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

Citation: Re Application 20211018, 2022 BCSECCOM 418 Date: 20221005

Re Application 20211018

Panel	Marion Shaw	Commissioner
	George C. Glover, Jr.	Commissioner
	James Kershaw	Commissioner

Hearing Date	June 21, 2022
Submissions Completed	June 21, 2022
Date of Decision	October 5, 2022

Appearing

Derek Chapman Deborah Flood	For the Executive Director
Rebecca Sim Brigeeta Richdale Samuel Bogetti	For the Applicant

Decision

I. Introduction

[1] This is an application by an individual (Applicant) under section 171 of the *Securities Act*, RSBC 1996, c. 418 (Act) that a Commission panel consider whether the executive director's decision to continue a number of freeze orders and a registered charge that are in place affecting the Applicant's property is in the public interest, and make an order revoking or varying those orders and that charge (Application).

II. Background

[2] The Applicant was the Vice President of Investments at a British Columbia-based reporting issuer (the Initial Issuer) from July 2015 until September 2017.

[3] In October 2018, pursuant to an investigation order issued by the Commission Chair under section 142 of the Act, Commission staff commenced an investigation into the Initial Issuer and its directors and officers which alleged, in part, that the Applicant's involvement with the Initial Issuer and the British Columbia capital markets resulted in breaches by the Applicant of sections 34 and 50 of the Act, dealing with unregistered trading and prohibited representations, respectively. In January 2019, pursuant to an amended investigation order issued by the Commission Chair, staff expanded its investigation to encompass additional issuers and trading

subjects and to include potential breaches by the Applicant of sections 57 and 57.2 of the Act, dealing with market manipulation and fraud, and insider trading, respectively.

[4] In April 2019, pursuant to section 151 of the Act, the Commission issued a number of freeze orders against certain of the Applicant's brokerage and bank accounts and a registered charge against the Applicant's interest in real property, as follows:

(a) [redacted], dated April 2, 2019 in respect of:
   (i) nine accounts held by the Applicant at an investment dealer; and
   (ii) two accounts jointly held by the Applicant and another subject at the same investment dealer;

(b) [redacted], dated April 2, 2019 in respect of three accounts held by the Applicant at another investment dealer;

(c) [redacted], dated April 4, 2019 in respect of one account held by the Applicant at another investment dealer;

(d) [redacted], dated April 4, 2019 in respect of two accounts held by the Applicant at another investment dealer;

(e) [redacted], dated April 2, 2019 in respect of seven accounts held by the Applicant at another investment dealer;

(f) [redacted], dated April 2, 2019 in respect of one account jointly held by the Applicant and the Applicant's spouse at a Canadian chartered bank ;

(g) [redacted], dated April 8, 2019 in respect of another two accounts held by the Applicant at an investment dealer;

(Freeze Orders) and

(h) Registered charge [redacted], dated April 3, 2019 on real property located in British Columbia jointly owned by the Applicant and the Applicant's spouse (Charge).

[5] The parties are agreed that the current value of the Applicant's assets subject to the Freeze Orders and the Charge is approximately $8 million.

[6] At the time she issued the original and amended investigation orders, and subsequently the Freeze Orders and the Charge, the Commission Chair had before her memoranda from staff summarizing the preliminary evidence already gathered by staff and their concerns regarding potential breaches of the Act (Memoranda).

[7] In accordance with the Act and with the standard practice of the Commission, the decision to issue the Freeze Orders and the Charge was made by the Commission Chair on an *ex parte* basis, without giving the Applicant an opportunity to be heard.

[8] In June 2019, the Applicant applied to the Commission (the Prior Application) for the revocation or variance of the Freeze Orders and the Charge on the basis that they were invalidly issued. At the hearing of the Prior Application, four other parties, identified as Parties A through D, also sought to have certain freeze orders and charges revoked as invalidly issued.

[9] On November 21, 2019, after giving all parties an opportunity to be heard, the Commission dismissed the Prior Application and upheld the original orders, including the Freeze Orders and the Charge (*Re Application to revoke certain orders No. 2*, 2019 BCSECCOM 416) (the Prior Decision).

[10] In December 2019, the Applicant and Parties A through D appealed the Prior Decision to the British Columbia Court of Appeal. In October 2021, in *Party A v. British Columbia (Securities Commission)*, 2021 BCCA 358 (*Party A*), the Court of Appeal dismissed the appeal, but expressly stated that the appellants could apply to the Commission for a fresh consideration of the matter, relying on the approach articulated in *Party A*, the passage of time and any new evidence they might choose to file.

[11] In November 2021, the Applicant made a fresh application under section 171 of the Act. That Application was heard on June 21, 2022. In it, the Applicant requested revocation or, in the alternative, variation of the Freeze Orders and the Charge. In the further alternative, the Applicant requested that any continuation of the Freeze Orders and the Charge be limited to a date certain.

[12] Both the Applicant and the executive director provided affidavit evidence and made oral and written submissions, and both parties were represented by counsel. This is the panel's decision on that Application.

[13] As was the case in the Prior Application, on application by the Applicant and with the consent of the executive director, the panel ordered that these proceedings take place *in camera*, and that the style of cause and name of the Applicant be anonymized, pending any further order in that regard.

III. Applicable Law

A. Applicable Legislation

[14] The relevant sections of the Act relating to the matters being investigated by the executive director and at issue in these proceedings are as follows.

