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

Citation: Re Parhar, 2017 BCSECCOM 286 Date: 20170906

NewGen BioPharma Corp., Jerwin Alfiler, Mackie Research Capital Corporation, Zia Hirji, Karan Tak, Shane Parhar and Afsheen Somji

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	George C. Glover, Jr.	Commissioner
Hearing dates	July 25 and 26, 2017	
Submissions completed	July 26, 2017	
Date of ruling	September 6, 2017	

Appearances

James Torrance Nicholas Isaac	For the Executive Director
Andrew Crabtree	For Zia Hirji
Patrick J. Sullivan	For Karan Tak
Howard Shapray, QC Sheila Tucker, QC	For Shane Parhar
Owais Ahmed	For Afsheen Somji

Ruling

I. Introduction

[1] Shane Parhar, Zia Hirji, Karan Tak and Afsheen Somji (the Applicants) applied for orders in connection with events that occurred during an ongoing investigation to determine whether the Applicants, among others, have engaged in conduct contrary to the public interest or in contravention of the *Securities Act*, RSBC 1996, c. 418.

[2] The investigation is ongoing and its outcome is, as yet, unknown. The executive director has made no allegations against the Applicants (or any other person) and has not issued a notice of hearing.

[3] The orders sought by the Applicants are as follows:

a) all of the Applicants seek an order directing the executive director to disclose to the Applicants all documents, evidence and material relied upon to establish the grounds for making the Commission's Investigation Order dated March 7, 2017 (the Investigation Order);

b) all of the Applicants seek an order directing the executive director to disclose to the Applicants all documents, evidence and material relied upon to establish the grounds for making the Commission's Order to Enter Business Premises of a Registrant dated March 17, 2017 (the Business Premises Search Order);

c) Parhar seeks an order restraining the Commission, the executive director and staff of the Commission from inspecting or examining any records, information, materials or property seized under the Investigation Order and the Business Premises Search Order, pending determination of the issues raised in Parhar's notice of application dated May 8, 2017;

d) Somji seeks an order directing the executive director to disclose to Somji all documents, evidence and material relied upon to establish the grounds for making the Commission's amended Investigation Order dated May 11, 2017 (the Amended Investigation Order);

e) Somji, Tak and Hirji seek an order directing the executive director to disclose to each of them all receipts for all material taken or copied during a search of the Vancouver business office of Mackie Research Capital Corporation (Mackie) conducted on March 17, 2017 (the Search); and

f) Somji, Tak and Hirji seek an order directing the executive director to disclose to each of them all materials taken or copied by staff of the Commission during the Search.

[4] At the commencement of the hearing of these applications, we asked for clarification with respect to the requested orders set out in subparagraphs 3(e) and (f) above. With respect to the orders requested in subparagraph (e), it was confirmed that the order requested would cover receipts for all materials taken or copied which are applicable not just to the three Applicants requesting this order, but to all materials taken or copied applicable to any person (whether an Applicant or not). Similarly, the requested order in subparagraph (f) is intended to provide to the respective Applicant a copy of all materials taken or copied during the Search, whether applicable to that Applicant or not.

[5] The requested orders set out in paragraph 3 arise, in part, in the context of an application under section 171 of the Act, filed by Parhar on May 8, 2017, which seeks:

a) a declaration that sections 142 and/or 143 of the Act unjustifiably infringe section 8 of the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982,* being *Schedule B* to the *Canada Act 1982* (U.K.) 1982, c.11 (the Charter);

b) further, or in the alternative, a declaration that the Commission's administration of sections 142 and 143 of the Act, as evidenced by the Investigation Order and/or the Business Premises Search Order, unjustifiably infringes section 8 of the Charter;

c) further, or in the alternative, a declaration that the Investigation Order and/or the Business Premises Search Order impermissibly sub-delegate, to enforcement division personnel, the Commission's statutory authority under section 142(2) of the Act;

d) further, or in the alternative, a declaration that sections 143(1)-(2) of the Act and/or the Business Premises Search Order do not provide the Commission with the authority to seize Parhar's personal smartphone from his immediate physical possession;

e) an order revoking the Investigation Order and the Business Premises Search Order pursuant to section 171 of the Act and/or section 24(1) of the Charter;

f) in the alternative, an order declaring that Parhar's personal smartphone is outside the scope of the Investigation Order and the Business Premises Search Order and not subject to being searched by enforcement division personnel without prior judicial authorization; and

g) such further and other orders as counsel for Parhar may advise.

