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

Citation: Re Birdsall, 2026 BCSECCOM 224 Date: 20260702

Lucas Christopher Birdsall

Panel	Gordon Johnson James Kershaw Jason Milne	Vice Chair Commissioner Commissioner
Submissions completed	March 27, 2026	
Date of ruling	July 2, 2026	

Counsel

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Ruling and Reasons

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I. Introduction

[1] This decision addresses an application filed by Lucas Christopher Birdsall (Birdsall) on March 3, 2026, in which Birdsall seeks:

a) an order pursuant to section 171 of the *Securities Act*, RSBC 1996 c. 418 (Act) revoking and setting aside the liability decision which this panel had issued;

b) an order pursuant to section 24(1) of the *Charter* setting aside the demand for production of documents (Demand) which Birdsall had been found to violate; and

c) a stay of proceedings against Birdsall.

II. Procedural history

[2] On December 10, 2025, this panel issued *Re Birdsall*, 2025 BCSECCOM 533, the liability decision in this proceeding (Liability Decision) relating to a notice of hearing issued against Birdsall on October 3, 2024. The findings were that Birdsall failed to comply with a summons and a demand for production of documents, both of which had been issued in the course of an investigation. The decision directed the parties to deliver submissions regarding sanctions according to a specified schedule. There have been some adjustments to that schedule since then.

[3] On December 22, 2025, Birdsall filed an application (December 22 Application) to stay the notice of hearing on the basis that the underlying demand for production of documents and summons violated sections 8 and 7 of the *Charter*, respectively.

[4] On February 9, 2026, Birdsall delivered a further application (February 9 Application) seeking orders adjourning the sanctions hearing pending a decision to the December 22 Application, for disclosure of certain materials and permission to cross examine witnesses who gave evidence at the sanctions hearing.

[5] On March 3, 2026, Birdsall delivered this application.

[6] On March 9, 2026, the panel issued its decision dismissing the December 22 Application.

[7] On April 13, 2026, the panel issued its decision dismissing the February 9 Application.

[8] Oral submissions regarding sanctions are scheduled for September 9, 2026.

III. Positions of the parties

A. Position of Birdsall

[9] Birdsall applies under section 171 of the Act to set aside the Liability Decision, based on a 2025 decision of the Ontario Court of Appeal, *Binance Holdings Limited v. Ontario (Securities Commission)*, 2025 ONCA 751 [*Binance*]. Birdsall submits that *Binance* "significantly clarified and developed the law governing the constitutionally allowable scope of securities investigators' power to compel evidence". Birdsall particularizes this submission by stating that *Binance* limits the powers of compulsion under the Act to "relevant evidence, as determined by the scope of the investigation".

[10] Birdsall submits that the underlying Demand, discussed at length below, was unrestricted, overly broad and must be set aside pursuant to the reasoning in *Binance*.

[11] In the context of this section 171 application, Birdsall submits the onus should be on the executive director to establish that revoking the Liability Decision would not be prejudicial to the public interest, as "the alleged unlawful conduct driving [this application] concerns the issuance of the Demand pursuant to the Commission investigators' powers". Birdsall argues that because the Demand was issued in breach of his constitutional rights, and because of the seriousness of the allegations made in this application, the onus should shift to the executive director to establish the continuation of the Liability Decision.

B. Position of the executive director

[12] The executive director submits that section 171 is not an opportunity for a party to re-litigate the liability or sanctions portion of an enforcement hearing, and respondents generally cannot rely on evidence or arguments that they could have presented prior to the close of the underlying hearing.

[13] While a significant change in the law may, in some circumstances, justify the revocation or variation of a decision under section 171 of the Act, the executive director argues that *Binance* does not represent a significant change in the law. Rather, the Ontario Court of Appeal applied existing case law to the facts before it.