> **Manipulation and fraud**
> **57 (1)** A person must not, directly or indirectly, engage in or participate in conduct relating to a security, derivative or underlying interest of a derivative if the person knows, or reasonably should know, that the conduct
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security,

…

Insider Trading
57.2(2) A person must not enter into a transaction involving a security of an issuer, or a related financial instrument of a security of an issuer, if the person

(a) is in a special relationship with the issuer, and

(b) knows of a material fact or material change with respect to the issuer, which material fact or material change has not been generally disclosed.

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.

[15] Section 151 of the Act, under which the Freeze Orders and the Charge were issued, was repealed and replaced by new section 164.04 of the Act effective March 27, 2020, but the general authority to issue a freeze order remains the same. At the relevant time, section 151 read in part as follows:

Order to freeze property
151 (1) The commission may make a direction under subsection (2) if

(a) it proposes to order an investigation in respect of a person under section 142 or during or after an investigation in respect of a person under section 142 or 147,

…

(2) In the circumstances described in subsection (1), the commission may direct, in writing,

(a) a person having on deposit, under control or for safekeeping any funds, securities, exchange contracts or other property of the person referred to in subsection (1), to hold those funds, securities, exchange contracts or other property, and

(b) a person referred to in subsection (1)

(i) to refrain from withdrawing any funds, securities, exchange contracts or other property from any person having them on deposit, under control or for safekeeping, or

(ii) to hold all funds, securities, exchange contracts or other property of clients or others in the person's possession or control in trust for an interim receiver, custodian, trustee, receiver manager, receiver or liquidator appointed under the *Bankruptcy Act* (Canada), the *Company Act*, the *Business Corporations Act*, the *Law and Equity Act*, the *Personal Property Security Act*, the *Winding-up Act* (Canada), the *Supreme Court Act* or this Act.

…

> (5) In any of the circumstances referred to in subsection (1), the commission may, in writing, notify a land title office or gold commissioner that proceedings are being or are about to be taken that may affect land or mining claims belonging to the affected person.

B. The *Party A* Decision

[16] Section 171 of the Act allows the Commission, where it "considers that to do so would not be prejudicial to the public interest," to revoke or vary a decision of the Commission made under the Act.

[17] In *Party A*, the Court of Appeal considered the following issues related to the imposition and revocation of freeze orders:

1. Should there be a minimum threshold required before a section 151(1)(a) asset freeze order can be issued, and what factors are relevant to the exercise of discretion to issue such an order?
2. Who has the onus on an application pursuant to section 171 seeking to revoke or vary a section 151(1)(a) order freezing assets, and what is the onus?

[18] The Court of Appeal began by considering the purpose of the freeze order power under the Act. At paragraph 140 of *Party A*, the Court concluded that the purpose of the asset freeze order under section 151 of the Act is to preserve property as security for potential monetary claims or penalties that could arise based on alleged contraventions of the Act.

[19] The Court of Appeal went on to articulate threshold standards for when it is appropriate to issue a section 151(1)(a) asset freeze order:

> [176] In the context of the statutory scheme and public interest mandate of the Commission, I am of the view that the legislature intended there to be some evidentiary threshold for the issuance and maintenance of asset freeze orders at an investigatory stage, pursuant to s. 151(1)(a), linked to the purpose of an asset freeze order.
>
> [177] I conclude that the Commission is required to assess the evidence to determine if it is sufficient to raise a serious question that the investigation could show breaches of the *Act* leading to financial consequences against the asset owner by way of monetary claims or penalties under the *Act*.
>
> [178] The evidence must be more than mere speculation or mere suspicion, but it can be less than evidence required to satisfy a balance of probabilities. In assessing the evidence, the Commission will bring to bear its experience, expertise and common sense, including in drawing reasonable inferences.
>
> [179] This evidentiary standard remains low and flexible and will not unduly constrain the enforcement arm of the Commission. It is not onerous to require that the executive director persuade the Commission, prior to the making of a s. 151(1)(a) order, that there is some evidence to raise a serious question that the investigation could show breaches of the Act leading to monetary claims or penalties against the asset owner. …
>
> [207] What is necessary prior to a s. 151(1)(a) freeze order being made is that an investigation must either be in place under ss. 142 or 147 or proposed under s. 142. It is

necessary that the Commission conduct a preliminary assessment of the evidence and conclude that it raises a serious question that the investigation could show breaches of the Act leading to financial consequences in the form of penalties or claims against the owner of the assets. Mere speculation will not be enough. The Commission will rely on its expertise, experience and common sense in assessing the evidence and in drawing any available reasonable inferences arising from the evidence.

[208] Additionally, the Commission must be satisfied that the issuance of the asset freeze order is in the public interest by considering all factors relevant to the case at hand. The public interest includes not only protection of the public, but also public confidence in the markets. Public confidence will often require the Commission to take into account the interests of the asset owners and to recognize that an asset freeze order is extremely intrusive.

[209] There can be any number of factors relevant to the public interest in a given case, depending on the circumstances. A non-exhaustive list of factors that may be relevant in a given case includes: the seriousness and scope of the allegations; the stage of the investigation and any urgency; the scope and value of the assets to be frozen in relation to the potential claims or penalties; the potential consequences of the order on the asset owner or other parties; and the strength of the evidence in support of the asset freeze order. Other factors may also be relevant, including whether there is a link between the assets and the wrongful conduct, a risk of dissipation of assets, or other security for the potential claims or penalties. These are not mandatory criteria that must be analyzed in a checklist fashion, but simply examples of factors that may be relevant to the public interest analysis.