[6] At the conclusion of the hearing of these applications on July 26, 2017, we reserved our decisions with respect to each of the orders sought (as described in paragraph 3 above).

[7] These are our rulings and reasons with respect to each of these applications.

II. Background

[8] Each of Parhar, Somji, Tak and Hirji is employed by Mackie at its Vancouver office and each is a registrant under the Act.

[9] On March 7, 2017, the Commission issued the Investigation Order. The operative part of the Investigation Order is as follows:

> 2. Having considered the representations of the Executive Director, and considering it to be expedient for the administration of the Act and in respect of matters relating to trading in securities or exchange contracts in British Columbia, under section 142 of the Act
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> a) the Commission appoints officers and employees of the Commission's Enforcement Division and the Investment Industry Regulatory Organization of Canada Vancouver Enforcement staff to make an investigation into trading securities by or of the Subjects from January 1, 2014 forward, to determine

whether the Subjects have engaged in conduct contrary to the public interest or in contravention of the Act and,

b) in making the investigation, the officers and employees of the Enforcement Division may exercise the powers under section 143(1) of the Act.

[10] Each of Parhar, Somji, Tak and Hirji is named as a subject in the Investigation Order.

[11] On March 7, 2017, the Commission issued a Non-Disclosure Order under section 148(1) of the Act.

[12] On March 17, 2017, the Commission issued the Business Premises Search Order. The operative parts of the Business Premises Search Order are as follows:

2. Having considered the representations of the Executive Director, and being satisfied that it is necessary and in the public interest, the Commission authorizes investigators appointed under the Investigation Order, to:

(a) enter the business premises of Mackie at 1075 West Georgia Street, Vancouver, British Columbia, on March 22, 2017 during business hours, for the purpose of carrying out an inspection, examination or analysis of records, property, assets or things that are used in the business of the Registrants that may reasonably relate to the Investigation Order;

(b) to require the production of the records, property, assets or things referred to in paragraph (a) and to inspect, examine or analyze them; and

(c) on giving a receipt, to remove the records, property, assets or things inspected, examined or analyzed under paragraph (a) or (b) for the purpose of further inspection, examination or analysis.

[13] On March 22, 2017, staff of the Commission attended at the Vancouver office of Mackie and executed a search under the Business Premises Search Order.

[14] Parhar was present in the Mackie office when the staff of the Commission executed its search. He was served with copies of the Investigation Order and the Business Premises Search Order.

[15] Parhar has a segregated office within the Mackie premises.

[16] Staff of the Commission took physical possession and copies of various documents and records and seized the computer used by Parhar in the Mackie office.

[17] Parhar was asked by staff of the Commission if he used his personal smartphone in connection with his work, to which Parhar replied in the affirmative. Thereafter, staff of the Commission demanded that Parhar turn over to them his personal smartphone.

[18] Subsequent to the search of the Mackie office, an agreement was reached between staff of the Commission and Parhar whereby Parhar's personal smartphone has not been

examined by Commission staff and is currently held by his counsel pending a determination of the applications for orders set out in paragraph 5 above.

[19] In an affidavit, Parhar set out that he uses his computer at work for both business and personal use and that it is password protected. He says that his personal smartphone is used mostly for personal purposes, but that it is also used for business purposes.

[20] Certain of the Applicants have asked for disclosure of the material relied upon by the Commission in issuing the Investigation Order and the Business Premises Search Order and been refused by staff of the Commission.

[21] Certain of the Applicants have communicated to staff of the Commission their concerns about the scope of the Investigation Order and the Business Premises Search Order.

