

BRITISH COLUMBIA SECURITIES COMMISSION

Section 161 of the *Securities Act*, RSBC 1996, c. 418

Citation: Re BridgeMark Financial, 2019 BCSECCOM 248

20190716

BridgeMark Financial Corp., Jackson & Company Professional Corp., Anthony Kevin Jackson, Lukor Capital Corp., Justin Edgar Liu, Rockshore Advisors Ltd. (formerly known as Cam Paddock Enterprises Inc.), Cameron Robert Paddock, Simran Singh Gill, JCN Capital Corp., John Rosarino Bevilacqua, Essos Corporate Services Inc., Sway Capital Corp., Von Rowell Torres, David Matthew Schmidt, Detona Capital Corp., Danilen Villanueva, Natasha Jon Emami, Altitude Marketing Corp., Ryan Peter Venier, Platinum Capital Corp., 658111 B.C. Ltd., Jason Christopher Shull, Tryton Financial Corp., Abeir Haddad, Tavistock Capital Corp., Robert John Lawrence, Jarman Capital Inc., Scott Jason Jarman, Northwest Marketing and Management Inc., Aly Babu Husein Mawji, Rufiza Babu Husein Mawji-Esmail, Denise Marie Trainor, Randy White, Escher Invest SA, Hunton Advisory Ltd., Kendl Capital Limited, 1153307 B.C. Ltd., Russell Grant Van Skiver, Bertho Holdings Ltd., Robert William Boswell, Haight-Ashbury Media Consultants Ltd., Ashkan Shahrokhi, Saiya Capital Corporation, Tara Kerry Haddad, Keir Paul MacPherson, Tollstam & Company Chartered Accountants, Albert Kenneth Tollstam, 727 Capital, David Raymond Duggan, Viral Stocks Inc., 10X Capital, Cryptobloc Technologies Corp., New Point Exploration Corp., Green 2 Blue Energy Corp., BLOK Technologies Inc., Kootenay Zinc Corp., Affinor Growers Inc., Liht Cannabis Corp. (formerly known as Marapharm Ventures Inc.), PreveCeutical Medical Inc., Speakeasy Cannabis Club Ltd., and Abattis Bioceuticals Corp.¹

Panel	Nigel P. Cave Judith Downes Audrey T. Ho	Vice Chair Commissioner Commissioner
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Decision date June 28, 2019

Date of reasons July 16, 2019

Reasons for Decision

[1] During late April and early May of 2019 a total of twelve applications (Applications)

¹ The original style of cause in this matter included Beleave Inc. On June 11, 2019, considering it would not be prejudicial to the public interest, the Executive Director discontinued the proceedings against Beleave, Inc. Therefore, the style of cause has been amended to refer only to the remaining respondents.

were filed by various named respondents in this matter, applying (among other things) to have certain orders to freeze property (Orders) made by the Commission, pursuant to section 151 of the Act, struck down, revoked or varied.

- [2] The list of applicants (Applicants) who made Applications was: BridgeMark Financial Corp., Tryton Financial Corp., Abeir Haddad, Saiya Capital Corporation, Tara Kerry Haddad, Northwest Marketing and Management Inc., Denise Marie Trainor, Sway Capital Corp., Tavistock Capital Corp., David Matthew Schmidt, Bertho Holdings Ltd., Detona Capital Corp., Rockshore Advisors Ltd., Cam Paddock, Randy White, Escher Invest SA, Hunton Advisory Ltd., Kendl Capital Limited, David Raymond Duggan, Viral Stocks Inc., 727 Capital, 10X Capital, Simran Singh Gill, Altitude Marketing Corp., Ryan Peter Venier, Tollstam & Company Chartered Accountants, Albert Kenneth Tolstam, Justin Liu, Lukor Capital Corp., Jarman Capital Inc., Scott Jason Jarman, Anthony Kevin Jackson and Jackson & Company Professional Corp.
- [3] Many of the Applications contained common grounds for challenging the Orders, including (the following are general descriptions of grounds of challenge that were made in a variety of specific forms but that were in substance the same):
- a) a finding and declaration that section 151 of the Act (and/or related review provisions under the Act) unjustifiably infringe section 8 of the *Canadian Charter of Rights and Freedoms, Part of the Constitution Act, 1982*, being *Schedule B to the Canada Act 1982 (U.K.)*, 1982, c.11 (Charter);
 - b) a finding and declaration that an Order made against a particular Applicant unjustifiably infringed upon the rights of the Applicant under section 8 of the Charter; and
 - c) a finding and order that an Order made against a particular Applicant be struck as failing to comply with section 151 of the Act as the decision maker had insufficient evidence to establish any of the elements necessary for the Commission to exercise its jurisdiction to make the Order against that Applicant (or, failing that, that the Commission has insufficient guidelines to make orders pursuant to section 151) (Guidelines Applications).
- [4] The Applications also included other specific grounds of challenge that were unique to each particular Applicant or a group of related Applicants.
- [5] During the same period of time, the Commission received applications in an unrelated matter that were substantively similar to the Applications (at least as they pertained to the matters described in paragraph 3 above).
- [6] On May 1, 2019, the tribunal of the Commission commenced a hearing management process to deal with the Applications and, in particular, the common issues that arose in order to address the Applications in a timely and efficient manner.