[20] The Court of Appeal then turned to the question of the onus on an application under section 171 to set aside a freeze order issued under section 151(1)(a), stating as follows:

[222] I conclude that where a section 151(1)(a) order under review was obtained in circumstances that did not give the asset owner an opportunity to be heard, the executive director will bear the onus on a s. 171 application of establishing that the evidence raises a serious question that the investigation could show breaches of the Act leading to financial consequences against the asset owner and that the public interest will be served by the continuation of the order, taking into account any relevant public interest factors. It will be up to the executive director to decide whether to try to establish this with the same evidence as was placed before the Commission when the original order was made or to also provide additional evidence.

[223] Likewise, in such circumstances, the proper approach for the Commission, on a s. 171 application to revoke or vary an asset freeze order that was obtained without notice to the asset owner, is to take a fresh look at whether continuation of the order is in the public interest based on the evidence and circumstances known at the time of the s. 171 application. The matter should be treated by the Commission as a new hearing, without according deference to the original freeze order made pursuant to s. 151(1)(a).

[227] Any public interest factors that might be relevant to the original asset freeze order under s. 151(1)(a) may also be relevant on a s. 171 application to set aside the order, and should be considered anew by the Commission when the s. 171 hearing is the first time

> the asset owner will have been heard. The Commission should also consider any new evidence.

[21] Hearings Policy 15-601 is a policy statement developed by the Commission that sets out its procedures for hearings. Hearings Policy 15-601 provides in paragraph 9.10 that a party bringing an application under section 171 to set aside or vary an order "usually … 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."

[22] Referring to that provision, the Court of Appeal in *Party A* stated as follows:

> [235] Given that elsewhere the hearings policy expressly recognizes the right to a new hearing where an affected party was not represented at the original hearing, it strikes me that the above aspect of the Hearings Policy was intended for circumstances where the original order was made after a contested hearing. It seems reasonable that where the order under review was made or continued after a full hearing with participation of the affected parties, more deference to the original order may be appropriate. In such a circumstance, it makes sense that there will be an onus on the applicant seeking to revoke or vary it to show that there is something new justifying a change, although the "something new" may be simply the passage of considerable time.
>
> [236] However, by describing this as the "usual" rule, the Hearings Policy recognizes there will be exceptions. In my view, one exception must be those situations where the order sought to be reviewed was obtained on a basis that was without notice to the affected party.
>
> [237] In the circumstance of a s. 151(1)(a) asset freeze order made without notice or participation of the affected party, … a proper interpretation of s. 171 requires that the application be treated as a new hearing, with the onus on the executive director to establish that continuation of the asset freeze order is in the public interest.

[23] Applying those principles to its review of the Commission's consideration of the Prior Application, the Court of Appeal found that the manner in which the panel had approached the evidence was equivalent to determining that it raised a serious question that the evidence could show breaches of the Act leading to financial consequences against the Applicant. It also found that the Commission had not in that case required the Applicant to tender new evidence; rather, the panel had properly considered what it regarded as the public interest, as well as the interests of the parties affected by the orders, and determined that the orders were validly issued. Accordingly, the Court of Appeal dismissed the Applicant's appeal of the Prior Decision.

IV. Positions of the Parties

A. Executive Director

1. The Evidentiary Threshold

[24] The executive director notes that in the Prior Decision, the Commission upheld the Freeze Orders and the Charge after a full hearing in which the Applicant participated. The executive director concedes, however, that the passage of time since then, coupled with the significant asset value frozen, satisfies the Applicant's onus under Hearings Policy 15-601 of showing there is "something new" justifying a fresh review on the merits, and that the executive director bears

the onus on that review of establishing that the continuation of the Freeze Orders and the Charge is in the public interest.

[25] The executive director submits that the evidence before the panel raises a serious question that the investigation could show breaches of the Act leading to financial consequences against the Applicant and establishes that the public interest will best be served by the continuation of the Freeze Orders and the Charge, taking into account the stage of the investigation and all relevant public interest factors. Accordingly, the executive director says, the preliminary evidence before the panel easily meets the onus imposed on him by *Party A*.

[26] The executive director emphasizes that in *Party A*, the Court of Appeal described the applicable evidentiary standard as "low and flexible". He also refers to the subsequent Court of Appeal decision in *Dunn v. British Columbia (Securities Commission)*, 2022 BCCA 132 where, at paragraph 57, the Court says:

> For reasons similar to those articulated in *Party A*, I am of the view that, in order to assess the public interest, the Commission is required to consider whether there is some evidence before it that raises a serious question that the breaches of the *Act* alleged in the notice of hearing may lead to financial consequences against the asset owner by way of monetary claims or penalties under the *Act*. Here, as in Party A, the evidentiary standard remains low and flexible, and will not unduly constrain the Commission.

[27] The executive director says that the investigation has obtained much stronger and more compelling evidence than that originally summarized in the Memoranda on which the Prior Decision was based, sufficient to establish that there is a serious question that the Applicant may have participated in a potential market manipulation scheme involving four of the issuer subjects specified in the amended investigation order, contrary to section 57 of the Act, and may also have engaged in insider trading, contrary to section 57.2 of the Act.

[28] Since the investigation order was amended in January 2019, the investigation has focused on the potential market manipulation by the trading subjects, including the Applicant, of four issuers, referred to in this decision as Issuers 2 through 5.

