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

Citation: Re Application 20240726, 2024 BCSECCOM 459 Date: 20241024

Re Application 20240726

Panel	Gordon Johnson	Vice Chair
	James Kershaw	Commissioner
	Jason Milne	Commissioner
Submissions completed	September 9, 2024	
Decision date	October 24, 2024	
Counsel		
Stephen Zolnay Beverly Ma	For the Executive Director	
Joven Narwal, KC	For the Applicant	

Ruling and Reasons for Ruling

I. Introduction

[1] On July 26, 2024, the Applicant filed an application (Application) with the Commission under section 171 of the *Securities Act* (Act) for orders:

a) setting aside a substituted service order made by the Chair (Order for Substituted Service),

b) setting aside the demand for production and summons which were the subject of the Order for Substituted Service,

c) staying that demand for production and summons pending a decision,

d) requiring disclosure of various categories of materials, and

e) anonymizing the Application and having it proceed in camera.

[2] The Applicant later abandoned the portions of the Application for an interim stay and for production of further materials, and the parties agreed the balance of the application could be heard in writing.

[3] The executive director delivered a redacted version of the record relating to the decision made by the Chair. The Applicant later delivered detailed submissions and evidence in

form of an affidavit from the Applicant. The executive director filed a response, and the Applicant filed a reply.

II. Background

[4] On May 13, 2022, the Chair issued an investigation order into the activities of a number of subjects, including the Applicant.

[5] At some point, Commission staff decided the investigation should include an interview with the Applicant and the production of certain documents from the Applicant. Various steps were taken by Commission staff to contact the Applicant and to serve the Applicant with the demand for production and summons.

[6] Prior to March 27, 2020, personal service would have been required to effect valid service of the demand for production and summons. On that date, an amendment to the Act came into effect adding various provisions. These amendments included changes in the sanctions which might apply to a failure to comply with a summons or demand for production and gave the Commission an ability to allow substituted service of these materials if certain requirements were met.

[7] On June 18, 2024, Commission staff applied in writing to the Chair seeking an order allowing for substituted service of the demand for production and summons. The application was set out in a 21-page memorandum, supported by affidavits attesting to the efforts which had been made by Commission staff to contact the Applicant and complete personal service. The Chair made the Order for Substituted Service the following day.

[8] Commission staff then took the steps required within the Order for Substituted Service to complete personal service. The demand for production required the Applicant to produce certain records by July 24, 2024, and the summons required the Applicant to attend for an interview on August 21 and 22, 2024.

[9] On July 22, 2024, Commission staff sent an email to the Applicant referencing the applicable deadlines. The Applicant's counsel responded to the email in less than 75 minutes. Communications between Applicant's counsel and Commission staff have continued thereafter, including, among other topics, regarding dates which would be convenient for the Applicant to produce the demanded documents and attend an interview.

III. Application to set aside Order for Substituted Service and the documents served

A. Applicable provisions of the Act

Section 171 application

[10] Under section 171 of the Act, the Commission has the discretion to make an order revoking or varying its decision if it considers that to do so would not be prejudicial to the public interest. Section 171 reads as follows:

Discretion to revoke or vary decision

171 If the commission, the executive director or a designated organization considers that to do so would not be prejudicial to the public interest, the commission, executive director or designated organization, as the case may be, may make an order revoking in whole or in part or varying a decision the commission, the executive director or the designated organization, as the case may be, has made under this Act, another enactment or a former enactment, whether or not the decision has been filed under section 163.

[11] Under section 1(1) of the Act, a "decision" in relation to the Commission includes an "order… made under a power or right conferred by this Act or the regulations".