[22] On May 11, 2017, the Commission issued the Amended Investigation Order. The operative parts of the Amended Investigation Order are as follows:

> Considering it to be expedient for the administration of the Act, in respect of matters relating to trading in securities or exchange contracts in British Columbia, and in respect of matters in British Columbia relating to trading in securities or exchange contracts in another jurisdiction, the Commission orders under section 142 of the Act that staff of the Enforcement Division of the Commission and the Investment Regulatory Organization of Canada, Vancouver office, are appointed to make an investigation into:
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> 1. The trading and distribution of securities in NewGen BioPharma Corp. (NewGen) and Breathtec Biomedical Inc. (Breathtec) by Zia Hirji, Karan Tak, Shane Parhar, Afsheen Somji (the Brokers) and others,
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> 2. Mackie Research Capital Corporation's supervision of their investment advisors, including the Brokers, in the trading and distribution of securities in NewGen and Breathtec,
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> 3. The accuracy of public information about NewGen, from approximately January 1, 2014, forward.

III. Law and Analysis

[23] In total, there are five disclosure applications (one for disclosure of the materials that were used in support of the issuance of each of the Investigation Order, Business Premises Search Order and Amended Investigation Order and two for disclosure of all receipts for and of all materials obtained or copied during the execution of the Business Premises Search Order) (collectively, the Disclosure Applications) and one application for a form of stay (the application that would prohibit Commission staff from reviewing the materials obtained under the Investigation Order and/or the Business Premises Search Order) (the Stay) pending determination of the matters set out in paragraph 5.

Stay Application

Jurisdiction

[24] The executive director submits that we do not have the jurisdiction to grant the Stay sought by Parhar.

[25] He says that the powers of the Commission are prescribed by the Act and that there is no statutory authority for the Commission to issue an interlocutory order of the kind sought by Parhar. He says that interlocutory orders of this type are an extraordinary remedy and that only superior courts have the inherent jurisdiction necessary to grant this form of relief. Finally, he says that our only applicable authority is that prescribed by section 171 of the Act which is to vary or revoke the Investigation Order and/or the Business Premises Search Order.

[26] We do not agree with the submissions of the executive director on this jurisdictional point and find that we have the authority under section 171 of the Act to grant the Stay.

[27] First, we consider granting of the Stay as a form of variance of the Investigation Order and the Business Premises Search Order. In granting the Stay, we are, in effect, imposing a condition or restriction on the operative effect of those orders (i.e. that certain materials, obtained under those orders, not be reviewed by Commission staff pending the determination of Parhar's substantive applications).

[28] Secondly, the Supreme Court of Canada, in *British Columbia v. Oliver Co-Operative Growers Exchange*, [1963] S.C.R. 7, has held that language similar to that in section 171 of the Act confers upon a government agency a broad and necessary authority to vary or revoke a prior decision of that agency to provide an outcome not otherwise specifically provided for by the agency's governing legislation. By definition, in section 1 of the Act, the Investigation Order and/or the Business Premises Search Order, are decisions of the Commission, and there is no doubt that we could revoke them in their entirely. It is consistent with that power to also have the lesser authority to temporarily stay, in a prescribed manner, the operative effect of those orders.

[29] Lastly, and most importantly, the Commission is an administrative tribunal. One of the cornerstones of an effective administrative tribunal is that it is to be the master (within the confines of administrative law principles) of its own procedures. The practical effect of accepting the executive director's submissions on this issue is that Parhar would have to seek the Stay in a superior court. It would be inconsistent with the Commission having control of its own processes and of providing a fair and efficient setting for the hearing and determination of matters properly to be determined by it (i.e. the substantive applications set out in paragraph 5 above), if we were unable to make interlocutory orders like the Stay.

Stay Criteria

[30] Parhar and the executive director agreed that the three part test articulated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 is the applicable one with respect to the application for the Stay.

[31] Under the *RJR* test, Parhar has the onus of establishing that:

- there is a serious issue to be tried;
- he would suffer irreparable harm if the application were refused; and
- he would suffer greater harm than would the executive director if the application were refused.

a) Serious issue to be tried

[32] The first element of the *RJR* test is generally not difficult for an applicant to establish. The test simply requires that the substantive application is neither frivolous nor vexatious.