[29] The executive director submits that the evidence raises a serious question that the Applicant:

- participated in a market manipulation scheme involving the other trading subjects and four issuer subjects of the investigation,
- played a part in obtaining undisclosed control of these issuer subjects,
- had advance notice of business deals that the issuer subjects would enter into before they were publicly announced,
- arranged for promotional campaigns of the issuer subjects based on the business deals, and then paid for some of those campaigns using the Applicant's own funds,
- traded in all four issuer subjects during the market manipulation scheme, and
- generated gross trading proceeds of over $16 million.

That pattern, the executive director states, is consistent with a "pump and dump" scheme common to many market manipulation cases.

[30] The stronger preliminary evidence to which the executive director refers includes the Applicant's and other trading subjects' own emails, spreadsheets prepared by another of the trading subjects outlining share allocations among the trading subjects including the Applicant, and brokerage records for accounts in the name of the Applicant, accounts in the name of the Applicant's spouse over which the Applicant had trading authority, and accounts which the Applicant controlled jointly with another trading subject.

[31] The executive director tendered evidence that the Applicant was part of the control group of at least Issuer 2, Issuer 4 and Issuer 5. The group's control of those issuers was not publicly disclosed. The executive director submits that the trading subjects' secret control of the issuers raises a serious question whether the supply of those issuers' shares was distorted.

[32] The executive director also tendered evidence that the Applicant was actively involved in arranging and paying for promotional campaigns for all four issuers from the Applicant's own funds, rather than the issuers paying for them, which, he says, raises a serious question whether the demand for the four issuers' shares was distorted during the promotional campaigns.

[33] The executive director submits that the Applicant's own emails indicate that the Applicant arranged directly with the promotional companies many of the promotional campaigns for the issuer subjects, and that invoices from those companies and the Applicant's banking records show that the Applicant paid some of those invoices with the Applicant's own funds.

[34] The executive director says that the evidence indicates that the Applicant paid the following amounts for promotional campaigns for the four issuers:

- $103,500 for Issuer 2
- Euro 100,000 for Issuer 3
- $133,789 for Issuer 4
- $30,046 for Issuer 5.

[35] The executive director also tendered evidence that the Applicant spent $135,090 on what were described in the email correspondence as "support bids" for shares of Issuer 5 and that the Applicant may have been coordinating their trading of shares of Issuer 5 with another trading subject, raising a serious question whether demand for Issuer 5's shares was distorted or, alternatively, there was created a misleading appearance of trading activity in Issuer 5's shares.

[36] The executive director also says that the Applicant's advance knowledge of news releases to be issued by at least Issuer 5, as suggested by the email correspondence between the Applicant and the entities carrying out the promotional campaigns, raises a serious question that the Applicant may have been in a special relationship with Issuer 5 that gave the Applicant advance knowledge of undisclosed material information related to it, and that that situation, coupled with their active trading in the shares of Issuer 5 during the relevant period, as demonstrated by their brokerage records and those of their spouse, constituted insider trading contrary to section 57.2 of the Act.

[37] The executive director states (at paragraph 57 of his submissions) that:

> According to the trading records obtained to date in the investigation belonging to [the Applicant] and their spouse from March 1, 2016 to the present, [the Applicant] and their spouse generated gross total proceeds from selling shares of [Issuers 2 through 5] during the relevant period in the amount of $15,841,197 plus USD $970,482.

[38] The executive director says that if the Applicant breached the market manipulation or insider trading provisions of the Act, that could lead to significant monetary orders and penalties being issued against the Applicant, including the disgorgement of trading profits.

[39] As described in more detail below, the Applicant argues that the executive director is required to break down the potential contraventions of the Act into their constituent elements so that the evidence can be assessed specifically against those elements in order to determine if the evidentiary threshold is met. The executive director argues that the Applicant is asking the Commission to apply a higher evidentiary standard to maintain the Freeze Orders and the Charge than was established by the Court of Appeal in *Party A*. The executive director states that it would only be necessary to provide that level of evidentiary support if the applicable standard was either *prima facie* evidence or proof on a balance of probabilities, both of which standards were considered and expressly rejected as unduly onerous in this context by the Court of Appeal in *Party A*.

[40] The executive director emphasizes that no notice of hearing has yet been issued nor allegations made. The executive director says that the Applicant is not entitled during an ongoing investigation to be informed of the manner in which he intends to prove any future allegations against the Applicant.

[41] The executive director argues that in upholding the Freeze Orders and the Charge, neither the Commission on the Prior Application nor the Court of Appeal in *Party A* imposed a requirement that the executive director tie the preliminary evidence specifically to the required elements of the potential contraventions under investigation. As a result, the executive director says, there is no basis for requiring him to do so on this application.

[42] In further answer to the Applicant's argument that in order to maintain the Freeze Orders and the Charge, the executive director must link the preliminary evidence specifically to the required elements of the contraventions, the executive director says that the Commission is an expert tribunal familiar with the required elements of the market manipulation and insider trading prohibitions in the Act. The executive director points in that regard to the statement of the Court of Appeal in *Party A* (at paragraph 178) that "in assessing the evidence, the Commission will bring to bear its experience, expertise and common sense, including in drawing reasonable inferences".

2. The Public Interest

[43] The executive director says that consideration of the public interest factors suggested by the Court of Appeal in *Party A* as potentially relevant strongly supports the continuation of the Freeze Orders and the Charge.