[14] On the issue of who bears the onus on this application, the executive director submits that it is Birdsall. In *Party A v. British Columbia (Securities Commission),* 2021 BCCA 358 [*Party* A], the Court of Appeal held that the executive director bore the onus of continuing an order freezing the assets of the applicant, as the underlying order was issued *ex parte* and without notice. The executive director submits that the reasoning in *Party A* does not apply to the current matter, as the applicant is seeking to revoke the Liability Decision. Unlike when contesting an *ex parte* order without notice, the executive director argues that the onus does not shift where the applicant participated fully in proceedings leading to a liability or sanctions decision. In this matter, Birdsall's participation was fulsome, including making other applications, and being represented by senior counsel throughout the two-day oral liability hearing.

[15] The executive director also submits that there is no merit to Birdsall's submission that the Demand was too broad and contravened section 8 of the *Charter*. The executive director submits that the Demand limits production to records in Birdsall's custody, possession or control, relating to the investigation, in a manner similar to a subpoena issued in civil proceedings in this province. It did not contain the overly broad language that was subject to scrutiny by the Ontario Court of Appeal in *Binance*.

C. Supplemental submissions from the parties

[16] After receiving the submissions from the parties outlined above, the panel wrote to the parties directing them to provide further submissions in this matter, as follows:

> Please provide your submissions on:
>
> 1. whether the decision in *Binance Holdings Limited v. Ontario Securities Commission*, 2025 ONCA 751represents a significant development in, or a consistent application of, the law relating to the relevance requirement in the power to compel records and documents under the Act. In particular, please provide submissions that address the state of the law prior to Binance, having reference to any relevant cases, but specifically

referring to:

· *Securities Commission v. Stallwood*, 1995 CanLII 1515 (BCSC)

· *Re Ward*, 2022 ABASC 139

· *Party A v. British Columbia (Securities Commission), 2021 BCCA 358*

2. whether your submissions on 1. above affect the factors for considering a section 171 application, as outlined in *Re Deyrmenjian*, 2019 BCSECCOM 93.

[17] Birdsall's supplemental submissions reiterated that *Binance* represents a significant development in the law relating to the evidence requirements in the power to compel records and documents under the Act. He argues that no previous decision involves a remotely comparable analysis or outcome.

[18] In particular, Birdsall argues that:

a) the law prior to *Binance* did not address the allowable scope of a demand for production through the lens of the protections afforded in section 8 of the *Charter*, and

b) *Binance* makes clear for the first time that the standard of relevance is not determined by the scope of the investigation order, but by what is reasonably required by the investigation itself.

[19] The executive director's supplemental submissions argue that prior to *Binance*, investigators under the Act were still bound by a relevancy requirement relating to what records they could compel under the Act. The executive director submits that Birdsall's theory resulting from *Binance*, that there is a difference between a demand that fits within the terms of the investigation order, and a demand that actually serves the investigation, is meaningless: in any case where the investigation order complies with the Act, it specifies the matter to be investigated. A demand properly issued under that investigation order will fit within both the order and the investigation.

[20] The previous case law, the executive director submits, is consistent with *Binance*, in that investigators cannot, and could not in the past, issue "unbounded" demands for records or issue demands that have "effectively unlimited breadth."

[21] We discuss these submissions at greater length below.

IV. Analysis

A. Pre-*Binance* legal context regarding scope of securities investigators' compulsion power

[22] The Courts have consistently held that the terms of an investigation order under the Act determine what is relevant for the purposes of any related investigatory power. One such investigatory power is the ability of a named investigator to compel production of evidence and records. In British Columbia, those powers are found under sections 142 through 144 of the Act. In exercising those powers, what questions could be asked and what documents could be demanded by an investigator are defined by the scope of the investigation order.

[23] The law is also clear that an investigator does not have any right to ask questions or to demand documents outside the scope of the investigation order, as outlined in *Party A* at para. 145:

> [145] For example, an investigation under s. 142 has limits. An investigation order issued under s. 142 determines what is relevant for related investigatory purposes of the *Act*. Defining the scope of the investigation is necessary in order to justify and define the scope of the investigator's powers to compel testimony and subpoena witnesses. An investigator does not have the right to ask questions or demand documents beyond the scope of the investigation order.
>
> [emphasis added]

[24] This is not new law.

