BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Application 20210107, 2021 BCSECCOM 394 Date: 20211006

Re Application 20210107

Panel	Gordon Johnson Deborah Armour, QC Audrey T. Ho	Vice Chair Commissioner Commissioner
Hearing date	May 17, 2021	
Submissions completed	May 17, 2021	
Decision date	October 6, 2021	

Appearing

Deborah W. Flood	For the Executive Director
Robert J.C. Deane Paige Burnham	For the Applicants

Ruling

I. Introduction

[1] In this decision we refer to one applicant as Mr. Executive and the other applicant as Ms. Executive. The reasons why we adopt this terminology will be obvious from the paragraphs which follow.

[2] On August 14, 2018, the Chair of the Commission issued an investigation order (the Order) under section 142 of the *Securities Act*, RSBC 1996, c. 418 (the Act). The Order authorizes staff of the Enforcement Division of the Commission to make an investigation, into:

1. trading in the securities of an issuer (the Issuer) by Mr. and Ms. Executive;

2. Mr. and Ms. Executive's knowledge of information contained in a specific news release issued by the Issuer in March 2018; and

3. the use of proceeds obtained by Mr. and Ms. Executive from trading in securities of the Issuer;

from approximately January 1, 2017 forward.

[3] The Enforcement Division of the Commission, and one individual investigator in particular, then began investigating and collecting evidence pursuant to the Order.

[4] On January 7, 2021, the Applicants applied to the Commission under section 171 of the Act to have the Commission revoke the Order, alleging that it would be in the public interest to do so given alleged misconduct by staff of the Enforcement Division in the course of the ongoing investigation.

[5] The Applicants also brought a pre-hearing application to proceed *in camera*. Our decision on that matter is discussed below.

[6] After the hearing of the January 7, 2021 application, the Applicants applied to re-open the hearing to admit fresh evidence and to seek orders restraining the Executive Director from issuing a notice of hearing until at least 60 days after this panel has issued our decision on the section 171 application. Our decision on this matter is set out below.

II. *In camera* hearing

[7] During an initial hearing management meeting, the Applicants applied to have the hearing of this matter proceed *in camera* and to anonymize whatever decision results in the course of this proceeding. The Executive Director did not object to the *in camera* application. Prior to the hearing, the panel granted the *in camera* application, subject to circumstances changing in the course of the proceeding, and we indicated that our reasons would be included in our eventual decision.

[8] The test we apply on applications to proceed *in camera* is set out in paragraph 8.4 of the Commission's hearing policy, *BC Policy 15-601 Hearings*. To summarize, hearings will be conducted in public unless a public hearing would be unduly prejudicial to a party or witness and it would not be prejudicial to the public interest to exclude the public for some or part of the hearing.

[9] The considerations which support our conclusion that the test to proceed *in camera* has been met here are as follows:

a) this application relates to an investigation order which is not public;

b) if we grant this application to revoke the Order, or if Commission staff completes this investigation without making public allegations in a notice of hearing, the investigation would remain confidential. Having this application open to the public would have the opposite effect, regardless of the outcome of the investigation;

c) the Applicants submit that they would suffer significant harm if the existence of the investigation becomes public;

d) the Executive Director did not object to this matter proceeding *in camera*;

e) whatever principles emerge from our consideration of this proceeding can be brought to the attention of the public without significant risk of indirectly identifying the Applicants; and

f) the panel may reconsider the *in camera* nature of the proceedings, should circumstances change.

III. Re-opening application

[10] The Applicants sought to introduce fresh evidence by way of an affidavit to support their re-opening application. The Executive Director opposed the re-opening application.

[11] We admitted the fresh evidence for the purpose of considering if we would grant the re-opening application.