[44] With respect to the seriousness and scope of the conduct under investigation, the executive director says that the evidence gathered to date suggests that the Applicant may have breached sections 57(a) and 57.2 of the Act by engaging in market manipulation and insider trading, two of the most serious types of misconduct contemplated by the Act, in a scheme involving four issuers and numerous trading subjects. To emphasize the scope of the investigation, the executive director notes that the Applicant's part in the larger scheme generated for the Applicant and the Applicant's spouse gross trading proceeds of over $16 million.

[45] With respect to the stage of the investigation, the executive director says that while it has been underway for some considerable time, it is investigating complex misconduct involving multiple parties, which necessarily takes time, and that there has been no delay in the Commission's investigation. He says that the investigation is not complete but has reached the stage where the focus is on reviewing and analyzing the evidence obtained to date. He argues that the Freeze Orders and the Charge remain necessary until the investigation is complete.

[46] With respect to the appropriateness of the amount of property frozen, the executive director argues that it is proportionate to the prospective monetary claims or penalties against the Applicant under the Act arising from the investigation, on the basis that if the Applicant is ultimately found to have engaged in market manipulation and/or insider trading, the Applicant could be subject to a disgorgement order in an amount that greatly exceeds the approximately $8 million current value of the frozen property subjected to the Freeze Orders and Charge, and could also be subject to significant administrative penalties for their misconduct.

[47] The executive director bases his submissions with respect to the size of a potential disgorgement order on the gross trading proceeds of over $16 million he says that the Applicant and the Applicant's spouse generated from sales of the shares of the four issuer subjects. The executive director acknowledges that the figure is gross, not net of costs, but says that as yet, he does not know the net numbers and so cannot be more specific. He argues that on the basis that the Applicant realized gross proceeds of some $16 million, the approximately $8 million in assets frozen is in the ballpark for a disgorgement order, in addition to which there could be administrative penalties. He adds that this appears to be a joint scheme, so it is possible that there will be a basis for a joint and several disgorgement order under which the Applicant could also be liable for financial penalties imposed on the Applicant's joint actors.

[48] With respect to the potential consequences of the Freeze Orders and the Charge on the asset owner or other parties, the executive director notes that the Applicant has tendered no evidence that the Freeze Orders and the Charge have caused the Applicant or anyone else any hardship or inconvenience.

[49] With respect to the strength of the evidence in support of continuing the Freeze Orders and the Charge, the executive director argues that considerably more and stronger evidence has been amassed in the course of the investigation since the Prior Decision, in the form of the Applicant's and other trading subjects' own emails, various spreadsheets prepared by another of the trading subjects outlining share allocations among the trading subjects including the Applicant, and brokerage records for accounts in the name of the Applicant, accounts in the name of the

Applicant's spouse over which the Applicant had trading authority, and accounts that the Applicant controlled jointly with another trading subject.

[50] Finally, the executive director says that this is the rare case where there is a demonstrated risk of dissipation of assets if the Freeze Orders and the Charge are not continued. In that regard, the executive director says that the investigation has obtained statements for the Applicant's bank accounts with the Abu Dhabi Commercial Bank in Dubai, U.A.E., which were sent to the Applicant's address in Dubai. The executive director says that those statements show that the Applicant transferred almost $1.9 million in trading proceeds from their brokerage accounts in Vancouver to one of their accounts in Dubai, including transferring $75,000 after the investigation was ordered and just over two months before the Freeze Orders were issued. The executive director also points to evidence indicating that the Applicant withdrew funds from their Vancouver bank accounts after they learned that the Freeze Orders had been issued and as the Freeze Orders were in the process of being served on their bank.

B. Applicant

1. The Evidentiary Threshold

[51] The Applicant argues that the executive director has not met the evidentiary threshold established by the Court of Appeal in *Party A* and, indeed, that it cannot be met without explicitly linking the evidence to the required elements of the potential breaches of the Act regarding market manipulation and insider trading. The Applicant says that, given the advanced stage of the investigation, the executive director's evidence to support the Freeze Orders and the Charge must be grounded in the required elements of the potential breaches of the Act outlined in the investigation order in order to elevate the matter beyond mere speculation or mere suspicion, and any evidence must be assessed in the context of the requisite elements.

[52] Having outlined the requisite elements of the breaches pursued in the Commission's investigation, the Applicant identifies in considerable detail the gaps in the evidence of market manipulation and insider trading advanced by the executive director. The Applicant argues that crucial details are missing and that, without those details, the executive director's evidence cannot raise a serious question that the investigation could show breaches of the Act leading to financial consequences against the Applicant by way of monetary claims or penalties under the Act.

2. *The Public Interest*

[53] The Applicant says that it cannot be in the public interest to maintain the Freeze Orders and the Charge if more than three years into an investigation, the executive director is unable to link the evidence obtained in the course of the investigation to specific elements of the potential breaches identified in the Commission's investigation.

[54] The Applicant adds that the weighing of three of the public interest factors to which the Court of Appeal referred in *Party A* (the seriousness and scope of the allegations, the stage of the investigation and the strength of the evidence) must be assessed collectively and any such assessment cannot be done in a vacuum that ignores the requirement to provide specific evidence of the elements of market manipulation and insider trading.

[55] The Applicant also argues that the quantum and duration of the Freeze Orders and the Charge are disproportionate in light of the executive director's failure to provide sufficiently detailed particulars of potential breaches of the Act, the weakness of the supporting evidence, and the advanced stage of the investigation.