[25] In *British Columbia (Securities Commission) v. Stallwood*, 1995 CanLII 1515 [*Stallwood*], the BC Supreme Court considered whether the Commission had failed to properly define the scope of an investigation in an investigation order, thereby improperly delegating that power to an investigator. The Court, relying on *Branch*, held that the complex nature of the securities industry meant that much information properly sought by investigators during an investigation would only be within the knowledge of the persons subject to that investigation. As such, an investigator must have sufficient flexibility, as the questions asked (and as a corollary the records demanded) will depend greatly on the answers given (and records produced). The Commission, by using phrases such as "may reasonably relate to the affairs or trading" of a specific person, or "incidental to" defined conduct in the investigation order, clearly defined the boundaries of an investigator's authority, and the questions asked and records demanded properly fell within its terms (*Stallwood* at paras. 72-75).

[26] Similarly, in *Re Ward*, 2022 ABASC 139 [*Ward*], staff of the Alberta Securities Commission tried to rely on *Stallwood* to argue that investigation orders should be interpreted broadly so as to not impede investigations or the protective public interest mandate of the Commission's enforcement division. In *Ward*, staff had collected records that predated the relevant period defined in the investigation order, and sought to rely on them at the hearing. The respondent argued that compelled records outside the relevant period constituted an illegal search, and that staff was not authorized to investigate allegations that predated the scope of the investigation order (*Ward* at para. 50).

[27] The ASC considered the evolving nature of investigations, and the ability of staff to amend investigation orders. Staff had argued that even though the compelled records at issue predated the terms of the investigation order, staff could have amended the investigation order, which would have cured the defect. Ultimately, the ASC finds at para. 55:

> Although we agree that s. 41 of the Act gives Staff broad powers to investigate things that occurred and conditions that existed at any time, we do not agree that this – or the relative ease of obtaining an amended investigation order – means that the parameters set out in an investigation order are tantamount to loose guidelines that Staff are at liberty to disregard. If that were the case, there would be little point to requiring investigation orders at all. However, the Legislature chose to require them, and chose to require ("the Executive Director *shall* prescribe"; emphasis added) that they delineate the scope of the investigation to be carried out. In our view, "the scope of the investigation" includes the relevant period of time. The limits of the order may be very wide given the investigative powers set out in ss. 41(4) and 42(1), but there are still limits.
>
> [emphasis added]

[28] The result of the foregoing was that the panel in *Ward* ascribed no weight to records that were compelled by staff that fell outside the relevant period in the investigation order (*Ward* at para. 58).

[29] These cases confirm that prior to *Binance*:

- the terms of an investigation order had to be sufficiently clear to define the scope of the investigation,
- the scope of the investigation order determines what is relevant for investigatory purposes, including the use of compulsion powers in the Act,
- an investigator must have flexibility enough to pursue inquiries that are related or relevant to that scope, and
- investigation orders can be amended to extend the scope of the compulsion powers.

B. *Binance* decision

[30] The *Binance* matter involves a May, 2023, Ontario investigation order naming Binance Holdings Limited and alleging trading without registration, illegal distributions, circumventing securities law and compliance requirements, and submitting misleading statements to the Commission.

[31] After issuance of the Binance investigation order, an investigator issued a summons under section 13 of the Ontario legislation demanding production of documents. The contentious fourth demand stated:

> For the period of January 1, 2021 to present, provide all communications regarding Ontario (or Canada generally) among directors, officers, employees, contractors, agents and consultants of Binance Holdings Limited and related entities ….
>
> (*Binance* at para. 13)

[32] The fourth demand:

> …went on to provide a wide non-exclusive description of the form of “communications” that could include “e-mails, letters, [and] chats/texts on messaging platforms (e.g. Signal, WhatsApp, Telegram, Slack, etc.)”. The Summons directed that the requested communications “shall include”, but again, not be “limited to”, “those among directors, officers, employees, contractors, agents and consultants of Binance regarding” a list of events and activities. The non-exclusive list of events and activities included account opening and trading procedures, staff training, hiring and the preparation of quarterly reports pursuant to the Undertaking.
>
> (*Binance* at para. 14)

[33] Binance asserted that the summons was so overbroad as to be unconstitutional.

