 2, 2014 response to the investor's email requesting a refund in which he stated that he had forwarded the request to Zhang who would respond. He said that this was consistent with his role with respect to the FS investment which was limited to assisting Zhang with translation to and from English.

[130] Wang testified that his role at the April 4 meeting was simply to act as an interpreter and that is what he did. In particular, he testified that when he coached the investor for over half an hour on what to say to the investigator, he was interpreting what had been said by Zhang in Chinese in the first 12 minutes of the meeting. He submitted that his conduct did not rise to the level of attempting to conceal or withhold information from the Commission.

[131] Wang testified there are inaccuracies in the transcripts of the recordings of the April 3 and 4 meetings which significantly alter the manner in which the transcripts are understood by the reader.

[132] In his testimony, Wang identified one omission in the April 3 transcript where Zhang's instruction to him to leave the room is omitted. This instruction takes place about an hour into the meeting after he and Zhang discussed with the investor and his mother the respondents' frustrations and concerns raised by the Complaint.

[133] Wang further identified four instances in the April 4 transcript where the conversation was shown as indecipherable and he said he was able to provide a translation. Two of the omissions were comments by Zhang related to the terms of the fictional "borrow to invest" investment together with a comment that "Us Chinese people don't like to borrow money". Wang also said that a direction from Zhang to Wang to speak English was omitted. The final instance identified by Wang occurred after his coaching session with the investor and related to a question from Zhang as to whether the investor and his mother wanted the respondents to remain for the call to the investigator and her comment that they might make the investor nervous.

[134] Wang testified there were further inaccuracies in the transcripts but did not identify anything specific.

[135] We note that Wang did not identify any inaccuracies in the transcript related to his extended coaching session with the investor.

[136] Wang submitted that these inaccuracies show that the transcripts are unreliable and should be given less weight.

[137] Wang also submitted that even if the transcripts proved to be accurate, they did not provide the necessary context required for a reader to be able to understand the circumstances they seek to convey which Wang said was that he was simply interpreting Zhang's words into English and not participating in developing the story to be told to the investigator.

[138] The recordings and transcripts of the April 3 and 4 meetings provide direct evidence that the respondents coached the investor and his mother to lie to the Commission. Wang's testimony as to the one omission from the transcript of the April 3 meeting and the four omissions from the transcript of the April 4 meeting show that the transcripts were incomplete in those instances but do not significantly affect the reliability of the rest of the content. The omissions provide more detail regarding the instructions given by Zhang to Wang but are generally consistent with the balance of the conversations. Wang's testimony that there were further unidentified inaccuracies in the transcripts cannot be given any weight, given that this testimony lacks any specific detail. We would expect him to testify as to any material inaccuracies.

[139] The executive director submitted that Wang was not a credible witness and his exculpatory evidence should be given no weight.

[140] The executive director said that at Wang's 2018 compelled interview, he was most likely lying when he said he did not remember that the respondents had attended a meeting with the investor and his mother where they coached the investor to lie to the investigator. He said it was not credible that Wang did not remember the most memorable part of his dealings with the investor and his mother.

[141] We note that the questions at the 2018 interview regarding Wang's dealings with the investor and his mother were put to Wang at the end of a lengthy compelled interview relating to a separate investigation into FS. Wang was given no prior notice that he would be questioned on these dealings at the interview. We also note the questions related to events that took place four years prior to the interview.

[142] In these circumstances, we make no finding as to the credibility of Wang's testimony at the compelled interview. In any event, the question of his credibility at the interview is not a critical factor in our deliberations as there is material direct evidence relating to the allegations in issue.

[143] The executive director also argued that Wang's testimony at the hearing was self-serving and not credible. He said that Wang's testimony did not make sense given the respective roles of Wang and Zhang in the FS organization.

[144] While the respective roles of the respondents in the FS organization have some relevance, what is key in these circumstances is the role each of them played in the alleged misconduct.

[145] The evidence before us is largely consistent with Wang's submissions. The investor testified Zhang was in control of all of the meetings and he believed she was Wang's boss. It was Zhang who first contacted the investor and met with him to present the investment. The investor testified that he decided to invest after this meeting with her. He testified he and his mother met with Zhang to formalize the investment and it was she who gave him the FS Investment Agreement. The investor said that Wang's role at the April 3 meeting was limited to acting as interpreter and witnessing his signature.

[146] The investor testified it was Zhang who took the lead in proposing to the investor and his mother that they lie to the investigator. She is the one who first raised the proposal with them on the

April 3 call. She was also the one who first outlined the details of the false story and first coached the investor at the April 4 meeting.

[147] However, the evidence does not support Wang's submission that his role at the April 4 meeting was limited to that of interpreter and his conduct did not rise to the level of attempting to conceal or withhold information from the Commission.

[148] The recording of the April 4 meeting establishes that Wang engaged in a lengthy coaching session with the investor in English during which he led the investor on a line by line basis through the false story he was to tell the investigator. During the first part of the meeting, Zhang spent 12 minutes outlining the key parts of the false story. Wang then took over and spent over one-half hour coaching the investor in English on the story. The recording showed that he engaged in role playing with the investor where Wang played the role of the investigator. Wang was clearly taking a role in developing the false story. Wang's conduct goes beyond that of acting as interpreter.

[149] Even if Wang was simply acting as an interpreter of Zhang's idea, he was still coaching the investor to lie to the investigator by translating those ideas into English. His role was critical to the success of the intended deceit as the call to the investigator was to be in English and Zhang did not speak English. The fact that the false story may have been Zhang's idea does not change the nature of Wang's conduct.

[150] The investor and his mother both testified that Wang was present during the investor's call to the investigator.

[151] We find that, in engaging in the above conduct, Wang concealed or withheld, or attempted to conceal or withhold, information reasonably required for an investigation under the Act.

Did the respondents know or reasonably should have known, an investigation was to be conducted

[152] Wang submitted that, given the seriousness of the offence, this element of section 57.5 of the Act is one to which the panel should give particular consideration as to what evidence is required to meet the standard of proof. He argued that the evidence required to prove his actual or objective knowledge must be compelling and highly reliable.

[153] As noted in *F.H. v. McDougall*, while context is important and a judge should not be unmindful where appropriate of the seriousness of the allegations and consequences, these considerations do not change the standard of proof. The court said there is only one rule and that is, in all cases, evidence must be scrutinized with care and that evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

[154] Wang said he did not have any involvement with the Commission prior to the matters in issue. He said he had received an email from the investor requesting a refund. In this context, it was reasonable for him to assume the Commission was contacting him only for the purpose of helping the investor get his money back.

[155] The evidence adduced by the executive director on this issue included:

- The testimony of the investigator regarding his April 3, 2014 call to Wang during which he requested information regarding the FS investment,
- A copy of the April 3, 2014 email from the investigator to Wang requesting details of the FS investment. The signature line identified the investigator as an investigator with the case assessment branch of the enforcement division of the Commission,
- The recording of the April 3 meeting in which the investor's mother told the respondents that, in her call with the investigator, he had asked for information regarding the FS investment including questions about the two individuals named in the FS investment agreement, and
- The recording of the April 4 meeting in which Wang said: "Because they, they, well obviously the reason that you called them because they are now, they are looking into it. So it's trouble, right?"

[156] Having been contacted by an individual from the Commission identified as an investigator requesting information regarding the FS investment and hearing that the investigator had asked the investor's mother for details of the investment including the names of the individuals who were parties to the investment agreement, it should have been clear to Wang that the Commission was conducting an investigation into the Complaint. This appears to be confirmed by Wang's statement at the April 4 meeting that the Commission was now looking into the FS investment and that was "trouble".

[157] We find the above evidence sufficiently clear, convincing and cogent to conclude on the balance of probabilities that Wang knew or ought reasonably to have known an investigation into the Complaint was to be conducted by the Commission. We have applied this same test to all of our findings but highlight it here in light of Wang's submissions on this point.

[158] It is clear from the recording of the April 3 meeting that Zhang was aware that the Complaint could trigger an investigation by the Commission. In the recording, she told the investor's mother she needed to know everything the investor's mother had said to the investigator. From the investor's mother's description of her call with the investigator summarized above, it should have been clear to Zhang that the Commission was conducting an investigation into the Complaint. This appears to be confirmed in the recording of the April 4 meeting where Zhang uses the example of the CRA to illustrate why the investor and his mother would not want the government investigating them. In the recording, she also said that she did not want any trouble from the Commission.

[159] We find that Zhang knew or ought reasonably to have known that an investigation into the Complaint was to be conducted by the Commission.

Did the respondents' conduct occur "before" a "hearing, review, investigation, examination or inspection" occurred

[160] Wang submitted there is no evidence that he took any action before any of the processes listed in section 57.5 (1)(b) of the Act occurred.

[161] He said that the word “before” in section 57.5(1)(b) is intended to target conduct that prevents or attempts to prevent the Commission from obtaining information, records or things that will assist them with moving ahead with a “hearing, review, investigation, examination or inspection”.

[162] We agree with Wang’s submission as to the purpose of the use of the word “before” in section 57.5(1)(b). This language is intended to target conduct such as in this case where the respondents coached the investor to lie to the investigator in an attempt to prevent an investigation into the Complaint from proceeding.

[163] It is clear from Zhang’s comments set out in paragraphs 26 and 27 that she did not want an investigation into the Complaint to proceed. She said:

You don’t want CRA to check you. Am I right? ... But you can’t stop it from investigating you. Once being investigated.

But I don’t want any trouble, you know? I have already ... the Securities Commission ... I don’t want to play this game.

[164] Wang made similar comments as set out in paragraph 40. He said:

Because they, they, well obviously the reason that you called them because they are now, they are looking into it. So it’s trouble, right? ...

They don’t have to look into it. ...

If you didn’t, you didn’t make the mistake, right? ...

So you call ... clarify a few things.

[165] The respondents then proceeded to coach the investor to lie to the investigator by telling him that the concerns underlying the Complaint had been resolved. This fabrication was clearly an attempt to cause the investigator to stop pursuing investigation of the Complaint.

[166] Wang submitted the investigator testified there never was an investigation of the conduct of the respondents and that, after Zhang repaid the investor, he closed the matter. Wang argued that, therefore, the evidence did not show that Wang took any action “before” any of the processes noted above.

[167] These submissions mischaracterize the testimony of the investigator. The investigator did not say that there never was an investigation. He testified that he conducted an inquiry and that the difference between an inquiry and a full investigation was the amount of work involved. As noted above, we have found that these preliminary investigative procedures carried out by the investigator constitute an “investigation”.

[168] We find that the respondents took actions prohibited by section 57.5 before a hearing, review, investigation, examination or inspection occurred when they coached the investor to lie to the

investigator in an attempt to prevent the Commission from obtaining information, records or things that would assist them in pursuing an investigation into the Complaint.

VI. Conclusion

[169] In conclusion, we find that each of the respondents breached section 57.5 of the Act when they engaged in the conduct described above.

[170] Having found that the respondents breached section 57.5 of the Act, we will not consider whether they also engaged in conduct abusive to the capital markets.

VII. Submissions on sanction

[171] We direct the executive director and the respondents to make their submissions on sanction as follows:

By January 11, 2021 The executive director delivers submissions to the respondents and to the secretary of the Commission.

By January 25, 2021 The respondents deliver response submissions to the executive director and the secretary to the Commission.

Any party seeking an oral hearing of the issue of sanctions so advises the secretary to the Commission. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).

By February 1, 2021 The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

December 9, 2020

For the Commission

Judith Downes
Commissioner

Deborah Armour, QC
Commissioner

Deborah Abbey
Commissioner