[12] According to the affidavit evidence:

a) On May 20, 2021, three days after we heard the section 171 application, counsel for the Executive Director requested a without prejudice conference call with counsel for the Applicants. The call took place on May 25, 2021 (the Call). At the outset of the Call, counsel for the Executive Director made reference to the Call being subject to privilege.

b) During the Call, counsel for the Executive Director relayed her instructions that the Executive Director was ready to issue a notice of hearing. The individuals to be named in the notice of hearing would be Mr. Executive and others. Counsel for the Executive Director summarized the allegations which would be contained in the notice of hearing. Counsel for the Executive Director did not make a proposal to resolve the potential allegations but said she wanted to give the Applicants the chance to make a proposal before the notice of hearing was issued.

[13] After considering the parties' submissions, we have decided to deny the application to re-open. Our reasons are set out below.

IV. Factual background

[14] Mr. Executive, during the period relevant to the Order, was the Executive Chairman and a shareholder of the Issuer, a company listed on the TSX-V. Ms. Executive is Mr. Executive's spouse.

[15] Mr. Executive set up a family trust many years before the period relevant to the Order, for the benefit of his family. A close relative of Mr. Executive is the sole trustee of the family trust.

[16] The family trust participated in a private placement of the Issuer prior to the period relevant to the Order. From September 2017 onward, this trust began selling shares of the Issuer into the market at a fixed quantity per month. However, the trustee changed

those instructions and instructed his investment advisor to sell all of the shares a few days before the March 2018 news release referred to below.

[17] Between September 2017 and April 2018, the Issuer published various news releases, including one in March 2018 that contained negative news for the Issuer.

[18] In February 2018, Mr. Executive transferred shares of the Issuer to Ms. Executive.

[19] In the first part of March 2018, the price of shares of the Issuer increased substantially, and then returned to its previous market price by late March.

[20] The investigation into this matter began with the Order. Some of the steps taken by Commission staff during the investigation and disclosed in these proceedings, include:

a) attending Mr. and Ms. Executive's home in November 2018 accompanied by a police officer;

b) issuing a demand for production of documents to the Issuer in December 2018;

c) interviewing Ms. Executive in January 2019;

d) obtaining an undertaking from Mr. Executive in April 2019, whereby Mr. Executive agreed to give Commission staff written notice of certain dealings in securities by him;

e) issuing a freeze order under section 151 of the Act in December 2019, which froze the assets in an account of Mr. Executive maintained at a brokerage firm; and

f) between June 2019 and May 2020:

    i. issuing a summons to a third party to attend an examination under oath,

    ii. issuing demands for production of documents to third parties including a company that Mr. Executive was CEO of and that provided management services to the Issuer, and

    iii. issuing a demand for production of documents to the trustee of the family trust.

[21] The undertaking and freeze order remained in place at the time of this hearing.

[22] The Executive Director disclosed very little information about further steps taken during the ongoing investigation.

V. Positions of the parties on the section 171 application

[23] The Applicants rely on section 171 of the Act, which reads as follows:

> 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.

[24] The Applicants argue that the test to be applied is the plain meaning of section 171 and that we should revoke or vary the Order if we find that to do so would not be prejudicial to the public interest.

[25] The Applicants submit that the Commission has a responsibility to protect the integrity of its processes. This responsibility includes the ability and the duty to scrutinize and, if appropriate, bring to an end improper conduct by investigators. The Applicants ground this submission by reference to the extensive powers given to the Commission to do such things as make orders preserving assets, compel production of documents, compel the giving of evidence under oath and otherwise interfering in the lives of residents of British Columbia. The Applicants state that a grant of such sweeping powers includes a corresponding duty to ensure that the powers are not abused.

[26] The Applicants seek to revoke the Order, based on the alleged misconduct of the investigating staff and the time that has elapsed since the Order was issued.