[33] Parhar set out a number of detailed arguments in support of why the substantive applications (set out in paragraph 5 above) are neither frivolous nor vexatious.

[34] It is sufficient for our current purposes to summarize them as follows:

- the sections of the Act that authorize the issuance of the Investigation Order and the Business Premises Search Order and/or the specific terms of the Investigation Order and Business Premises Search Order are overly broad and infringe upon Parhar's rights under section 8 of the Charter; and

- the specific terms of the Investigation Order and Business Premises Search Order are overly broad and are not compliant with either the terms of the Act or basic administrative law principles.

[35] The executive director expressly did not accept that there was a serious issue to be tried regarding the substantive applications themselves; however, the executive director also did not contest that the issues set out in paragraph 34 above met the *RJR* test of what constitutes a serious issue to be tried on a preliminary stay application.

[36] We agree that the threshold of what is a serious issue to be tried is low and the terms of the Investigation Order and Business Premises Search Order, on their face, are broad. The breadth of the orders raises issues that are not frivolous or vexatious. Therefore, we find that there is a serious issue to be tried.

b) Irreparable harm

[37] Parhar relies heavily on the decision in *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 in support of his submission that he will suffer irreparable harm if we do not grant his application for the Stay.

[38] At issue in *143471* was an appeal of a decision to grant a stay preventing Quebec taxation authorities from reviewing materials they had seized in searches carried out at both a personal residence and at a business premises. The seized materials were held by the court pending a determination of the stay application.

[39] In upholding the stay, the majority of the Supreme Court of Canada made the following determinations that are relevant to this application:

- business records in a highly regulated industry have attached to them a greatly reduced expectation of privacy, but that expectation of privacy is not zero;
- the seizure of the materials in a search cannot be divorced from the circumstances of the search and seizure itself. The Court rejected the notion that once the materials are seized it is no longer necessary to consider the manner in which they were obtained; and
- the question of irreparable harm is highly contextual and, where a violation of section 8 of the Charter is in question, the intrusiveness of the measures taken by the government must be considered and measured.

[40] In summation on the question of irreparable harm, the majority in *143471* set out:

> 86 The constitutionality of ss. 40 and 40.1 of *An Act respecting the Ministère du Revenu* will be determined in the principal applications to quash the warrants. Should those sections eventually be found to be unconstitutional, then the searches and seizures will have violated the privacy interest of the respondents in their homes and offices. The government will, without authority, have entered the premises and searched for and seized the documents. Thus the government will have had the continuing possession of the documents in the absence of any authority and in violation of the *Charter*. This, it seems to me, would constitute irreparable harm to the respondents.

[41] The executive director submits that there is no possible risk of irreparable harm in this case.

[42] He says that:

- no prejudice can arise from the review of materials at the investigative stage, given that investigators lack any adjudicative function (citing *British Columbia (Securities Commission) v. Branch* (1990), 68 D.L.R. (4th) 347 (B.C.S.C.), affirmed [1995] 2 S.C.R. 3);
- the only risk, if one or more of Parhar's substantive applications are ultimately successful, is that certain evidence that would otherwise be relevant to the investigation may need to be set aside, which is a risk for the executive director and not Parhar;
- Parhar has merely asserted a privacy related harm and that the mere assertion of harm or prejudice is insufficient;
- Parhar's assertion that his ability to exercise his right to seek review will be irreparably impacted without the Stay is not sufficient to establish irreparable harm;
- the *143471* decision is distinguishable in that case it involved a search of a private residence (as well as a business residence) by a taxation authority and that

different privacy expectations attach to searches of business premises in a highly regulated industry such as the securities industry; and

- no actual irreparable harm has arisen at this early stage of an investigation and a proper assessment of whether wrongs occurred in the course of the investigation should be considered by a panel of the Commission in the context of a notice of hearing (see *A.B. v. British Columbia Securities Commission*, 2004 BCSC 165).

[43] On the question of irreparable harm, we find the facts and circumstances in the case before us are not materially different from those in *143471*.

[44] Firstly, the Supreme Court of Canada in *143471* found that the searches in question in that case arose in the context of a highly regulated industry.