[34] Consistent with the existing law, the Court in *Binance* reviewed *Branch*, noting the low expectation of privacy afforded participants in the securities industry, and went on to find that even though that expectation was low, it was not zero: the ability of regulators to compel production of documents and information is limited to terms that are fair and reasonable, and

Binance's section 8 rights are engaged by the compelled production of its business records (*Binance* at para. 37 and 38).

[35] In conducting the section 8 analysis under the *Charter*, the Court stated:

> [80] I am persuaded that the power of an appointed investigator to issue a production order under s. 13 is limited to documents that may be relevant to an inquiry that is properly undertaken pursuant to the *Securities Act*. A seizure that purports to compel the production of documents in the absence of a reasonable foundation to believe they may be relevant is therefore overbroad and unreasonable, contrary to s. 8 of the *Charter*.
>
> [81] In this case, the inquiry that was being undertaken was described by the Commission in commendable detail in the Investigation Order, which set out both the events of interest and the Commission's concerns about Binance's regulatory non-compliance. However, the Summons demanded production, without limitation, of all communications between virtually anyone that may have managed, been employed by, or done work for either Binance or its related entities over a two-and-a-half-year period relating not only to Ontario but to all of Canada, regardless of the subject matter of those communications. This demand, enforceable by the threat of contempt proceedings, is staggering in its breadth and in my view was made without apparent concern about the relevance of what was being demanded, beyond mere speculation that there could be something relevant that would otherwise be missed. I am therefore persuaded that the s. 13 Summons issued in this case is unconstitutionally overbroad.

[36] To summarize, the Court in *Binance* found that while the investigation order was described in "commendable detail", the subsequent summons was "staggering in its breadth" and "made without apparent concern about the relevance of what was being demanded." The Court held that the summons contravened s. 8 of the *Charter* as it purported to compel records that the investigator had no foundation to believe were relevant to the investigation being conducted under the investigation order.

[37] Birdsall submits that *Binance*:

> has significantly clarified and developed the law governing the constitutionally allowable scope of securities investigators' power to compel evidence: in particular, that securities investigators' powers of compulsion are limited to <u>relevant</u> evidence, as determined by the scope of the investigation.
>
> […]
>
> *Binance* represents a significant development in the law governing the constitutional exercise of securities investigators' powers, and more particularly the <u>relevance</u> requirement that attends the power to compel documents and records.
>
> […]
>
> It cannot be seriously disputed that *Binance* is the first decision to apply those same principles to the powers of an investigator to demand records under securities legislation.

> To characterize *Binance* as other than a dramatic development in securities law ignores the entire dearth of comparable authorities in this area.
>
> [emphasis in original]

[38] We agree with Birdsall's position that "securities investigators' powers of compulsion are limited to relevant evidence, as determined by the scope of the investigation." However, contrary to Birdsall's submissions, *Binance* is not the first decision to apply a relevance requirement in relation to an investigator's power under the Act to compel documents and records.

[39] To the contrary, *Binance* is consistent with *Stallwood*, *Ward,* and *Party A*. Just as in *Binance*, the scope of an investigation has long been properly defined in the investigation order, and the exercise of compulsory powers under the Act has consistently been limited to records and evidence relevant to that scope for decades.

[40] Birdsall submits that the principles set out in *Binance* represent a significant development in the law in two related but distinct respects. First, *Binance* is the first case to apply the limiting principles of section 8 to an investigator's demand for production of documents, as opposed to compelled oral testimony. Birdsall quotes paragraph 94 of *Binance*, where the point is made that demands for production of documents "must be sufficiently clear and specific to inform the subpoenaed party of precisely what documents are being demanded" and the demand "must only be as broad as is necessary for the purposes of the inquiry in progress".