[27] The Applicants build their allegations of misconduct and delay around four main propositions. They say:

a) The investigation has gone on for too long, some 33 months as of the date of the application. They add that the investigation has had significant impacts on the Applicants, especially in light of the ongoing freeze order and undertaking. The Applicants also note that the mere fact of having the investigation hanging over their heads is a burden and it is problematic that some of their confidential advisors have necessarily become aware that they are under investigation for securities related conduct.

b) The investigation was prompted by a single trade between the Applicants in February 2018, but the investigation has intruded into many aspects of the Applicants' lives wholly-unrelated to the trade in question. The investigators exceeded the scope of the Order, or at minimum interpreted it in an overly broad manner, when they made very significant requests for documents and other information from the Applicants and from other parties. The Applicants submit that these requests are excessive, particularly in light of the significant efforts expended in complying with them.

c) The investigation began with a visit to the residence of the Applicants at a time of day when it would be reasonable to assume that only Ms. Executive would be at

home. They submit that there can be no proper motive for such a visit, and that it in fact caused significant distress.

d) The investment advisor who arranged for the execution of a key sell order by the family trust has evidence which might exonerate the Applicants and, so far, the investigators have elected not to interview that individual.

[28] The Applicants submit that the evidence is sufficient for us to draw an inference that the investigators were motivated by an improper purpose. The Applicants put the point this way in their application:

> More than two years on, Staff move the investigation forward, if at all, at less than a glacial pace. The only reasonable inference to be drawn is that this investigation, like perhaps others, is being prolonged for improper and collateral purposes, namely to induce the Applicants to seek to make a voluntary resolution. The record supports the conclusion that Staff have artificially prolonged and weaponized the investigation process. This ought to be a matter of significant concern to the Commission, including in its supervisory function.

[29] The Applicants note that a consideration of the public interest must include a consideration of protecting markets from improper activity. But they argue very strongly that they are also members of the public, that no formal allegations have been made against them, and their interests deserve to be included in the balance when public interest factors are assessed.

[30] The Executive Director submits that it is obvious from a plain reading of the Order that all the investigative steps taken are within the scope of the Order. It is not confined to any single trade.

[31] The Executive Director also argues that the Applicants' submissions are founded on unsubstantiated and false accusations about the conduct of Commission staff. Contrary to the submissions of the Applicants, the Executive Director states that there is nothing unusual about the length of time of the investigation, nor is there any evidence of ulterior motives behind the investigation.

[32] Further, the Executive Director submits that the threshold for establishing an abuse of process is high, and the Applicants have not established any facts that would be considered unfair or oppressive. In particular, he submits that there is no evidence of:

a) any actual prejudice suffered by the Applicants;

b) any misconduct by Commission staff, let alone the type of egregious behavior that is necessary for a decision maker to find as an abuse. Rather, the Applicants are asking the panel to make unsubstantiated inferences in support of this argument, which falls far below the requirement of overwhelming and clear evidence;

c) any unreasonable or inordinate delay. The Executive Director submits that the investigatory steps that have unfolded are those that are normally expected in an investigation of this sort. The Executive Director has used his powers under the Act to issue summonses and make demands for production from the subjects of the Order and third parties who may have information relevant to the investigation.

[33] The Executive Director also submits that the application amounts to an impermissible collateral attack on steps taken during the investigation, and orders issued during the investigation, given that the Applicants have fully cooperated with the investigation at its various stages, including attending interviews and providing documents, their application now should be dismissed as an impermissible collateral attack. In particular, the Executive Director argues that the proper recourse for the Applicants would have been to seek revocation or variation orders relating to the various steps taken during the investigation rather than applying now to have the investigation in its entirety struck.

[34] The Executive Director also takes the position that some of the assertions made by the Applicants in the section 171 application are on behalf of third parties who have no standing in the application.

[35] The Applicants respond to the issues of collateral attack and standing by stating that they are not seeking to set aside any particular order issued during the investigation, but rather the investigation as a whole. Further, they argue that if they conducted themselves as suggested by the Executive Director, they would first have to refuse to cooperate with production orders and summonses, and seek review of every step of the investigation. This, the Applicants argue, would lead to the deleterious effect that all subjects of investigations would need to engage in such refusals in order to safeguard the right to subsequently seek to have the entire investigation revoked, in a manner similar to the application before us.

VI. Collateral attack, standing

[36] We do not consider it necessary to provide significant analysis on these two issues, and discuss them briefly at the outset.

[37] A collateral attack has been characterized by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63 at paragraph 33, citing *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at p. 599 as "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment." A fundamental premise of the doctrine is that litigants must raise issues at their first opportunity, so that they can be dealt with on a timely basis and in the correct forum.

[38] We are not persuaded by the Executive Director's arguments on standing and collateral attack. On the standing issue, it is sufficient that the Applicants are directly affected by the Order they seek to have revoked. Revocation of the Order might impact other parties who are not applicants before us, but that does not preclude standing for the Applicants. On the issue of collateral attack, we agree with the Applicants' argument that this is not a

collateral attack as they are not seeking to set aside any particular order or demand issued during the investigation, but rather the Order as a whole.

VII. Law regarding scrutiny of investigatory conduct

[39] Investigations under the Act have long been the source of consideration by various levels of court in Canada. Seminal in a line of cases is the Supreme Court of Canada's decision *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3. In *Branch*, this Commission commenced an investigation into a company following disclosure of questionable expenditures. At issue was whether summonses issued under the Act were contrary to the *Charter*. During the course of its consideration, the Court turned its attention to some of the principles regarding the nature of investigations under the Act, and the extent to which the discretion of investigators should be constrained. *Branch* makes it clear that during the investigation phase of an enforcement proceeding, the level of fairness afforded an individual is less than that during the hearing phase. Further, there is a reasonable expectation that market participants who participate voluntarily in a highly regulated industry might be questioned by a regulator, and that securities investigations by their very nature are complex and difficult. In particular, L'Heureux-Dubé J. states:

> **76** First, the argument that fundamental fairness may require different standards in different contexts is evidenced by the different procedural protections that we generally accord to witnesses called to appear at hearings similar to that challenged in the present case. Although those conducting an investigation are always under a duty to act fairly, this Court has held that fairness in the context of such hearings does not require that the persons who are the "subjects" of the investigation participate in the examination of other witnesses, or that they be provided with an opportunity to adduce evidence or make submissions to the investigator: *Roper v. Royal Victoria Hospital*, [1975] 2 S.C.R. 62, and *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181. See also *Ontario Securities Commission v. Biscotti* (1988), 40 B.L.R. 160 (Ont. H.C.).
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> **77** Second, although activity in the securities sphere is of immense economic value to society generally, it must be remembered that participants engage in this licensed activity of their own volition and ultimately for their own profit. In return for permitting persons to obtain the fruits of participation in this industry, society requires that market participants also undertake certain corresponding obligations in order to safeguard the public welfare and trust. Participants must conform with the extensive regulations and requirements set out by the provincial securities commissions. Many of these requirements are fundamental to maintaining an efficient, competitive market environment in a context where imperfect information is endemic. They are also essential to prevent and deter abuses of such asymmetries of information, and therefore to maintain the integrity of the securities system and protect the public interest.
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> **78** Third, given the nature and breadth of this obligation, as well as the important economic stake that the investing public holds in its proper fulfilment, I fail to see how market participants would not expect to be questioned by regulators from time to time as to their market activities, in order for the securities commissions to be able to ensure that they, or the corporations they represent,

> have complied with prescribed standards. Although similar comments are more frequently made in relation to the notion of "reasonable expectation of privacy" under s. 8 of the *Charter*, I believe such considerations to be equally relevant to the application of the principles of fundamental justice under s. 7 of the Charter in the context of securities regulation. Indeed, as La Forest J. observed in *Thomson Newspapers, supra*, at p. 539, referring to his reasons in *Lyons, supra*, and *R. v. Beare*, [1988] 2 S.C.R 387, one must "consider (the impugned legislation) against the applicable principles and policies that have animated legislative and judicial practice in the field".
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> **79** A fourth consideration is the nature and complexity of the securities industry and the difficulties faced by regulators in ensuring the continued protection of the public. The Attorney General for Ontario identifies the three types of market players regulated by the *Securities Act*, S.B.C. 1985, c. 83: market professionals and traders, issuers of securities, and owners and/or holders of securities. She argues, convincingly in my mind, that the investigatory powers impugned in the present case are the primary vehicle for the effective investigation and deterrence of insider trading, stock manipulation, and other trading practices contrary to the public interest that may be engaged in by any or all of these three types of players. Moreover, she argues that such powers are the only investigative vehicle currently available in respect of owners and holders of securities.

[40] Similarly, in the decision *Re Parhar*, 2017 BCSECCOM 286, the Commission panel reviewed a number of applications in the context of an ongoing investigation, including applications for further disclosure and restraining the Executive Director from reviewing certain documents. When considering the applications, the panel reviewed the law in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, as well as its application by the Ontario Securities Commission in *Azeff*, 2012 ONSEC 16 (CanLII), as it relates to the duty of fairness owed to a person under investigation, but prior to the issuance of a notice of hearing. The panel concluded that the scope for intervention into an ongoing investigation should be limited.

[41] The Applicants ask that we apply s. 171 with all of the relevant context brought into the necessary balancing of public interest factors. In this sense, the Applicants ask us to follow the approach used in *X Corp.,* 2004 ONSEC 19, although the Applicants assert that the factors favoring intervention by this panel are stronger than those that existed in the *X Corp.* proceeding. In *X Corp.*, the applicant brought an application to revoke an investigation order of the OSC, arguing that the investigation was too long, causing prejudice and harm to the issuer. At the time of the application, the investigation had taken eighteen months, and a hearing had not been commenced.

[42] In *X Corp.*, the OSC reviewed section 144 of the Ontario legislation. Its finding can be summarized as follows:

a) The purpose of a hearing under section 144 (which is analogous to section 171 of the Act) is not to determine the veracity of the facts which are to be ascertained by the investigation launched by the order at issue. However, the panel may consider

if new facts have arisen since the investigation order was issued, that may inform its public interest consideration.

b) The panel hearing the variation or revocation application must be of the opinion that to vary or revoke the investigation order is not prejudicial to the public interest.

c) In coming to such an opinion, the panel must consider balancing the objectives of the Act, the protection of investors, along with the fostering of fair and efficient capital markets and public confidence in them. Part of this analysis will include the reality that an investigation by staff into the affairs of an issuer will always cause some prejudice.

[43] In *X Corp.*, the OSC considered the amount of time that had progressed in the investigation, the serious nature of the matters being investigated, and the remaining unanswered questions, and found that it remained in the public interest to continue the investigation.

VIII. Analysis

[44] The parties all accept that the Commission has the jurisdiction to vary or revoke an investigation order. We agree with the Applicants that the test to be applied under section 171 is whether the variance or revocation of the Order would be prejudicial to the public interest, consistent with the approach taken in the *X Corp*. decision. We also agree that any consideration of the public interest should be made in light of the impacts of the Order on the Applicants. We agree with the Executive Director that the onus is on the Applicants to establish that it would not be prejudicial to the public interest for us to vary or revoke the Order.

[45] Our analysis of the public interest factors begins with a focus on the four main subjects of complaint raised by the Applicants regarding the conduct of the investigators. That conduct has obviously caused the Applicants great distress, but it is necessary that we consider events not just through the eyes of the Applicants but also through an objective lens which includes the broader context.

[46] The first significant concern raised by the Applicants regarding the conduct of the investigators is that they feel it has gone on too long. They assert that the matters under investigation are not complex and that long before now the investigation should have been wrapped up, either by closing the file on the matter or by issuing a notice of hearing so the Applicants can get disclosure of the case against them and set about defending themselves.

[47] The Executive Director responds to the Applicants' concerns and submissions about delay in part by referring to the established administrative law tests for a stay of proceedings for delay as expressed in cases such as *Blencoe v. British Columbia (Human Rights Commission*), 2000 SCC 44. The Executive Director asserts that the *Blencoe* test

could not be met by the Applicants here for a number of reasons including the absence of the type and degree of prejudice which would be required for a stay based on delay.