- [7] On May 8, 2019, the Attorney General of British Columbia, pursuant to section 43(3) of the *Administrative Tribunals Act*, SBC 2004, c.45 (ATA), delivered notice to the Commission that he was requesting that the Commission refer a stated case (Stated Case) to the British Columbia Supreme Court for determining the following questions of law:
- a) is section 151 of the Act consistent with section 8 of the Charter? and
 - b) if the answer to question (a) above is “no”, does section 151 of the Act constitute a reasonable and demonstrably justified limit under section 1 of the Charter?
- [8] Section 43(3) of the ATA sets out that if a constitutional question is raised in an application before the Commission, the tribunal of the Commission must refer that question to the Supreme Court of British Columbia if requested to do so by the Attorney General.
- [9] The Attorney General’s request of May 8, 2019 covered the constitutional challenges to section 151 of the Act that arise in both this matter and in the applications in the other unrelated matter. As a consequence, the Commission formed a separate hearing panel to satisfy the Attorney General’s request to refer the legal questions set out in his letter of May 8, 2019 and to adjudicate any issues among the parties relating to what should form part of that referral.
- [10] Upon being advised of the Attorney General’s request for a referral of the Stated Case, the Applicants agreed, by consent, to hold in abeyance their applications described in paragraph 3 (b) above until the opinion of the Supreme Court of British Columbia on the Stated Case is given (subject to their right to revoke their consent).
- [11] On May 30, 2019, the executive director filed an application seeking the following orders:
- a) an order pursuant to section 43(2) of the ATA, referring certain questions raised in the Applications (essentially the issues described in paragraph 3(c) above) to the British Columbia Supreme Court within a stated case; and
 - b) an order pursuant to section 43(5)(b) of the ATA, suspending those portions of the Applications relating to those issues until an opinion of the British Columbia Supreme Court has been given in the stated case.
- [12] The panel determined to hear the executive director’s application in writing. All of the Applicants were provided with an opportunity to provide their position on the application and written submissions.
- [13] We were advised that some of the Applicants had agreed with the executive director and the Attorney General of British Columbia that the substance of their applications, seeking

a test or guidelines, should be heard by the Supreme Court in the context of the Stated Case. Those Applicants therefore did not proceed with that aspect of their Applications.

[14] The remaining Applicants either consented to the executive director's application or took no position other than David Raymond Duggan, Viral Stocks Inc., 727 Capital and 10X Capital (the Objecting Respondents), who objected. The Objecting Respondents and the executive director provided written submissions on the application.

[15] On June 28, 2019, we dismissed the executive director's application with reasons to follow. These are our reasons.

I. Law

[16] Sections 43(2) and 43(5) of the ATA state:

(2) If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.

...

(5) Subject to the direction of the court, the tribunal must

- a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,
- b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and
- c) decide the application in accordance with the opinion.

II. Positions of the parties

[17] The executive director submitted that the Guidelines Applications raise questions of law as set out in section 43(2) of the ATA that relate to the Stated Case as contemplated in section 43(5)(b) of the ATA.

[18] The executive director further submitted that if we were to hear the Guidelines Applications then there would be a risk of inconsistent findings between that of the panel and that of the Supreme Court of British Columbia in the Stated Case. As a consequence, it would be impracticable for us to hear the Guidelines Applications.

[19] There were two possible interpretations of the submissions made by the executive director:

- a) that the Guidelines Applications were necessarily related to the Stated Case, such that they really form part of the Stated Case and the hearing of the Guidelines Applications should therefore be suspended under section 43(5)(b); or

- b) that the Guidelines Applications were related to issues in the Stated Case and that we should exercise our discretion to refer those questions, in addition to the questions already referred in the Stated Case, pursuant to section 43(2) of the ATA and the hearing of the Guidelines Applications should therefore be suspended under section 43(5)(b).

[20] While there is a distinction between those two submissions – and we were not clear from the submissions which of those two positions was being advanced – that distinction was not significant in the circumstances of this case and our reasons below address both possible submissions.

[21] The Objecting Respondents made a number of submissions, including as follows:

- a) the Guidelines Applications are not stand-alone applications but are rather arguments raised in the context of an application by the Objecting Respondents that the orders under section 151 of the Act should be set aside (none of which is dependent on the constitutional validity of section 151 of the Act);
- b) that any order which ties the Guidelines Applications to the Stated Case would circumscribe the Objecting Respondents’ ability to fully challenge the issuance of the orders under section 151 before the Commission;
- c) section 43(5)(a) of the ATA mandates that, to the extent practicable, the tribunal of the Commission must hear and decide all questions except the questions which form part of a stated case – this codifies a requirement that the tribunal of the Commission hear those matters to avoid the delay and resulting prejudice arising from such delay brought about by constitutional challenges; and
- d) that the Guidelines Applications do not ask the tribunal of the Commission to go through a Charter analysis to determine the constitutionality of section 151 of the Act; rather, those applications ask the tribunal to interpret that provision of its home statute through the lens of an expert tribunal on securities matters to arrive at a set of criteria for the granting of section 151 orders.