[41] Birdsall summarizes his first point as follows:

> To summarize on this first point, the law prior to the Ontario Court of Appeal's decision in *Binance* establishes only (1) that the <u>enabling provisions</u> of the *Securities Act* do not violate s. 8 of the Charter; and (2) that pursuant to the statute, the Commission has a duty to specify the scope of an investigation via an investigation order, and that this scope is determinative of relevance within the investigation itself. <u>It is repeated that no court or Commission prior to Binance addressed the allowable scope of a demand for production through the lens of s. 8's protection from unreasonable search and seizure</u>; such decisions as have dealt with the issue have indicated an entirely contrary state of the law.
>
> [emphasis in original]

[42] Birdsall submits that *Binance* also represents a significant development of the law because after *Binance* relevance is determined "not by the scope of the <u>investigation order</u>, but by what is reasonably required by the <u>investigation itself</u>". Birdsall goes on to submit that it is no longer sufficient for an investigator to establish relevance by reference to the investigation order. Instead, "the investigator must establish relevance with regard to the <u>underlying investigative purpose</u>, which is a significantly higher bar".

[43] We address Birdsall's second point first. We disagree with Birdsall's submission *Binance* establishes that, in securities proceedings, relevance is no longer determined by reference to the investigation order. It is true that the Ontario Court of Appeal used language referencing "what is reasonably required for the investigation". Birdsall infers from this an intention by the Ontario Court of Appeal to set aside the pre-existing law tying relevance to the scope of the investigation order at issue. We conclude that the Ontario Court of Appeal would have been much more explicit if that had been its intention. There are several reasons for our conclusion,

especially:

a) The precedents demonstrating that relevance is determined by reference to the investigation order are well established and long standing;

b) The precedents fit logically in the statutory context. The Act allows investigations and the Act creates powers of investigation which are triggered by an investigation order. It follows that the investigation order should determine the scope of an investigation;

c) The approach of assessing relevance by reference to the investigation order both permits effective and flexible investigations and protects members of the public from unreasonably broad demands; and

d) The phrase which is submitted to represent the new standard for relevance, "the underlying investigative purpose", is a relatively vague standard in comparison to the investigation order, and the Act creates no mechanism to define or communicate "the underlying investigative purpose" to interested parties. The proposed new standard could be far more subjective than the traditional standard which is determined by reference to the investigation order.

[44] In any event, in British Columbia we are bound by the decisions of our Court of Appeal in *Stallwood* and *Party A*. Here, relevance is determined by reference to the investigation order.

[45] Turning to Birdsall's first suggestion for why *Binance* represents a significant development in the law, we agree with Birdsall to a limited extent. In *Binance,* the court extended a *Charter* remedy to overly broad demands for production of documents. We agree with the principle underlying that extension. However, if a challenge to the breadth of a demand for production of documents is brought in British Columbia in a timely manner, existing administrative law principles might lead to the same outcome as would follow under the *Charter* and, if not, a *Charter* remedy may be available. As a result, although the approach in Binance is different in some ways from what we see in decisions which pre-date *Binance*, it is not clear that the differences are significant and, in our view, the result under the *Binance* analysis would be the same as the result which would be expected based on previously decided cases.

C. Principles regarding the application of section 171

[46] In this application, Birdsall seeks to rely on section 171 to set aside the Liability Decision of this panel. This application is based on the theory that the June 21, 2024, Demand issued during the investigation was unconstitutional, in accordance with the November 6, 2025, *Binance* decision.