[45] Secondly, as the Supreme Court of Canada said in *143471*, the question of irreparable harm is highly contextual. In the case before us, there was no search of a private residence. However, there was a search of a business premises that included a search of an individual's segregated office and a seizure of his phone from his personal possession. On the spectrum of a public authority's investigation powers, this business premises search by the Commission was both significant and intrusive. Materials seized included both an office computer and a personal smartphone, the uses of which were both business and personal. While we acknowledge that the expectation of privacy in business documents in a highly regulated industry is not high, it is not zero, and, in this case, we have actions taken by the Commission that have resulted in the seizure of items used for more than just business purposes.

[46] It is the combination of the intrusive nature of the search (including a search of an individual's segregated office and seizure of his personal phone), the nature of the information included in the seized materials (private information that is personal and confidential to Parhar) and the fact that the intrusion is ongoing (the seized material, other than Parhar's phone, remains in the executive director's possession) that constitutes the irreparable harm.

[47] In all, if either or both of the Investigation Order or the Business Premises Search Order are found to be invalid, we find that Parhar will have suffered harm that is not measurable in damages. We find that Parhar has satisfied the second element of the *RJR* test.

c) Balance of convenience

[48] Parhar submits that the harm to his privacy interests is serious and ongoing.

[49] Parhar submits that the executive director has not demonstrated any actual harm that would arise from the grant of the Stay. In particular, Parhar submits that the limitation period associated with any allegations that might arise from the conduct of Parhar during the time period under review by the Commission (as suggested by the terms of the Investigation Order) is not close to expiring.

[50] Further, Parhar suggests that we follow the reasoning set out by the Ontario Superior Court in *R. v. Lee*, 2006 Carswell Ont 4780 (OSC) at para. 27 where it suggested that "the temporary prevention of the authorities from inspecting the fruits of searches made in one case can certainly not be viewed as having a particularly profound effect on the enforcement of the Act generally." The Court in *Lee* was considering an application that would prevent a public authority from temporarily reviewing materials seized in a customs related search.

[51] The executive director submits that in the regulatory context the public interest in a public authority pursuing its mandate generally outweighs any harm suffered by the applicant in cases such as this. The executive director points to the decision in *RJR* and its assessment of the balance of convenience:

> 71 …In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant… The test will nearly always be satisfied upon proof that the authority is charged with the duty of promoting and protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[52] The executive director has also raised the specter of the Commission's investigation process becoming besieged and bogged down by stay applications of this type if we order the Stay. He also says that the effect of the Stay will be to shut down an active investigation.

[53] We are sympathetic to aspects of the executive director's submissions on this issue. The investigative powers of the Commission are a critical aspect of its ability to carry out its public interest mandate. Those powers cannot be unduly limited. The majority of applications for interlocutory relief similar to the Stay during the investigative stage of Commission proceedings are likely to fail the balance of convenience leg of the *RJR* test. Frankly, were Parhar's substantive applications founded solely on the constitutionality of the provisions of the Act underlying the Investigation Order and the Business Premises Search Order, such that the Stay called into question the Commission's ability to use those provisions, and effectively carry out investigations, generally, during the tenancy of the Stay, we would find that the balance of convenience favours the Commission.

[54] However, Parhar's substantive applications are also specific to the actual terms of the Investigation Order and the Business Premises Search Order. In our view, the Stay is limited in its effect to the circumstances of this investigation and not to Commission investigations generally. Further, the Stay would not act to inhibit the Commission from continuing its investigation in this matter under the terms of the Amended Investigation Order, provided such further investigation did not violate the terms of the Stay.

[55] Although there is no significant harm to Parhar, given his limited expectation of privacy in the circumstances of this case, there is no apparent harm to the Commission. No evidence of actual harm to the Commission that would be triggered by granting the Stay was introduced by the executive director. All of the harms that the executive director suggests will flow from granting the Stay are speculative in nature. While we agree that in some circumstances examples of the potential harm identified by the executive director may be crystalized, that is not the case in this matter. To the contrary, the Stay would not act to prevent the Commission generally from using investigation orders or business premises search orders in pursuit of its public interest mandate to protect the public. Nor would the Stay inhibit the Commission from pursuing its investigation in this specific case under the terms of the Amended Investigation Order, provided such further investigation did not violate the terms of the Stay. In the specific circumstances of this case, we find that the balance of convenience favours Parhar.

[56] Parhar has established all three elements of the test for a stay as set out in *RJR*. We also find that ordering the Stay is not prejudicial to the public interest. Therefore, under section 171 of the Act, we order the Stay.

Disclosure applications

[57] There are five separate applications for disclosure brought forward by one or more of the Applicants.

[58] The applications by Somji for disclosure of all materials relied upon in support of the Amended Investigation Order and the two applications by Somji, Tak and Hirji for receipts for all materials taken during the Business Premises Search Order and for disclosure of all materials taken and/or copied during the Business Premises Search Order can be dealt with summarily.

[59] In support of these applications, the respective Applicants suggest that this disclosure is relevant to the issue of possible sanctions in the event that the substantive applications by Parhar (or similar applications by the respective Applicants, if made) were successful. They also suggested that the requested disclosure might be necessary to assist them in determining if a challenge should be brought with respect to the Amended Investigation Order.

[60] We note the following in respect of these applications:

- no substantive application has been made by any Applicant with respect to the Amended Investigation Order challenging its validity on any grounds;
- if a notice of hearing is eventually issued in this matter, there are broad disclosure obligations which would require disclosure of anything relevant to any eventual allegations and which has been obtained under any of the Investigation Order, Business Premises Search Order or the Amended Investigation Order; and
- should any of Parhar's (or another Applicant's) substantive challenges to either the Investigation Order or the Business Premises Search Order be successful,

there will be a subsequent opportunity to bring further disclosure applications to the panel as being relevant to the question of what sanctions are appropriate.

[61] These applications are premature and, as will be discussed in further detail below, should be dismissed on the reasoning set out in the Commission's decision in *Botha*, 2009 BCSECCOM 10 (discussed below).

[62] Therefore, we dismiss the following applications

- Somji's application for an order directing the executive director to disclose to Somji all documents, evidence and material relied upon and establishing the grounds for making the Amended Investigation Order;

- Somji's, Tak's and Hirji's application for order directing the executive director to disclose to each of them all receipts for all material taken or copied during the Search; and

- Somji's, Tak's and Hirji's application for an order directing the executive director to disclose to each of them all materials taken or copied by staff of the Commission during the Search.

[63] The remaining two disclosure applications are brought by all Applicants and request disclosure of all documents, evidence and material relied upon and establishing the grounds for the Investigation Order and the Business Premises Search Order.

[64] The Applicants cite *Attorney General of Nova Scotia et al v. MacIntyre*, [1982] 1 S.C.R. 175 for the proposition that, in the criminal law context, where a search warrant has been executed and then is subsequently challenged, the subject of the warrant has a right to disclosure of the information used to obtain the warrant. They say that that principle should apply in this administrative context.

[65] They further cite *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 for the proposition that the subject of a warrant's right to disclosure of information in support of the warrant, in order to challenge the validity of a warrant, is a common law right that exists unless there is express statutory authority to the contrary. They say that there is no such express statutory prohibition against such disclosure in the Act.

[66] The Applicants say that these disclosure applications are not premature in that they are under no obligation to await an allegation of misconduct or a charge before attempting to challenge the validity of a warrant (see *O'Neill v. Canada (Attorney General)*, 2005 CanLII 18308 (On SC), 198 C.C.C. (3d) 143).

[67] Finally, they say that the Business Premises Search Order has been executed and that the Commission's interest in investigative secrecy is no longer paramount to the Applicants' right to disclosure. They also say that the materials they seek to have disclosed may be redacted by the Commission to protect confidential investigative techniques.

[68] Lastly, and most importantly, the Applicants say that they require the requested disclosure not to challenge the ultimate finding of a contravention of the Act but rather to establish whether their constitutional rights have been infringed.

[69] The executive director again says that we do not have the authority to make the orders for disclosure of the materials relied upon in issuing the Investigation Order and the Business Premises Search Order. In the alternative, the executive director says that these disclosure applications are premature.