[12] The March 27, 2020, amendments to the Act included the enactment of subsections 144(1.1) through (1.3), which deal with service. The current section 144 reads, in full:

> **144**(1) An investigator appointed under section 142, 143.1 or 147 has the same power
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> (a) to summon and enforce the attendance of witnesses,
> (b) to compel witnesses to give evidence on oath or in any other manner,
> (b.1) to compel witnesses to preserve records and things or classes of records and things, and
> (c) to compel witnesses to provide information or to produce records and things and classes of records and things
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> as the Supreme Court has for the trial of civil actions.
>
> (1.1) A summons under subsection (1), or a demand under that subsection to produce records, property, assets or things or a class of records, property, assets or things, must be served personally on the witness or, if the witness cannot be conveniently found, may be left for the witness at the individual's last or usual residence with an occupant of the residence who appears to be at least 16 years of age.
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> (1.2) Despite subsection (1.1), if
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> (a) the person to be served by personal service is evading service, or
> (b) after a diligent search,
> i. the person to be served by personal service cannot be found, or
> ii. the last or usual residence of the person cannot be found or is unoccupied
>
> the commission may make an order that the document may be served by substituted service in accordance with the order.
>
> (1.3) If a document is to be served by substituted service permitted under subsection (1.2), a copy of the substituted service order that granted permission to use that substituted method must be served with the document unless
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> (a) the commission orders otherwise, or

(b) the substituted service permitted under subsection (1.2) is service by advertisement.

(2) The failure or refusal of a witness

(a) to attend,
(b) to take an oath,
(c) to answer questions,
(c.1) to preserve records and things or classes of records and things in the custody, possession or control of the witness, or
(d) to provide information or to produce the records and things or classes of records and things in the custody, possession or control of the witness

makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

(3) Section 34 of the *Evidence Act* does not exempt any financial institution, as defined in that section of that Act, or any officer or employee of an institution from the operation of this section.

(4) A witness giving evidence at an investigation conducted under section 142, 143.1 or 147 may be represented by counsel.

[13] After the Act amendments, and under "Administrative Penalty", section 162(3) now provides:

(3) If the commission, after a hearing, determines that a person named in a summons or demand under section 144 (1) has failed or refused

(a) to attend,
(b) to take an oath,
(c) to answer questions,
(d) to preserve records and things or classes of records and things in the custody, possession or control of the person, or
(e) to provide information or to produce the records and things or classes of records and things in the custody, possession or control of the person,

the commission may, if the commission considers it to be in the public interest to make the order, order the person to pay the commission an administrative penalty of not more than $1 million.

B. Position of the Applicant

[14] The Applicant's submissions include detailed and nuanced arguments regarding what evidentiary standard should be applied by the Chair when Commission staff seek an order of substituted service under section 144(1.2) of the Act. The primary elements of the Applicant's submissions are the following:

a) Unless there is specific statutory language to the contrary, statutory regimes such as this one related to permitting substituted service should be interpreted in accordance with the flexible, context specific approach mandated in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699. Relevant factors include the importance of the decision to the individual affected and the legitimate expectations of the person challenging the decision.

b) The consequences to the Applicant of non-compliance with the substituted service order can be very high, including enforcement orders under section 144(2) of the Act and administrative penalties of up to $1 million.

c) Until very recently the governing framework for service required personal service, and the letter from a Commission investigator attaching the documents sought to be served referenced the old provisions requiring personal service. As a result, it is reasonable for a party affected by Commission proceedings to maintain an expectation of personal service.

d) The evidentiary burden which must be met to satisfy the requirement that a party was evading service under section 144(1.2) of the Act requires evidence of that party's knowledge or mental state. This submission is supported in part by reference to the comparable rules of civil procedure in British Columbia, although with an acknowledgement that "there are important differences between the two regimes". The Applicant asserts that because the rules of civil procedure allow for service to be set aside on equitable grounds and because the civil rules apply to a broad range of service, some of which are relatively routine, while section 144(1.2) of the Act applies directly to a type of service which might lead to serious consequences for non-compliance, the requirements in the Act should be interpreted to create a higher burden on the party seeking substituted service.

e) The Applicant references a large number of cases which suggest that an element of knowledge or mental state must be proven with respect to the party who is alleged to be evading service.

f) The Applicant suggests that because the executive director did not draw the Chair's attention to the arguments and lines of authority which the Applicant asserts represent the law, or at least represent obvious arguments which the Chair should have considered before making the Order for Substituted Service, the *ex parte* application to the Chair did not include the appropriate full and frank disclosure which is necessary in an application of this nature.

g) The Applicant asserts that in the context of a new provision such as section 144(1.2) there was an obligation to provide a decision maker with a complete picture of the authorities related to the meaning of the words "evading service".

h) The Applicant submits that the submissions presented to the Chair were further deficient because those arguments indicate in crafting the requirements of a substituted service order "it is not necessary that the method of substituted service ensure that notice will be received. It is sufficient that the alternative method is reasonably likely to bring the process to the attention of the person served". The Applicant, relying on *Ho v. Porter*, [1994] BCJ No 1574, submits that the correct standard is that the process for substituted service must create an "overwhelming likelihood" that the individual avoiding process will receive *de facto* notice.

i) The Applicant submits that the executive director acted improperly by joining the application for substituted service in what is referenced as an omnibus application seeking similar orders against several subjects of the application who were alleged to be evading service. The Applicant argues that the circumstances of other individuals, and the evidence that those other individuals are evading service, will colour the perception of the evidence which is specific to the Applicant.

j) The Applicant submits that the onus is on the executive director to establish that the Order for Substituted Service should not be stayed.

C. Position of the executive director

[15] The executive director emphasizes the frequency of attempts to inform the Applicant that the Commission is seeking to speak with and to deliver documents to the Applicant. These efforts include multiple emails, voicemails and text messages left by process servers and an email and site visit by Commission staff to the Applicant's residence. The email sent by Commission staff specifically asked the Applicant to advise of a time and place when the Applicant would be available to accept personal service.

[16] The executive director also emphasizes the extent of the effort made to personally serve the Applicant. Visits to the Applicant's residence for the purpose of service occurred on August 1, 2023, a Tuesday, at 5:40 pm, on August 7, 2023, a Monday, at 10:56 am, on August 18, 2023, a Friday, at 8:20 am, on August 23, 2023, a Wednesday, at 9:40 am, on August 24, 2023, a Thursday, at 8:15 pm, and on February 15, 2024, a Thursday, at 8:15 am.

[17] The executive director submits that Commission staff had strong evidence supporting their belief they were visiting the current residence of the Applicant. The record confirms the Applicant's residential address listed in the Applicant's driver's license, and land title records confirm that the owner of that property is the Applicant.

[18] The executive director provides comments on many of the case authorities cited by the Applicant and seeks to distinguish them on the facts. The executive director submits that the cases before us do not establish that there are leading cases which establish conflicting lines of authority. The executive director submits that some of the cases cited

by the Applicant in fact support the position of the executive director. In particular, the executive director submits:

> The Applicant cites *McKinley (Re)* (sub nom *Law Society of British Columbia v McKinley*) at paragraph 59(g) (on page 14) and paragraph 34(f) (on page 20) of [the Applicant's] submissions. In this case, a Law Society hearing panel issued an order for substituted service of a citation against a lawyer who had "informed a Law Society investigator that she would not cooperate with the Law Society by advising of a place to serve documents on her or make herself available for personal service". The hearing panel ultimately found that the lawyer was evading service by "willingly not making herself available to receive service, despite being informed that the Law Society has been attempting personal service".

[19] The executive director expands on the proposition that a party who is the subject of efforts to serve him or her can be found to be evading service by declining to make himself or herself available. The executive director references the comments of the Supreme Court of Canada in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 to the effect that the securities market is highly regulated and all those who enter it are aware of and must accept justifiable state intrusions.

[20] The executive director submits that there is no basis for the suggestion that the substituted service, which was ordered in this case, created a risk that the Applicant might face a risk of imprisonment without further notice. The executive director notes that any penal jeopardy would exist only at the British Columbia Supreme Court level and that for any application to find a party in contempt, the alleged contemnor must be personally served with the application or must otherwise receive notice of the application. In addition, a petitioner in a contempt application must establish beyond a reasonable doubt that the person alleged to have breached the order had actual knowledge of the order and intentionally failed to comply with it.

[21] The executive director submits that the burden is on the Applicant to establish the facts which the Applicant alleges and to establish that revoking the Order for Substituted Service would not be contrary to the public interest. The executive director acknowledges the comments of the Court of Appeal in *Morabito v. British Columbia (Securities Commission),* 2022 BCCA 279 at paragraph 97 to the effect that even when the onus is on an applicant, in some circumstances the evidence submitted by an applicant can be sufficient to shift the evidentiary burden onto the executive director to provide an explanation. The executive director disputes that such circumstances are present here.

[22] The executive director submits that there is nothing improper about including multiple requests for orders from the Chair in a single application. The executive director asserts that the application materials carefully distinguish between the evidence which relates to the subjects of the application, and so no decision maker would "lump" the evidence together. The executive director also references the administrative efficiency which is

created by bringing a single application instead of a group of very similar independent applications.

[23] The executive director denies any failure to inform the Chair regarding the proper interpretation which should be given to section 144(1.2) of the Act. The executive director points specifically to language in the submission to the Chair noting that some cases have held that evading service "entails that the person to be served has some kind of knowledge that they are being sought for process and are avoiding contact."

[24] The executive director submits that the Applicant had counsel contact the Commission, after substituted service had been completed and just before the deadline to comply with the demand for production and summons. The executive director emphasizes that the response from counsel came almost immediately after an email was sent to the Applicant, demonstrating both that the prior efforts by Commission staff to contact the Applicant using that email must have been successful and that substituted service was effective in getting effective notice to the Applicant. The executive director submits that nothing the Applicant has submitted demonstrates any level of prejudice to the Applicant, and that the Applicant remains uncooperative.

D. Analysis and conclusion

[25] We have organized our analysis around the following questions:

a) What evidentiary standard applies to applications to the Chair under section 144(1.2) of the Act?

b) Did the executive director fail to properly inform the Chair as to the law?

c) Should the Order for Substituted Service be set aside because doing so would not be prejudicial to the public interest?

a) What evidentiary standard applies to applications to the Chair under section 144(1.2) of the Act?

[26] The Applicant submits that we should approach the interpretive question before us from the perspective of the reasonable expectation of the Applicant that, consistent with the seriousness of the materials sought to be delivered and the state of the law before the amendment to the Act permitting substituted service, section 144(1.2) should require a high level of proof of intentional evasion by a party who is the subject of service attempts.

[27] The executive director submits that we should place some reliance on the language in *Branch* regarding the highly-regulated nature of public markets, and the related expectation that participants should expect state intrusion into their business, to support an argument that we should follow the approach used in *McKinley (Re),* 2018 LSBC 11 and find that under section 144(1.2) of the Act, the term "evasion" includes being aware of an effort to effect service and declining to arrange for that to happen.

[28] We do not think that either argument is compelling. We think that the meaning of section 144(1.2) is quite clear based on the ordinary meaning of the words used when read in the context of the Act as a whole and, most importantly, in the context of the section itself.

[29] Section 144(1.2) is set out above, but it is brief and repeating its wording is justified here. It reads as follows:

> (1.2) Despite subsection (1.1), if
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> (a) the person to be served by personal service is evading service, or
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> (b) after a diligent search,
>
> (i) the person to be served by personal service cannot be found, or
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> (ii) the last or usual residence of the person cannot be found or is unoccupied,
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> the commission may make an order that the document may be served by substituted service in accordance with the order.

[30] It is useful to begin the analysis by focusing on the intention expressed in subsection (b). There, the legislature makes it clear that if the Commission first makes a diligent search for a person sought to be served and that person either cannot be found or their last or usual residence is unoccupied, then substituted service is available. Evasion of service need not be established. This language makes substituted service available (after a diligent search for the person to be served) even when a person to be served is unaware of efforts to complete service. It also makes substituted service available even when it would be clear that there could never be an "overwhelming likelihood" that the individual to be served will receive *de facto* notice. This clear intention, embedded within the relevant section itself, is a complete answer to many of the submissions made by the Applicant. For example, the Applicant's expectations arising from the pre-existing law requiring personal service are not sufficient to override this clear intention of section 144(1.2)(b).