[47] A fundamental principle of the common law is the doctrine of *functus officio* – once a decision maker has rendered a decision, they no longer have the capacity at common law to change it. This means that once a matter is decided, the same decision maker is prohibited from revisiting it – otherwise proceedings would never end:

> …out of the various common-law finality doctrines, *functus officio* is the only doctrine that is directed at the decision-maker, rather than the parties… Upon the rendering of a final and valid decision, the decision-maker is enjoined from reconsidering the decided matter

> and rescinding or varying the decision in any manner.[1]

[48] The Supreme Court of Canada has confirmed the applicability of *functus officio* to administrative tribunals:

> [T]here is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp*.
>
> *Chandler v. Alberta Association of Architects*
> [1989] 2 SCR 848 at 861

[49] The Act specifically limits the application of this doctrine by authorizing the Commission, the executive director or a designated organization to revisit *their own decisions* and orders under section 171, if to do so would not be prejudicial to the public interest:

> **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.

[50] While not an exclusive list, the following are examples of common variation applications before the Commission under section 171:

- vary or revoke preservation orders,
- reduce monetary sanctions,
- allow a person to become an officer or director of a specific issuer where they are otherwise prohibited, and
- allow a person to become a registrant where they are otherwise prohibited.

[51] There is no time limit attached to section 171. Applications to vary or revoke a decision can be made at any time. This allows the Commission to take into account changed circumstances that may impact the analysis of the public interest long after a decision has been made. While an application to vary an existing enforcement order under section 161 or 162, after a hearing, can be brought years after it was initially issued if circumstances have changed, the lack of time limit can also impact an ongoing hearing matter, such as this one.

[52] For example, applications to vary or revoke orders made under delegated authority can arise:

- during an investigation by enforcement,
- prior to the issuance of a notice of hearing, or
- during a liability hearing, or prior to the sanctions portion of a hearing.

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[1] *Doctrine of Functus Officio: The Changing Face of Finality's Old Guard*, Anna SP Wong, La Revue Du Barreau Canadien, 2020 Volume 98, 2020 CanLIIDocs 3309 at 548

[53] A close look at the wording of section 171 and the regulatory scheme in the Act that establishes oversight and procedural fairness in Commission decisions is critical to understanding that it is not the purpose of section 171 for that section to be used to review or appeal an underlying decision.

[54] The plain language of section 171 demonstrates it is not a review or appeal provision. In particular, the ordering and language of "…the commission, the executive director or a designated organization, <u>as the case may be</u>, may make an order revoking in whole or in part or varying a decision the commission, the executive director or the designated organization, <u>as the case may be</u>, has made under this Act…." demonstrates that the Legislature intended that a 171 application be heard by the original decision maker. If a 171 application were heard as a review, the emphasized words would be meaningless.

[55] On a 171 application, the decision maker must consider that it would <u>not</u> be prejudicial to the public interest to revoke or vary the original decision. Implicit in this phrasing is that the original decision was in the public interest. If a party is challenging the underlying order based on the improper exercise of authority, jurisdiction or other legal ground, then they are taking issue with whether the order is in the public interest, or otherwise should not have been made at first instance. The forum to bring this type of application is elsewhere in the Act – in particular, under sections 165 and 166 of the Act.

[56] This is reflected in BCP 15-601, which states:

> **9.10 Post Hearing Applications - Applications to Vary and Appeals of Decisions**
> ***(a) Discretion to Revoke or Vary***
> Under section 171 of the Act, the Commission may revoke or vary a decision it has made, or that was made by a single commissioner, <u>if to do so</u> would not be prejudicial to the public interest. A party that is subject to a decision may apply to the Commission for an order revoking or varying the decision. Generally, the Commission conducts these hearings in writing; it considers written submissions and makes its decision.
>
> Section 171 is intended to allow the Commission to consider the ongoing appropriateness of an order made by a Commission panel, or by a single commissioner under delegated authority. <u>It is not intended to be used to apply for review of an initial decision made by a single commissioner. Those applications are properly brought under sections 165 and 166, as outlined above in Part 7 Reviews.</u>
>
> Before the Commission varies or revokes a decision, it must consider that it would not be prejudicial to the public interest to vary or revoke the decision. This usually means that the party applying for variation or revocation must show the Commission new and compelling evidence that was not before the original decision maker, or a significant change in the circumstances since the original decision was made.
>
> A party must apply to the Commission in advance of the hearing and demonstrate why the evidence that was not before the original decision maker is new and compelling, and should be admitted. The Commission will hear submissions from all parties. In some circumstances, the Commission may hear the application to introduce new evidence as part of the hearing to revoke or vary a decision. In that case, it will receive the evidence for the purposes of determining if it meets the test to be admitted.
>
> [emphasis added]