III. Analysis

[22] We do not agree with the executive director’s submissions that the Guidelines Applications “raise questions of law as set out in section 43(2) of the ATA that relate to the stated case as contemplated in section 43(5)(b) of the ATA”.

[23] The executive director’s submissions did not articulate specifically the manner in which they “relate” to the Stated Case. We interpret the Guidelines Applications as raising issues with respect to:

- a) the statutory interpretation of section 151 of the Act; and

b) the manner in which the Commission should exercise its discretion to issue orders under section 151 of the Act, with reference to:

- i) legislative intent;
- ii) administrative law principles; and
- iii) the public interest.

- [24] While we are cognizant that the statutory interpretation of section 151 of the Act, and the basis upon which the Commission could make an order under that section, may well be issues that arise in the context of the Stated Case, we do not view those issues as relating only to the constitutional validity of the section. The Supreme Court will consider in the Stated Case whether the power given to the Commission in section 151 is constitutionally valid. A question in the Guidelines Applications will be whether the Commission should have exercised that power in the particular circumstances. Those are different questions.
- [25] As a consequence, we do not view that we are obligated to suspend the Applications as they relate to the Guidelines Applications pursuant to section 43(5)(b) of the ATA. We therefore dismissed the executive director's application to suspend the Guidelines Applications until the opinion of the court on the Stated Case has been rendered.
- [26] With respect to the submission that we should, voluntarily, refer these matters as a stated case pursuant to section 43(2) of the ATA, we view the tribunal of the Commission as the presumptive forum for the adjudication in first instance of these issues. That view is informed by both a consideration of the legislative intent in our Act as well as an interpretation of section 43 of the ATA.
- [27] Our Act establishes the tribunal of the Commission as the place to bring applications to challenge (or ask for a variance of) orders made by the Commission. In so doing, the legislative intent is clear – that the tribunal of the Commission, with its presumed expertise in the subject matter, is best placed to consider all questions of law and assessments of the public interest that arise from the interpretation of the Act and acts taken by the Commission in furtherance thereof. This includes consideration of whether the Commission should have exercised its discretion to make an order under section 151. In our view this is further supported by section 43(5)(a) of the ATA.
- [28] We view the need for a voluntary reference, by the Commission, of a matter to the Supreme Court of British Columbia pursuant to section 43(2) of the ATA as one which would be necessitated in the public interest by unusual circumstances. This is consistent with both our statutory mandate as the presumptive forum as described above and with our public interest mandate as we are almost certainly able to hear these applications in a more timely and efficient manner than via the stated case process.
- [29] We do not see that there are unusual circumstances in this case. We say that for the following reasons:

- the tribunal of the Commission has a long history of hearing applications challenging the validity of the issuance of an order made under section 151 of the Act – a number of those cases have squarely raised issues which are likely to form part of the arguments relating to the Guidelines Applications;
- as stated above, while the statutory interpretation of section 151 of the Act and the basis upon which the Commission can make an order under that section may be issues that arise in the context of the Stated Case, we do not view those issues as being *solely issues to be viewed through the lens of the constitutional validity of the section*. There are public interest and administrative law issues that are raised by the Guidelines Applications that are separate and distinct from the constitutional issues raised by the Stated Case;
- we do not see that the risk of conflicting findings between our panel decision and the opinion of the Supreme Court of British Columbia as being high but, if such does occur, the consequences of such a conflict would not be overly significant. We do not view the risk as being high because the questions that are being asked in the Stated Case and those that will come before us are fundamentally different (as described in the point above). We do not view the consequences of such a conflict as being overly significant in that, if the opinion of the Supreme Court of British Columbia with respect to a test or guidelines is inconsistent with our findings with respect to the Guidelines Applications, then future proceedings before Commission panels (which involve the interpretation of section 151) will be required to follow the Court’s opinion.

[30] As a consequence of all of the above, we dismissed the executive director’s application to refer the Guidelines Applications to the Supreme Court of British Columbia pursuant to section 43(2) of the ATA. In arriving at this decision, we wish to emphasize that we make no comment on any applications that any party may make to the panel of the Commission that has been formed to refer the Stated Case to the Supreme Court of British Columbia, to have the constitutional validity question expanded or clarified to include legal issues relating to a test or guidelines for the use of section 151 of the Act or to have facts or evidence included as part of the Stated Case related to a test or guidelines for the use of section 151, within the *context of the constitutional validity question*.

[31] As a consequence of our finding that we are not obligated to suspend the Guidelines Applications and our decision not to refer the Guidelines Applications to the Supreme Court of British Columbia, we also dismissed the executive director’s application to

suspend those applications until the opinion of the court on the stated case has been rendered.

July 16, 2019

For the Commission

Judith Downes
Commissioner

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner