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

Citation: Re [redacted], 2024 BCSECCOM 256 Date: 20240607

[redacted]

Panel	Deborah Armour, KC	Commissioner
	James Kershaw	Commissioner
	Jason Milne	Commissioner
Submissions completed	May 10, 2024	
Decision date	June 7, 2024	

Parties

Karin Blok	For the Executive Director
Joven Narwal, KC	For [redacted]

Ruling and Reasons for Ruling

I. Introduction

[1] On June 12, 2024, this panel will hear an application by [redacted] ([redacted]) pursuant to section 171 of the *Securities Act,* RSBC 1996, c. 418 (Act) to revoke certain Commission orders.

[2] Prior to that application being heard, [redacted] seeks various orders to restrict public access to the hearing.

[3] This is our ruling on [redacted] preliminary application to restrict public access to the hearing on June 12, 2024 and our reasons for the ruling.

II. Background

[4] On March 10, 2023, [redacted] filed an application to vary three preservation orders (Preservation Orders) issued by the Commission on February 17, 2023 (Preservation Order Application).

[5] On March 31, 2023, the executive director filed materials opposing the Preservation Order Application.

[6] On April 12, 2024:

a) [redacted] and its directors filed an application seeking orders that the Preservation Order Application be held *in camera*, that its style of cause and the names of the applicants be anonymized, and that the hearing materials be sealed (Anonymization Application), and

b) [redacted] filed written submissions in the Preservation Order Application seeking revocation of the Preservation Orders.

[7] On May 2, 2024, the executive director filed submissions responding to the Anonymization Application and replying to [redacted] submissions on the Preservation Order Application.

[8] On May 10, 2024, [redacted] filed submissions replying to the executive director's May 2, 2024 materials on the Anonymization Application.

[9] [redacted] did not file any affidavits or seek to have any evidence entered in support of the Anonymization Application.

III. Applicable law

A. Applicable legislation

[10] Section 19 of the *Securities Regulation,* B.C. Reg. 196/97 states:

> **When hearing public**
>
> (1) Subject to subsection (2), every hearing is open to the public.
>
> (2) If the person presiding considers that a public hearing would be unduly prejudicial to a party or a witness and that to do so would not be prejudicial to the public interest, the person presiding may order that the public be excluded for all or part of the hearing.

B. Commission policy

[11] BC Policy 15-601 - *Hearings,* section 8.4(a) provides:

> 8.4 Public attendance
> ***(a) Hearings are public*** – A hearing must be open to the public, unless the Commission considers that:
>
> • a public hearing would be unduly prejudicial to a party or a witness and
> • it would not be prejudicial to the public interest to order that the public be excluded for all or part of the hearing

IV. Positions of the Parties

A. [redacted]

[12] [redacted] notes that the Commission has not made any public allegations against [redacted]. A Notice Of Hearing has not been issued nor are there any criminal or civil proceedings.

[13] [redacted] refers to two Commission proceedings that were *in camera* and anonymized that it says show there are precedents for the orders sought: *Re Application 20220610,* 2023 BCSECCOM 264 and *Re Application 20211018,* 2022 BCSECCOM 418.

[14] [redacted] also relies on the British Columbia Court of Appeal case of *Party A v. British Columbia (Securities Commission),* 2020 BCCA 88, in which the appellants sought an order that the appeal file be sealed and that references to parties be anonymized in a manner consistent with the naming protocol that had been applied by the Commission in the proceedings below.

[15] [redacted] quotes paragraphs 4 – 7 of *Party A* where the Court considers affidavit evidence from an expert retained by the applicants. The affidavit attached a report by the expert

which opined that the integrity of the investigation, the capital markets in general and the applicants in particular would all unfairly suffer harm from premature disclosure of the investigation. The expert concluded that it would be contrary to the public interest for the hearing to proceed in a public setting.

[16] The Court of Appeal held that the circumstances in that case satisfied the test for sealing the appeal file and ordered the file sealed on the condition that the appellants file an anonymized version of specified documents which would then appear in a public file.

[17] [redacted] submits that the expert opinion in *Party A* is directly relevant to the prejudice that could be suffered by [redacted] and is directly applicable to these proceedings. [redacted] also submits that that Court of Appeal decision establishes that harm can be caused to private equity businesses such as that of [redacted].

[18] [redacted] also purports to rely on an affidavit made by a former Director of the Commission in *Shapray v. British Columbia (Securities Commission),* 2009 BCCA 322. That affidavit supported the proposition that it would be contrary to the public interest for the existence of the subject investigation to become publicly known as it would undermine the effectiveness of the investigation, could damage reputations, violate privacy and unfairly affect the price of securities.

[19] [redacted] submits that it would be unduly prejudicial to the Applicants and the executive director for the Preservation Order Application to proceed by way of an open hearing as it would compromise the integrity of the investigation. [redacted] also cites the privacy interests of the applicants and the potential harm to the capital markets if the order sought is not granted. Given that the Commission has not made any public allegations against the applicants, disclosing the presence of the investigation would promote speculation by the public as to potential wrongdoings of the applicants.

B. The Executive Director

[20] The executive director opposes the Anonymization Application.

[21] The executive director starts with the proposition that court proceedings are presumptively open. He cites the Supreme Court of Canada case of *Sherman Estate v. Donovan*, 2021 SCC 25 which says at paragraph 38 that the person seeking to restrict access to the proceedings bears the onus to establish that open proceedings would pose a serious risk to an important public interest, that the order sought is necessary to prevent that risk and that the benefits of the order outweigh its negative effects. The Supreme Court of Canada said that the open court principle would only be overridden in exceptional circumstances.

[22] The executive director submits that the open court principle applies to Commission proceedings and references the *Securities Regulation,* section 19 and BC Policy 15-601 - *Hearings*, section 8.4. It is only where it would be “unduly prejudicial to a party or witness” and not prejudicial to the public interest that the Commission should depart from that principle.

[23] In response to [redacted] assertion that the orders sought are not unprecedented, the executive director refers to the evidence of the expert in the *Party A* Court of Appeal

case where the expert indicated that his opinion was limited to the potential prejudicial impact on the applicants in that case.

[24] The executive director submits that [redacted] has failed to meet its onus to establish that the open court principle should be overridden. He says that [redacted] submissions are nothing more than "general assertions of potential prejudice untethered from the facts of the case". The executive director submits that were the submissions accepted, there would never be any basis for open hearings.

[25] The executive director says that, contrary to the *Shapray* case, there is no evidence that a public hearing would compromise the investigation in this case. He also submits that [redacted] has not identified any risk to [redacted] privacy if the hearing of the Preservation Order Application is held in public. He points out that [redacted] has not identified any potential harm to the capital markets. There is no evidence that a public hearing could impact [redacted] business.

[26] Finally, the executive director submits that there is no evidence that a public hearing would be prejudicial to the public interest.

V. Analysis

[27] As noted above, the Anonymization Application is brought by [redacted] and its directors. The Anonymization Application pertains to the Preservation Order Application. The three bank accounts which are the subject of the Preservation Orders are solely in the name of [redacted].

[28] In his response submissions on the Anonymization Application, the executive director submitted that there is only one applicant and that it is [redacted]. The executive director points out that only [redacted] funds were restrained by the Preservation Orders and only [redacted] seeks variation or revocation of those orders. We note that reply submissions on the Anonymization Application were filed on behalf of [redacted] alone, not on behalf of its directors. We conclude that the proper applicant for both the Anonymization Application and the Preservation Order Application is [redacted].

[29] Accordingly, we have used the singular term "applicant" or "[redacted]" throughout these reasons except where referring to the submissions that purported to be on behalf multiple applicants.

[30] Hearings before the Commission are presumptively open to the public. As outlined in *Securities Regulation,* section 19, in order to grant the order sought by [redacted], we must find that:

a) a public hearing would be unduly prejudicial to [redacted] or a witness; and
b) it would not be prejudicial to the public interest to order that the public be excluded for all or part of the hearing.

[31] [redacted] cited *Re Application 20211018.* That decision merely states that, on the application of the applicant and with the consent of the executive director**,** an order for anonymization was granted. No other reasons were given for the decision.

[32] [redacted] also cited *Re Application 20220610* as a case where an order for anonymization was made as part of a section 171 review. Other than stating that no notice of hearing or public allegations had been issued and that the executive director did not oppose the application for anonymization, no reasons were given.