[57] BCP 15-601 also outlines that an applicant under section 171 must show the Commission new and compelling evidence that was not before the original decision maker, or a significant change in circumstances since the original decision.

[58] This Commission has considered the requirement for "new and compelling" evidence in numerous decisions, oft citing *Re Deyrmenjian*, 2019 BCSECCOM 93 [*Deyrmenjian*]. In that decision, the panel reviewed the previous decisions and consolidated the factors an applicant must establish as follows, at para. 28:

> a) the additional evidence must be
>
> > i. relevant to the allegations in the notice of hearing;
> >
> > ii. "new" in that it was not reasonably available for use by the applicants at the time of the hearing;
> >
> > iii. "compelling" in that if the panel had been provided with the evidence at the time of the hearing, it would have decided differently; and
>
> b) it would not be prejudicial to the public interest for the panel to revoke their findings.

[59] The panel in *Deyrmenjian* goes on to elaborate that:

- The "compelling" aspect of the test is more important as it can be determinative of the outcome – because if the "new" evidence is not compelling, there is no need to carry on with the analysis of whether it is new.

- Evidence is "new" if it was not reasonably available at the time of the liability hearing. A determination of what "reasonably available" means may include an examination of whether the party seeking to rely on it deliberately chose to withhold the evidence at first instance. Further, a determination of whether the evidence is "new" is not necessarily determinative of the issue, and a panel may find that there are circumstances where evidence that is not new may still be compelling.

- Even if the additional evidence is "new", the panel must still consider whether it is not prejudicial to the public interest to vary or revoke a decision.

(see *Deyrmenjian* at paras. 29-36)

[60] The test from *Deyrmenjian* has subsequently been applied in other Commission decisions, including *Re Enna M. Keller*, 2022 BCSECCOM 29, and *Re Dunn*, 2024 BCSECCOM 279.

[61] As was established in *Morabito v. British Columbia (Securities Commission)*, 2022 BCCA 279, the onus under a section 171 application is, except in limited circumstances, on the applicant. Birdsall submits that his is one of those limited circumstances where the onus shifts to the executive director, but we see no basis for that.

D. Application to this case

[62] After a process which afforded every opportunity for Birdsall to bring applications regarding administrative law issues, *Charter* issues or other issues, and during which deadlines were eventually set for further applications, this panel issued its decision on liability. The decision on

liability was issued several weeks after the *Binance* decision was issued. Despite that, it was only after the issuance of our decision on liability that Birdsall brought this application under section 171 of the Act.

[63] Section 171 of the Act is discretionary. It permits us to revoke or vary our liability decision if we consider that to do so would not be prejudicial to the public interest. In considering this application, we should consider a number of factors, especially whether there is new and compelling evidence or new circumstances. The argument here is that the *Binance* decision is both new and sufficiently compelling that it would not be prejudicial to the public interest for us to revoke our Liability Decision.

[64] As we explained in our decision regarding the December 22 Application, the *Binance* decision was not new as of the time we issued our decision on liability. However, as is explained in *Deyrmenjian* and as Birdsall correctly submits, if newly submitted evidence or circumstances are sufficiently compelling, that can be persuasive even if it is not truly "new". For this reason, we must bring into the balance our assessment of the strength of Birdsall's submission that under the *Binance* test the Demand violated section 8 of the *Charter* and, as such, Birdsall was not obligated to comply with the Demand.

[65] The Demand includes the following language:

> TAKE NOTICE that by order of the British Columbia Securities Commission I have been appointed to make an investigation in the matter noted above. In connection with that investigation, you are required to produce to me by 4:00 p.m. July 24, 2024, records and things and classes of records and things that are in your custody, possession, or control relating to the matter noted above, including:
>
> 1. copies of all documents related to the promotion of Braxia Scientific Corporation, formerly known as Champignon Brands Inc. (Champignon) during the period of March 26, 2019 to June 30, 2020 (the Relevant Period), including agreements, invoices, promotional materials, and correspondence sent or received, including but not limited to email communications, text messages, and messages through any other communication apps such as WhatsApp or Discord, in native format with attachments included
>
> 2. copies of all documents and correspondence related to the acquisition of Champignon securities, by yourself or any of the following companies:
>
> a. [redacted]
> b. [redacted]
> c. [redacted]
> d. [redacted]
>
> (collectively, the Companies)
>
> 3. copies of all agreements, invoices and correspondence discussing retainer or scope of work related to consulting work yourself or the Companies performed for Champignon during the Relevant Period
>
> 4. copies of all correspondence between yourself and any other consultants for Champignon regarding engaging their services or the scope of their work with Champignon

[redacted]

5. copies of all documents and correspondence related to the distribution of the securities of [redacted] to any of its shareholders

6. copies of all documents and correspondence related to any consulting work yourself or the Companies performed for [redacted] during the Relevant Period

7. copies of all correspondence with the directors or officers of [redacted] regarding its business activities, plans, and assets sent or received during the Relevant Period

8. copies of all documents and correspondence related to Champignon's acquisition of [redacted] including:

a. due diligence records
b. valuation records
c. correspondence with any finders
d. negotiations

[66] Birdsall submits that the Demand is completely unbounded because it demands production of materials "relating to the matter noted above". Birdsall notes that, although there is a list of specific materials which must be produced, that list follows after the demand for materials relating to "the matter noted above". Birdsall submits that the list adds to the general demand and does not limit it.

[67] The executive director submits that it is proper to read the Demand such that the words "relating to the matter noted above" means the investigation, and the nature of the investigation is described and limited by the specific listing of materials that Birdsall was compelled to produce. In the alternative, the executive director submits that, in any event, the words complained of never compel Birdsall to produce more than materials in his "custody, possession or control" relating to the investigation, and as a result this Demand is completely different in nature from the demand in *Binance*, where materials were sought to be produced without a requirement that those materials relate to the investigation.

[68] We agree with the executive director's interpretation of the Demand for the following reasons:

- An open ended demand is not useful to anyone. It does not tell the subject of the demand what to look for. It does not assist the investigator in assessing if the demand has been complied with. An open ended interpretation is not consistent with common sense or the purposes of the Act.

- The Demand is in the required form which is used for all demands. We are not aware of anyone interpreting a prior demand in the manner which Birdsall now interprets this Demand.

- Unlike in the case of *Binance*, the Demand is limited in scope by the words "relating to the matter noted above" and the subsequent detailed listing of materials sought to be compelled.

[69] In addition, we agree with the executive director's alternative argument that even if the

interpretation of the Demand asserted by Birdsall is the correct one, that interpretation limits the scope of required production to things related to the investigation, which falls within the category of things that *Binance*, and the existing case law in British Columbia, has long determined can be compelled.

[70] As a result of our conclusions about how to interpret the Demand, we conclude that Birdsall's submissions are not sufficiently compelling to justify a conclusion that revoking the existing Liability Decision is not prejudicial to the public interest. Birdsall's Liability Decision was very recently issued. He is now raising arguments that he could have raised before that decision. We conclude that it is not likely that these new arguments would have led to a different outcome.

V. Conclusion

[71] This application is dismissed.

July 2, 2026

For the Commission

Gordon Johnson
Vice Chair

James Kershaw
Commissioner

Jason Milne
Commissioner