[70] The executive director says we do not have the authority to order disclosure of materials used in connection with obtaining investigative orders prior to the issuance of a notice of hearing. Ordering disclosure of this kind prior to the issuance of a notice of hearing would undermine the Commission's use of its investigation powers and would create a form of ongoing, or rolling, disclosure during an investigation.

[71] In particular, the executive director says that the Applicants are not yet entitled to the disclosure required by the Commission's decision in *Fernback (Re) 2004 BCSECCOM 378* (which generally imported the disclosure principles set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 into Commission proceedings following the issuance of a notice of hearing).

[72] He further cites the decision in *Botha* as support for the notion that we do not have the authority, at the investigative stage, to order the disclosure requested by the applicants. In *Botha*, the panel was asked to order disclosure of any information or documents used to obtain an investigation order and to disclose any documents obtained pursuant to such order. The applicant argued that he needed such disclosure in order to seek relief for infringement of his constitutional rights and that the jurisdiction to make the disclosure order could be found under section 24 of the Charter. In rejecting the application, the panel determined that the applicant had not made an application under the Charter and that there was therefore no authority under section 24 of the Charter to make the order. The panel also noted that the applicant was not able to say on what grounds he intended to challenge the investigation or the investigation order. The panel went on to say that it was of the view that the application was premature (i.e. should be heard once a notice of hearing had been issued) and that there was no specific provision of the Act that provided for such an order.

[73] The executive director also says that the disclosure requested by the Applicants is not necessary for them to advance their substantive applications as their arguments relate to the breadth of the Investigation Order and the Business Premises Search Order, the terms of which are clear on their face.

[74] The executive director cites *Branch* for the proposition that reliance on criminal law jurisprudence with respect to challenging warrants is not appropriate in that the Applicants have no expectation of privacy associated with materials used for business purposes in a highly regulated industry.

[75] Finally, the executive director says that if we grant the disclosure orders requested by the Applicants there is a substantial risk to the efficacy of future Commission investigations. He says that recipients of future investigation orders will routinely ask for disclosure and that future litigation will ensue with concomitant delays to the Commission's ability to pursue its public interest mandate in protecting the investing public.

[76] We are sympathetic to the executive director's "floodgates" argument. We view the Commission's decision in *Botha* as appropriate where a disclosure application during the investigative stage of a Commission proceeding represents a mere "fishing trip". Applications of that kind are strongly discouraged.

[77] However, the circumstances in the case at hand are distinguishable from *Botha*. Parhar has filed an application with the Commission challenging both the Investigation Order and the Business Premise Search Order. Without, in any way, commenting on the merits of that application, which is yet to be determined, it is clear to us that that application raises real and substantial issues. The terms of those orders, on their face, are broad. Under the authority of those orders, the Commission has carried out the search of a business premises and seized certain materials, some of which have both a business and a personal use. In our view, the disclosure applications in this case cannot be viewed as mere "fishing trips".

[78] Somji's application for disclosure of all materials used in support of making the Amended Investigation Order are much more analogous to the circumstances in *Botha* and, as noted above, we find the reasoning in that decision supportive of our view that that application is premature.

[79] While we acknowledge that, in the absence of a notice of hearing, the disclosure obligations on the executive director as set out in the Commission's decision in *Fernback* are not triggered, we do have the authority to make the requested disclosure orders.

[80] Basic tenets of administrative law provide us with the authority to make the requested orders. The Ontario Securities Commission decision in *Azeff*, 2012 ONSEC 16 (CanLII), canvassed, in part, the question of whether a duty of fairness was owed by the OSC to a person under investigation and prior to the issuance of allegations against that person. Although the panel in *Azeff* denied a variety of requested orders, which the applicant said should have stemmed from the OSC's alleged breaches of procedural fairness, the decision, relying upon the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, confirmed that a limited duty of fairness is owed by the OSC to persons during the investigative stage of a Commission process. The panel set out that the extent of this limited duty of fairness is highly contextual.