[33] As noted above, [redacted] has not filed any evidence in support of this application. [redacted] in effect seeks to rely on the expert opinion entered in *Party A.* There are a few reasons why [redacted] is not able to rely on that evidence in this case. First, as the affidavit was not made in this proceeding, it is not admissible in this case. Further, no notice has been given, in this case, of [redacted] intention to rely on expert evidence as required by section 4.1(c) of BCP 15-601. This section requires compliance, at a minimum, with the 30-day time period established by the *Evidence Act,* RSBC 1996, c. 124. Moreover, [redacted] did not ask the panel to exercise its discretion to admit expert evidence in circumstances that did not comply with the *Evidence Act*.

[34] Most importantly, it is clear from the evidence cited in *Party A* that the expert intends to limit his opinion to the facts in that case. At paragraph 29 of his report, he says "Although my opinion is limited to the potential prejudicial impact on the Applicants,… the other named individuals and companies would also likely be harmed." In paragraph 30 of his report, he says "What heightens the unfairness **in this case**…" And then in paragraph 31, he refers to "the integrity of **this** investigation…" meaning the one in that case. [emphasis added]

[35] The expert in *Party A* makes no attempt to make his opinion apply to all cases where anonymization is sought in connection with a section 171 application nor can we see how he could purport to do so. We do not accept that the expert in a different case, decided four years ago, would be able to give evidence that would apply in future cases with facts that expert had not been able to consider in rendering his report. That is an untenable position.

[36] If we have misapprehended [redacted] position and it is in fact that it is the reasons in *Party A* that should be applied in this case and not the evidence of the expert, we are left with the significant distinguishing factor that evidence was tendered in *Party A* but not in this case. As we elaborate below, we find that distinction to be determinative.

[37] We likewise do not see how *Shapray* is of assistance to [redacted]. The facts in that case were very different than those in this case. The applicant was challenging the constitutionality of then section 148(1) of the Act which prohibited disclosure of information gathered in the course of a Commission investigation. The executive director was relying on that section to refuse to release information gathered in the course of an investigation. He filed the affidavit [redacted] refers to in its submissions. The Court of Appeal decided the case on constitutional grounds finding, at paragraph 59, that the impugned section of the Act was invalid as it impaired free expression contrary to the Canadian Charter of Rights and Freedoms. *Shapray* did not deal with the open court principle.

[38] Although not cited by either party, we have considered the Commission decision in *Re Application 20210107,* 2021 BCSECCOM 394. In that case, an order for an *in camera* hearing was granted by the panel. The facts were arguably more compelling than those before us as the underlying application was to set aside an investigation order. As the panel noted, if they ultimately granted the order to set aside the investigation order, the

investigation would remain confidential. Having the application open to the public would have the opposite effect. While those facts are somewhat different from ours, that reasoning could be applied here. However, another distinguishing fact was that the executive director in that case did not object to the matter proceeding *in camera*. The decision did not indicate whether evidence was tendered in support of the application for an *in camera* hearing.

[39] We are not aware of any cases where anonymization was sought where the executive director did not either consent or took no position. This is important as it might be assumed in cases where the executive director has consented or taken no position that he had a concern that a public hearing could prejudice the investigation. That is not the case here. As the executive director has submitted, there is no evidence that an open hearing would compromise the investigation in this case.

[40] It is possible that [redacted], by filing the appropriate affidavit material, would be able to meet its onus and establish it would be unduly prejudiced if the orders sought are not granted. We do not know that. There is simply no evidence to establish that [redacted] would be unduly prejudiced. If we were to grant the order sought in the absence of any evidence of prejudice to any party or witness, it would be contrary to the presumption in favour of open hearings as found in *Securities Regulation,* section 19, *BC Policy 15-601 - Hearings* and the open court principle.

[41] We find that the Applicant has failed to meet its onus to establish that a party or witness would be unduly prejudiced if the orders sought are not granted.

[42] Having made that finding, we do not need to consider the second branch of the test, namely whether issuing the orders sought would not be prejudicial to the public interest.

VI. Conclusion

[43] The Anonymization Application is dismissed.

[44] We will delay making these reasons public **until 4pm on June 11, 2024,** to allow [redacted] time to take any other steps it may see fit.

June 7, 2024

For the Commission

Deborah Armour, KC
Commissioner

James Kershaw
Commissioner

Jason Milne
Commissioner

This decision is currently anonymized for publication pending the outcome of an application to vary the decision, pursuant to section 171 of the Securities Act, initiated by the applicant.