[31] The language of subsection 144(1.2)(b) also contradicts the executive director's argument that in order to give effect to the direction from the Supreme Court of Canada in *Branch* (and, to be clear, from other courts in other contexts) that participants in securities markets should be taken to accept certain extended obligations and interventions, we should extend a very liberal interpretation to the word "evading". The reality is that the Act opens the door for substituted service in a broad range of circumstances when Commission staff are, despite diligent efforts, encountering difficulties in serving a summons or demand for production. If a subject to be served simply cannot be found, service is available without evidence of efforts to evade. If a subject's residential address is known but the space is unoccupied, the substituted service is available without engaging the concept of evasion. The determination that a particular space is unoccupied can be a reasonable inference drawn after expending reasonable efforts to reach the desired occupant.

[32] We continue our analysis by focusing on the intention expressed in subsection (a). “Evading service” is a concept which is incorporated in a broad range of administrative and civil procedural rules across Canada. It is not an exaggeration to say that someone who is searching for precedents could quickly find hundreds of them. Most applications for substituted service, by their nature, are unopposed. Most are brief. Many do not cite leading authorities, instead taking a practical focus on the evidence. Looking only at the cases cited to us, the most common view, which is contained in the authorities, is that “evading service” requires at least an awareness that someone is attempting service, and some effort to avoid that service. Our conclusion is that the ordinary meaning of the words “evading service” is consistent with the outcome that we see most commonly in the cases cited to us. The ordinary meaning of the word “evading” includes some level of awareness and avoidance. We also conclude that the same meaning applies when the word “evading” is used in section 144(1.2) of the Act.

[33] We emphasize that the evasion of service need not be proven by admission by the party sought for service. Proof is on the usual standard which applies in the context of the Act. Proof can be, and in fact usually can only be, proven by inference. In the case of people who are aware someone is attempting service, evading service can be as simple as choosing not to answer the door at your residence, choosing to not be home at hours when attempts to effect service are most likely or walking the other direction when seeing someone outside of your residence whom you do not recognize. The above list of what constitutes evading service is not exhaustive.

b) Did the executive director fail to properly inform the Chair as to the law?

[34] Until we issued this decision, no decision had been issued interpreting section 144(1.2) of the Act. The executive director, in making submissions to the Chair about how to interpret the Act, would have faced the challenges of which cases to cite out of an enormous pool of case precedents, each with its own facts and legislative context.

[35] The precedents which are based on the rules of civil procedure in British Columbia provide a useful reference regarding how section 144(1.2) should be interpreted. However, it is unfair in this instance to criticize the executive director for failing to draw any particular precedent to the attention of the Chair. This follows, in part, from the reality which we have described above that there are so many precedents and not a single, universally cited leading precedent. In addition, there are different considerations that apply under section 144(1.2) and the rules of civil procedure do not provide perfectly comparable guidance. Even the Applicant, in submissions made to us, agrees that cases from the context of the rules of civil procedure should be considered with caution. We conclude that as long as the executive director drew the primary options for how to interpret section 144(1.2) to the attention of the Chair, that would be sufficient to fulfill the executive director's obligation. Whether one specific case or another had been cited would not be determinative.

[36] The Applicant submits that the legitimate expectations of the Applicant are an important factor in assessing the applicable standard to be applied, and presumably (since this is asserted to be critical to the interpretative process) the executive director should have

drawn that argument to the attention of the Chair. We conclude that arguments about the interpretation of section 144(1.2) based on what were argued to be the legitimate expectations of the Applicant would not have been intuitive to a lawyer in the position of counsel for the executive director making submissions to the Chair. We consider the argument to be a weak one, and we conclude there was no obligation on the executive director to draw the argument to the attention of the Chair.

[37] The executive director specifically advised the Chair that "in some cases, it has been held that "evading" entails that the person to be served has some kind of knowledge that they are being sought for process and are avoiding contact." We conclude that this is the correct approach to apply under section 144(1.2). The executive director also made it clear to the Chair that the law is as yet undefined in this new context. We conclude that the submission of the executive director to the Chair did not violate the executive director's duty to avoid misstating the law or drawing the decision maker's attention to important lines of authority which the executive director was aware of.

c) Should the Order for Substituted Service be set aside because doing so would not be prejudicial to the public interest?

[38] We conclude, based on the British Columbia Court of Appeal's decision in *Morabito*, that the onus is on the Applicant to establish that setting aside an order under 171 of the Act would not be prejudicial to the public interest. We are fully conscious of the Court of Appeal's admonition that in some cases the facts themselves might require an explanation from the executive director, but we do not see that as an issue here. The executive director has been attempting to complete service, he is relying on a provision of the Act, and the most serious allegation made against the executive director is that his description of the applicable law in submissions to the Chair was incomplete. We have addressed that allegation. We conclude that the executive director is not required to give further explanations than those that have been provided.

[39] The application to the Chair for the Order for Substituted Service was granted without reasons. It is not part of the normal administrative process of the Commission that reasons be given on such an application. In deciding the application, it was open to the Chair to conclude there was a requirement to find that the Applicant had some level of knowledge of efforts by the executive director to serve documents. Significant evidence existed in support of that, particularly in the form of the message which had variously been left at telephone numbers of the Applicant's, by text message to the Applicant's number, by email and physically at the Applicant's residence. Evidence was before the Chair that the Applicant had a level and type of awareness to a degree which provided a sufficient basis for the Chair to conclude that the Applicant had the requisite awareness. We would have reached the same conclusion.

[40] In addition, the Chair had before her evidence of five attempts to serve the Applicant at the Applicant's residence. The efforts did not all occur on the same day of the week at the same time. They were spread out over different days of the week and different times of the day. As a result, evidence was before the Chair which provided a sufficient basis for the Chair to conclude that the Applicant was, on at least one of those attempts at

service, evading service. The evasion could have taken the form of the Applicant recognizing that someone was ringing the buzzer or knocking on the door but choosing not to answer, or the form of the Applicant choosing not to return home except at unusual hours in order to avoid contact. We would have reached the same conclusion; the Applicant was evading service.

[41] We add that, in any event, the Applicant's subsequent acts with respect to the matters that were intended to be brought to the notice of the Applicant are consistent with the Applicant receiving *de facto* service including the act of appointing counsel before the deadline for compliance set out in the summons and demand for production. Counsel for the Applicant is now actively advancing defenses on the Applicant's behalf. It is here, and not at the stage of interpreting the words "evading service", that the public interest factors of the Act are most applicable.

[42] The clear intention of section 144(1.2) of the Act is to assist the Commission in the proper service of documents of the type which its investigators sought to deliver to the Applicant. The executive director's application to the Chair for the Order of Substituted Service could have relied on subsections (2)(a) or (b) of that section in the alternative to subsection (1). If that had been the case, it would have been apparent that some basis for substituted service had been established, whether due to the Applicant being evasive or simply unfindable. Instead, the application relied only on the allegation that the Applicant was evading service. As a result, in this case, unlike in most other potential cases when an order for substituted service is sought, if there had been a failure by the executive director to prove that the requirements of subsection 144(1.2)(a) had been met, it can be seen as closer to a clerical error than a step which is contrary to the public interest. Considering the lack of any prejudice to the Applicant, and considering the clear intention of the Act to permit substituted service in cases such as this, where diligent efforts to effect service had been made, and considering that the application could very easily have listed all potential grounds for ordering substituted service and considering that efforts to serve the Applicant have now dragged on excessively long, and not due to any lack of diligence on the part of the executive director, setting aside the service which was effected in this case would most definitely be prejudicial to the public interest.

[43] We order that, except with respect to the application to anonymize which is addressed below, this application is dismissed.

IV. Application to anonymize and proceed in camera

A. Introduction and applicable law

[44] The Applicant submits that it would be unduly prejudicial to the respondents and to the executive director for this matter to proceed in an open hearing. The Applicant submits that the hearing should be subject to a sealing order and that the style of cause and the name of the Applicant should be anonymized.

[45] The Commission recently considered the issue of anonymization in *Re Application 20230310,* 2024 BCSC 380. In that case, the Commission had dismissed an application

for anonymization earlier in the proceeding, and the applicant had applied pursuant to section 171 of the Act to vary that earlier ruling. The Commission granted the application, revoked its previous order, and anonymized the proceeding.

[46] This panel has considered the reasoning in *Re Application 20230310* and agrees with it. That case was particularly instructive to this hearing panel because, in both cases, no notice of hearing had been issued by the executive director.

[47] In granting the section 171 application and making an order for anonymization in *Re Application 20230310,* the hearing panel set out an analytical framework based on provisions of the *Securities Regulation,* B.C. Reg. 196/97 (Regulation) and BC Policy 15-601 – *Hearings* (Hearings Policy).

[48] Section 19 of the Regulation states:

> **When hearing public**
> 19 (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.

[49] Section 8.4(a) of the Hearings Policy states:

> 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

[50] After noting that hearings before the Commission are presumptively open to the public, the panel in *Re Application 20230310* referred to section 19 of the Regulation and held at paragraph 38 that in order to grant the anonymization order sought, it would have to find that:

> a) the matter being made public would be prejudicial to the applicant in that case or to a witness, and
>
> b) it would not be prejudicial to the public interest to order that the matter be anonymized.

[51] In carrying out its analysis, the hearing panel situated the application for anonymization in the context of the Commission proceeding as a whole. The panel wrote:

> [56] We find that the most compelling factors in considering the public interest are that this proceeding is still at the investigative stage and that it is possible that no notice of hearing will ever be issued. We cannot ignore the fact that the executive director sought and obtained the Preservation Orders *ex parte* and in a closed hearing. It is somewhat problematic that, but for the Applicant seeking to set aside the Preservation Orders, the investigation would remain non-public. In weighing the public interest, we also accept the submission of the Applicant that it would be difficult for the Applicant to defend itself at an open hearing without the opportunity that a hearing on the substantive allegations set forth in a notice of hearing affords.
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> [57] The executive director has cited an Alberta Securities Commission case for the proposition that the expectation of privacy in securities-related cases is low. We note that case is distinguishable from this one insofar as a notice of hearing had already been issued in the Alberta case.
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> [58] There may well be other cases at the pre-notice of hearing stage where it would be prejudicial to the public interest if the matter was not made public. That is not the case here. We find that it would not be prejudicial to the public interest to revoke the Previous Decision and to grant the anonymization order.

[52] As stated above, we agree with that reasoning. While every case will depend upon its own facts, we find the absence of a notice of hearing in this matter – which means that no aspect of this proceeding would be public but for the Application – to be a very important consideration.

B. Position of the applicant

[53] The Applicant's written submissions were filed prior to the Commission's decision in *Re Application 20230310* and argued several grounds to justify an order for anonymization.

[54] The Applicant pointed to section 11 of the Act which imposes confidentiality obligations on persons acting under the authority of the Act. The Applicant argued that the language in that section makes the investigation in this matter presumptively confidential and that there is no basis on which to rebut this presumptive confidentiality.

[55] In arguing the benefits that anonymization confers on the integrity of investigations and on those being investigated, the Applicant also cited a range of materials including legislative provisions from Alberta and Ontario that address the non-disclosure of investigations by the securities commissions in those provinces, a report from an independent committee appointed by the Minister of Finance in Ontario, and cases from the Ontario Securities Commission.

[56] The Applicant also pointed to previous decisions of this Commission which granted anonymization and to the decisions of our Court of Appeal in *Party A v. British Columbia (Securities Commission),* 2020 BCCA 88 and in *Shapray v. British Columbia (Securities*

Commission), 2009 BCCA 322 which commented on impacts of the fact of investigations becoming publicly known.

[57] In sum, the Applicant submitted that privacy interests, the integrity of the investigation, potential harm to the capital markets, and the public interest all favour anonymization in this case.

C. Position of the executive director

[58] The executive director's written response submissions were also filed prior to the Commission's decision in *Re Application 20230310.*

[59] The executive director focused his submissions on the open-court principle captured in section 19 of the Regulation and on provisions of the Hearing Policy that make clear the usual practice of the Commission to conduct its hearings publicly.

[60] Relying on *Re BridgeMark Financial,* 2019 BCSECCOM 218, the executive director rejected the Applicant's submission that section 11 of the Act presumptively makes the investigation in this matter confidential. In the *BridgeMark* decision, upheld by our Court of Appeal, the Commission determined that the need to hold hearings publicly in accordance with the open court principle can constitute a public duty exception to the confidentiality requirements of section 11.

[61] The executive director also pointed to the Supreme Court of Canada decision *Sherman Estate v. Donovan,* 2021 SCC 25 that confirmed a strong presumption in favour of open courts and set out three factors a person seeking to limit that openness must establish:

a) that court openness poses a serious risk to an important public interest,

b) that the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not, and

c) that as a matter of proportionality, the benefits of an order limiting openness outweigh its negative effects.

[62] The executive director also submitted that cases on which the Applicant relies, including previous decisions of the Commission granting anonymization as well as cases from the Ontario Securities Commission, are factually distinguishable from the matter before us.

[63] Further, the executive director submitted that the Applicant's position on anonymization lacks an evidentiary foundation and does not satisfy the requirements for departing from the open court principle as articulated in *Sherman Estate*.

D. Reply submissions of the Applicant

[64] The Applicant filed reply submissions shortly after the Commission issued its decision in *Re Application 20230310.*

[65] In relying on that decision in reply submissions, the Applicant asserted that the Commission had set out a different test for anonymization than the standard articulated by the Supreme Court of Canada in *Sherman Estate*.

[66] Emphasizing that in *Re Application 20230310* the Commission made particular note of the fact that a notice of hearing had not been issued, the Applicant submitted that it would be extremely unfair in the matter before us for an investigation that would otherwise not be known to the public to be made public because a subject of that investigation applied for a review of the Commission's exercise of discretion in issuing the Order for Substituted Service.

E. Analysis and conclusion

[67] We find the reasoning in *Re Application 20230310* to be compelling when applied to the facts of this case. As the panel in that decision noted, there may be cases at the pre-notice of hearing stage where it would be prejudicial to the public interest were the matter not be made public. As did the panel in *Re Application 20230310,* we conclude that this is not one of those cases.

[68] Here, the executive director had not made public either the fact of his investigation or the Order for Substituted Service, which he obtained on an *ex parte* basis.

[69] Under section 171 of the Act, the Applicant was clearly entitled to bring the Application to seek a revocation of the Order for Substituted Service.

[70] To consider the Application, the Commission holds a hearing, a process which necessarily engages section 19 of the Regulation, which presumes that every hearing is public, subject to the considerations identified in sub-paragraph 2 of that section.

[71] We have reviewed the positions of the parties against the language of section 19 of the Regulation and the relevant caselaw. As to the test to be applied to determine whether an application at the pre-notice of hearing stage should be anonymized, we do not agree with the Applicant's submission that *Re Application 20230310* sets out a test that is somehow different from the analysis of the open court principle by the Supreme Court of Canada in *Sherman Estate.*

[72] As we read *Re Application 20230310,* the hearing panel simply applied the language of section 19 of the Regulation in the context of the facts before them and the relevant case law on the open court principle, including *Sherman Estate.*

[73] Taking the same approach here, we conclude that it is appropriate to grant anonymization. We have considered affidavit evidence from the Applicant which asserts, among other things, that the existence of the investigation being made public would cause serious and irreparable harm to the Applicant's reputation, personally and professionally, and that the thought of the Application being public causes the Applicant extreme stress and anxiety because the Applicant would not be able to properly

address the allegations or defend the Applicant's reputation while the investigation is ongoing.

[74] While we place some weight on the Applicant's affidavit evidence, it is the fact that a notice of hearing has not yet been issued that makes any evidence of prejudice much more compelling.

[75] Were we addressing an application in a proceeding in which a notice of hearing had been issued, our analysis would be considerably different and we might well insist on a higher evidentiary standard to establish prejudice sufficient to justify an order pursuant to section 19(2) of the Regulation.

[76] On the facts of this case, however, we are guided by the analysis of the hearing panel in *Re Application 20230310* and we reach the same conclusion. We find that:

a) holding this hearing publicly would be unduly prejudicial to the Applicant, and

b) it would not be prejudicial to make the orders below restricting public access to this hearing.

[77] We order that:

a) the ruling and reasons of the section 171 hearing in writing will be anonymized;

b) the style of cause and the name of the Applicant will be anonymized; and

c) the hearing materials will be sealed.

October 24, 2024

For the Commission

Gordon Johnson
Vice Chair

James Kershaw
Commissioner

Jason Milne
Commissioner