[81] In *Azeff*, the panel summarized the principles that flow from the *Baker* decision as follows (paragraph 200):

… In *Baker*, the Supreme Court identified five non-exhaustive factors to consider when determining the content and extent of the duty (*Baker, supra* at paras. 23-27). These five non-exhaustive criteria used to determine the content and extent of the common law duty of procedural fairness in a given set of circumstances may be summarized as follows:

a) The nature of the decision being made and the process followed in making it: Paragraph 23 of *Baker* states "The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness";

b) The nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": Greater procedural protections, for example will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted;

c) The importance of the decision to the individual or individuals affected: The more important the decision is to the lives of those affected and the greater the impact on that person or those persons, the more stringent the procedural protections that will be mandated;

d) The legitimate expectations of the person challenging the decision: If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness; and

e) The choices of procedure made by the agency itself: When the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints.

[82] The panel in *Azeff* noted, in considering the first criterion set out in *Baker*, that the powers exercised by regulatory staff during the investigation stage more closely resemble the exercise of prosecutorial discretion than to judicial decision making. In this context, the panel noted that the scope for intervention during the investigation stage should be limited.

[83] We agree that applications for orders questioning the exercise of the Commission staff's prosecutorial discretion must be viewed through this lens. However, this perspective must be set against the third criterion from *Baker*, that being the importance of the decision to the individuals effected.

[84] In this case, the Commission has carried out its investigation, in part, through the use of a significant power, that of a business premises search. It has done so under orders that are, on their face, broad in scope. The issues raised by these actions and as set out in the substantive applications are real and substantial. We find it procedurally fair that the Applicants obtain the disclosure they seek in order to fully advance their substantive applications. The impact of this required disclosure on the Commission's investigation, following execution of the Business Premises Search Order, will not be significant and our order (set out below) allows the Commission to redact any information which may related to persons other than the Applicants and/or that may prejudice a confidential investigative technique.

[85] In the interests of procedural fairness to the Applicants, in the specific circumstances of this case, we find that the requested disclosure should be made.

[86] We find that the decision in *Branch* is distinguishable from the case before us. In *Branch*, the Supreme Court of Canada was dealing with the Commission's use of production orders which are a far less intrusive investigative power than a business premises search order. Further, the case before us involves the seizure of a computer and a smartphone which have mixed personal and business uses, whereas *Branch* dealt solely with documents used in a business context.

[87] We are not concerned that ordering the requested disclosure will lead to a flood of successful applications of its type, which in turn could impair the Commission's ability to perform its public interest mandate of protecting the public. A combination of the reasoning underlying the decision in *Botha* and the very limited duty of fairness owed to persons during the investigative stage of Commission proceedings will limit orders of this type.

IV. Orders

[88] We therefore order that:

a) the executive director disclose to Parhar, Somji, Tak and Hirji all documents, evidence and material relied upon to establish the grounds for making the Investigation Order;

b) the executive director disclose to Parhar, Somji, Tak and Hirji all documents, evidence and material relied upon to establish the grounds for making the Business Premises Search Order;

c) the executive director and staff of the Commission be prohibited from inspecting or examining any records, information, materials or property seized under the Investigation Order and the Business Premises Search Order, pending determination of the issues raised in Parhar's notice of application dated May 8, 2017;

d) the materials disclosed pursuant to subparagraphs (a) and (b) of this order may only be used by the recipients for the purposes of applications challenging the validity of the Investigation Order and/or the Business Premises Search Order;

e) the executive director may redact from any of the materials required to be disclosed pursuant to subparagraphs (a) and (b) of this order any information pertaining to persons other than Parhar, Somji, Tak or Hirji and/or any information that might disclose a confidential investigative technique;

f) a recipient of any of the materials required to be disclosed pursuant to subparagraphs (a) and (b) of this order shall give the executive director not less than five business days' prior written notice of an intention to file with a Court or the Commission any of such materials, to give the executive director time to apply for a sealing order; and

g) to allow for the giving of the notice required by subparagraph (f), if requested, the executive director shall consent to an extension of any filing deadline with any Court or Commission for at least five business days.

September 6, 2017

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

George C. Glover, Jr.
Commissioner