[56] The Applicant takes issue with the executive director's submission that the Applicant generated gross proceeds of over $16 million from the sale of shares of the four issuer subjects and therefore could be subject to a disgorgement order in that amount as well as a significant administrative penalty. The Applicant says that is an unsubstantiated conclusion based on a grossly inflated and unexplained amount of trading proceeds, both because it refers to gross trading proceeds, without taking into account any related costs, and because the executive director has submitted evidence for a lengthy period of trading without any detail related to the relevancy of the trades. The Applicant says that for that reason, the panel should not give any weight to the executive director's evidence of gross trading proceeds.

[57] The Applicant argues that since the executive director has not indicated how much more time is required for Commission staff to complete their review and analysis of the information gathered to date or whether other investigative steps remain, the panel has no information as to when the executive director expects to be in a position to fill the gaps or whether such gaps are capable of being filled. The Applicant submits that the executive director should be required to provide the panel with further information regarding his next steps and timing, and that if the panel determines to maintain the Freeze Orders and the Charge in place, it should do so only to a specified date so that the panel may assess the progress made at that date.

[58] Finally, the Applicant responds to the executive director's point that the Applicant has tendered no evidence of hardship or inconvenience arising from the Freeze Orders and the Charge by arguing that where there is in place an order that interferes with an asset owner's ability to use his or her property, the resulting hardship and inconvenience do not require evidentiary support.

V. Analysis

A. The Evidentiary Threshold

[59] Section 171 of the Act allows the Commission, where it "considers that to do so would not be prejudicial to the public interest," to revoke or vary a decision of the Commission made under the Act.

[60] The Commission was satisfied on the Prior Application that the Freeze Orders and the Charge were validly issued in the public interest and that in the circumstances existing at that time, revocation or variance of them would be prejudicial to the public interest. The Court of Appeal upheld those findings in *Party A*. Our task now is to determine whether, in all the circumstances existing at the time of this application, and taking all relevant factors into account, revocation or variance of the Freeze Orders and the Charge would be prejudicial to the public interest.

[61] The Court of Appeal in *Party A* articulated the threshold test we are to apply: is the evidence sufficient to raise a serious question that the investigation could show breaches of the Act leading to financial consequences against the Applicant by way of monetary claims or penalties under the Act? If we find that that test is met, we are then to consider whether the public interest

is best served by the maintenance or the revocation or variance of the Freeze Orders and the Charge.

[62] As stated by the Court in *Party A* at paragraph 179, the "evidentiary standard remains low and flexible." The Court specified that the evidence must amount to more than mere suspicion or speculation but need not rise to the level of *prima facie* evidence or proof on a balance of probabilities. In so doing, the Court recognized that the question is considered at the investigatory stage and so may encompass a broad range of circumstances.

[63] The Applicant argues that given the advanced stage of this investigation, it is not possible for the executive director to satisfy the evidentiary threshold without specifically tying the preliminary evidence to the required elements of potential breaches of the Act. With respect, we regard that as a misunderstanding of the Court of Appeal's requirements set out in *Party A*, which consist of two requirements for maintaining the Freeze Orders and the Charge: first, a "low and flexible" evidentiary standard; secondly, a determination, taking into account the evidence and circumstances known at the time and without according deference to any earlier decision to impose or continue the orders, that the public interest is best served by maintaining the Freeze Orders and the Charge.

[64] Commission investigations such as this one are complex and time-consuming. Once an investigation is commenced, information is amassed and then evaluated and analyzed before decisions are taken on whether additional information is required and whether and which offences will be alleged. Once allegations have been crystallized in a notice of hearing, the executive director will be much better placed than he would be at any earlier stage to argue his case for the maintenance of a freeze order. Even then, however, the threshold evidentiary standard remains the same. What may change with the stage of the investigation is the panel's assessment of the relevant public interest factors.

[65] The executive director rightly emphasizes that the investigation in this matter is not finished. No notice of hearing has yet been issued. At this point, no allegations have been made. The executive director submits that the evidence amassed to date in the Commission's investigation points to certain breaches of the Act, but the work of analyzing the evidence and crystallizing the allegations against the Applicant is not yet complete.

[66] The case before the Court in *Party A* included not only the appeal by the Applicant and Parties A through D, but also two other appeals of Commission decisions dismissing applications made by other parties for the revocation or variance of freeze orders. Subsequent to the release of the Court of Appeal's decision in *Party A*, certain of those parties made a fresh application to the Commission for a revocation order. The Commission's decision in that matter, *Justin Edgar Liu, Lukor Capital Corp., Anthony Kevin Jackson, BridgeMark Financial Corp, Cameron Robert Paddock, Rockshore Advisors Ltd.*, 2022 BCSECCOM 294 (*BridgeMark*), was released after the hearing in this matter was completed.

[67] The panel in *BridgeMark*, applying the approach laid out by the Court of Appeal in *Party A*, assessed the evidence presented by the executive director on a preliminary basis in order to determine whether the threshold for maintaining the freeze orders had been met and it continued

to be in the public interest to maintain them. The *BridgeMark* panel's assessment included a thorough analysis of the evidence presented by the executive director, including with specific reference to the required elements of the breach of the Act alleged to have been committed by the *BridgeMark* applicants, which in that case was insider trading.

[68] The *BridgeMark* panel concluded that the evidentiary threshold was met in respect of each of the applicants, but its subsequent assessment of the relevant public interest factors led it to different conclusions in respect of different applicants. In the event, some of the freeze orders were maintained, some were revoked and some were varied.

[69] The situation before us differs markedly from that in *BridgeMark* in that at the time the *BridgeMark* revocation application was heard, a notice of hearing specifying the allegations to be met had been issued fully 12 months earlier and the scheduled hearing on the merits was just months away. In the matter before us, the investigation has not been completed and no notice of hearing specifying the allegations to be met has yet been issued. In these circumstances, we find it premature to require the executive director to tie the preliminary evidence gained thus far in the Commission's investigation to all the elements of any contraventions he may allege in the future. To do so would require the executive director to meet an evidentiary burden greater than that outlined in *Party A*.

[70] The Court of Appeal in *Party A* was clear that placing the onus on the executive director in these matters was not intended to be unduly burdensome to the enforcement arm of the Commission. The objective is not to require the executive director to prosecute his case twice, but to ensure that it is in the public interest to keep the Freeze Orders and the Charge in place pending the issuance of a notice of hearing and a hearing on the merits.

[71] At this stage, we are not making any findings of fact for the purpose of liability under the Act. That will be done following a hearing on the merits, if the investigation ultimately leads to the issuance of a notice of hearing by the executive director against the Applicant. At this time, we are only making a preliminary assessment of whether the evidence before us is sufficient to raise a serious question that the investigation could show breaches of the Act leading to monetary claims and penalties against the Applicant. To the extent that we have formed conclusions and made determinations in this matter, we have done so based on the threshold set out in *Party A* and only for the purpose of deciding whether the Freeze Orders and the Charge should be maintained at this time.

[72] While the executive director has not yet made any formal allegations against the Applicant, the executive director led the panel in significant detail through the preliminary evidence relating to the conduct of the Applicant that has been amassed in the course of the Commission's investigation, as outlined above. We find that there is evidence sufficient to raise a serious question that the conduct of the Applicant constituted both market manipulation and insider trading, contrary to the Act. From the evidence before us, we agree with the executive director that the alleged conduct of the Applicant bears the hallmarks of "pump and dump" schemes that would constitute contraventions of the insider trading and market manipulation provisions of the Act. There is no dispute that these serious questions of misconduct, if proved after a hearing on

the merits, could lead to significant financial consequences in the form of penalties or claims for disgorgement.

[73] On the basis of our review of the Commission investigation's preliminary evidence, we are satisfied on a preliminary assessment basis that the executive director has met the necessary evidentiary threshold.

B. The Public Interest

[74] We turn then to consider whether the public interest is best served by the maintenance or the revocation or variance of the Freeze Orders and the Charge.

[75] As noted in *Party A*, there can be any number of factors relevant to the public interest in a given case, depending on the circumstances. We summarize below our conclusions with respect to the relevant factors listed in that decision, including: the seriousness and scope of the potential allegations; the stage of the investigation and any urgency; the scope and value of the assets to be frozen in relation to potential claims or monetary penalties; the potential consequences of the orders on the asset owner or other parties; the strength of the evidence in support of the asset freeze order; any link between the assets and the wrongful conduct; the risk of dissipation of assets; and any other security for the potential claims or penalties.

[76] With respect to the seriousness and scope of the potential allegations, we find that both market manipulation and insider trading are very serious offences under the Act. As stated by the Court of Appeal at paragraph 116 of *Party A*, the "purpose of securities legislation includes three goals: protection of the investing public, which is the primary goal; capital market efficiency; and ensuring public confidence in the system". Market manipulation and insider trading strike at the foundations of securities regulation, undermining the integrity of the capital markets and destroying investor confidence. The scope of the conduct under investigation in this matter is also extensive, involving a network of some 22 issuer and trading subjects.

[77] With respect to the stage of the investigation, the Court of Appeal in *Party A* had this to say:

> [287] I agree with the appellants that the passage of time and the status of the investigation, as of the time of the s. 171 application as compared to the s. 151(1)(a) application, are relevant factors for the Commission to consider on the s. 171 application. The passage of time may result in a different weighing of the various public interest factors. For example, a long delay without much progress in an investigation might cause the Commission to take a more critical look at the executive director's evidence in support of the order and to give more weight to the impact of the order on the affected party.

[78] The investigation was commenced more than three years ago but is not yet complete. An investigation like this one, which involves numerous issuers and trading subjects, is complex, and necessarily takes considerable time to conclude. The executive director did not simply rely on the evidence he provided in the Prior Application. On the contrary, the executive director reported that the investigation has amassed considerable evidence since the Prior Application to implicate the Applicant in one or more serious contraventions of the Act, and took considerable time to take the panel through some of that evidence. The submissions before the panel did not

address sections 34 and 50 of the Act (dealing with unregistered trading and prohibited representations, respectively), which were also listed in the original investigation order. There is no evidence of delay on the part of the Commission's investigative staff or the executive director. Rather, it appears the executive director is proceeding diligently with the investigation.

[79] Based on the stage of the investigation, we cannot determine with specificity whether or not the Freeze Orders and the Charge are commensurate in size and scope with the potential financial consequences. Unlike in *BridgeMark*, where the executive director was essentially in a position to preview his case based on the specific allegations in the notice of hearing, and the panel had the benefit of submissions relating to precedents for financial penalties imposed in comparable situations, this matter is at too early a stage for that.

[80] The parties are in agreement that the frozen assets have an aggregate current value of approximately $8 million. The executive director says that the Applicant and their spouse have realized over $16 million in gross trading proceeds as a result of the conduct under investigation, and that if the Applicant is found to have generated those trading proceeds from breaching section 57(a) or 57.2 of the Act, the Applicant could be at risk of a disgorgement order equal to at least the value of the frozen assets, together with a significant administrative penalty. The Applicant says that the executive director's reliance on the gross proceeds realized by the Applicant as the basis for potential penalties cannot stand, since previous decisions of the Commission have clarified that the appropriate measure is the net trading proceeds. We agree that net trading proceeds are an appropriate consideration after a breach of the Act has been proved. However, at this point in the proceedings, we have been given no evidence of the net trading proceeds realized by the Applicant by either the executive director, who does not yet have that information, or by the Applicant, who has not divulged it.

[81] For the purposes of this preliminary assessment, we based our assessment of the public interest on the potential that the executive director will ultimately issue a notice of hearing that alleges that the Applicant has engaged in market manipulation and insider trading. Given the nature of the potential contraventions of the Act, and the fact that the executive director has met the evidentiary burden, we find that significant financial consequences for the Applicant could follow if the Applicant were found liable for those breaches of the Act. Both orders for disgorgement and a significant administrative penalty could approximate the value of the assets that are subject to the Freeze Orders and the Charge. When asked if a different figure would be more appropriate, the Applicant suggested halving the value of the assets frozen, but did not provide any justification for that suggestion. Given the stage of the proceedings, we conclude that the assets frozen are proportionate to the potential monetary penalties or claims that could arise from the investigation.

[82] The Court of Appeal in *Party A* was clear that the determination of the public interest in these circumstances requires that the interests of the public in maintaining the Freeze Orders and the Charge as surety for potential future financial consequences must be balanced against the resulting hardship to the Applicant. We acknowledge that the Freeze Orders and the Charge impinge on the Applicant's property rights and that the length of time during which the investigation has been underway exacerbates the intrusive nature of the orders, but note that the

Applicant has not provided us with any evidence of any particular resulting inconvenience or hardship to the Applicant or any third party.

[83] Even where the preliminary merits test is met, the relative weakness or strength of the evidence in support of the continuance of the Freeze Orders and the Charge can be a relevant factor to be weighed in combination with all other public interest factors. We find that the preliminary evidence to implicate the Applicant that has been amassed in the course of the investigation, which includes the Applicant's own email correspondence and bank and brokerage statements, is relatively strong.

[84] The Court of Appeal in paragraphs 203 and 204 of *Party A* confirmed that given the complexity of schemes and transactions that may conceal the money trails leading from breaches of the Act, there is no obligation on the executive director to show a link between the assets sought to be frozen and the alleged wrongdoing. The Court added, however, that if the executive director can show some evidence that the assets were obtained directly or indirectly in breach of the Act, that may strengthen the case for an asset freeze order. We find in the circumstances that it is reasonable to infer on the basis of the preliminary evidence provided by the executive director that some or all of the trading proceeds realized by the Applicant were obtained through conduct that was in breach of the Act.

[85] With respect to evidence of the risk of dissipation of assets, the Court in *Party A* said this:

> [205] Likewise, I agree with the Commission that the executive director is not required to show a risk of dissipation of the assets as a condition of granting an asset freeze order: *Samji* at paras 33-37. However, while it is not necessary to have evidence of a risk of dissipation of assets, where there is evidence related to this factor, including when it can be inferred from evidence of dishonest conduct, it will be relevant evidence for the Commission to weigh.

[86] The executive director says that this is the rare case in which there is evidence of a real risk of dissipation of assets, given the Applicant's bank accounts in Dubai and their conduct when they first became aware of the Commission's investigation and the imposition of the Freeze Orders and the Charge. We find that there is reasonable cause to believe that if the Freeze Orders and the Charge were revoked, the funds currently frozen would be at risk of dissipation, and so may not be available to satisfy any financial consequences that may ultimately be ordered against the Applicant by the Commission.

[87] Finally, with respect to the factors identified by the Court in *Party A* as potentially relevant to the public interest analysis, we were not provided by either party with any information as to the existence of property of the Applicant other than the assets subject to the Freeze Orders and the Charge that might serve as security for potential claims or penalties.

[88] Neither the executive director nor the Applicant suggested any other factor that might be relevant to the public interest analysis.

[89] We note that the Applicant asked the panel to require the executive director to provide it with further information regarding the investigation's next steps and timing and, if the panel should

decide to maintain the Freeze Orders and the Charge in place, to do so only to a certain date so that the panel may assess the progress made to that point. We decline to do so. We have seen no evidence of delay by the Commission's investigative staff or the executive director, and we see no reason to depart from our usual expectation that Commission staff will proceed expeditiously to conclude the investigation and that the executive director will similarly proceed expeditiously to make a final decision whether to issue a notice of hearing against the Applicant.

VI. Conclusion

[90] We find that there is sufficient evidence to raise a serious question that the investigation could show that the Applicant breached sections 57(1)(a) and 57.2(2) of the Act, both of which carry the possibility of significant financial consequences to the Applicant.

[91] We find that, in all the circumstances existing at the time of this application, and taking all relevant factors into account, the revocation or variance of the Freeze Orders and the Charge would be prejudicial to the public interest. We dismiss the Application.

October 5, 2022

For the Commission

Marion Shaw
Commissioner

George C. Glover, Jr.
Commissioner

James Kershaw
Commissioner