[48] The Applicants are dismissive of that approach, noting that their application is not based on the test as defined in cases such as *Blencoe*. They assert that in the context, delay is merely a factor to be considered in the balancing of other factors which would be relevant to our public interest assessment. The Applicants also suggest that the combination of factors they have identified, including the existence of the freeze order which is in place and the fact that they felt some pressure to provide the undertaking, together amount to material prejudice.

[49] The relevant provision in the Act dealing with timelines is section 159, which states:

> **Limitation period**
> **159** (1)Proceedings under this Act, other than an action referred to in section 140 or 140.94, must not be commenced more than 6 years after the date of the events that give rise to the proceedings.

[50] The Act is silent as to the maximum length of time an investigation may take once commenced. Based on the limited chronology of events provided by the parties, there is no doubt that the Executive Director is well within the limitation period outlined in the Act.

[51] We note that the Supreme Court of Canada in *Branch* made reference to the need for Commission investigations to proceed quickly. We agree with that comment. Often investigations begin in circumstances where investors may be losing money each day to fraudulent behavior or where someone who is breaching the Act is in the process of removing funds from the jurisdiction. But this need to move quickly to prevent harm should not be confused with an obligation to complete an investigation on an artificial timeline, and particularly not on an artificial timeline set by the subject of an investigation. We think the comments of the Supreme Court of Canada in *Branch* which are most relevant to the current context, are the comments quoted above relating to the importance and complexity of investigations in the securities field.

[52] The length of time taken in this case along with the fact of and the events during the home visit appeared to be the primary reasons given during oral arguments by the Applicants' counsel for why we should conclude that the investigation has been motivated by an improper and ulterior motive. The difficulty with this submission is that securities regulatory investigations, by their nature, are often complex. They often occur in multiple stages, where investigators gather information which may lead to further rounds of information collection, with analysis of the gathered information at each stage. We see evidence of that in the facts described in paragraph 20 above. All of these steps take time. The duration of this investigation is not inconsistent with many investigations that result in enforcement proceedings before us and, as stated above, well within the limitation period in section 159. We are unable to conclude, from the evidence before us, that the length of time taken in this investigation has been inappropriately long.

[53] The second significant concern raised by the Applicants relates to the scope of the investigation. While it might be the case that the Applicants and entities and parties connected to them have been required to produce a large volume of records and other information, we are not able to conclude that those demands are inappropriate or overly broad. We find that there is evidence in the record which shows there are circumstances to justify the existence of an investigation. The investigation would logically extend to the topic of whether Mr. Executive caused trades to be executed through accounts which he might have had some form of control over but which might not have been in his name.

[54] The Applicants also submit that the investigation has included periods of significant activity followed by periods of silence. We do not find this argument persuasive. Investigations often include phases where significant amounts of documents and related information are collected, followed by periods which might look like inactivity to those outside of the investigation but which include significant analytical work by investigators, including work which might lead to further rounds of information collection. To find that the investigation has been "inactive" based solely on outside appearances of inactivity, when the total duration of the investigation is not beyond the norm, would be speculation.

[55] The third significant concern raised by the Applicants relates to the attendance by investigators and a police officer at the home of the Applicants. The Applicants ask us to draw inferences that the attendance had a sinister purpose. Reference is made to factors such as these:

a) the visit occurring at a time of day when it might be expected that only Ms. Executive and not Mr. Executive would be at home;

b) The location of the family home is a quiet residential street where any commotion is likely to attract the attention of neighbors;

c) the visiting investigators were accompanied by an armed police officer who was a physically imposing man;

d) Ms. Executive recalls the police officer peering in at least one window;

e) the investigators repeatedly rang the doorbell and knocked loudly on the front door to get the attention of whoever was inside;

f) when Ms. Executive came to the inside of the door, the investigator adopted an aggressive tone and yelled through the door, identifying his purpose primarily by saying he was from "the Commission"; and

g) the entire incident was prolonged, likely lasting in the order of 30 minutes according to the memory of Ms. Executive.

[56] At the time of the visit, Ms. Executive was experiencing some circumstances which made her sensitive to the impacts of the visit. These included the fact that she was in the shower when the visit started and was clad only in a housecoat for the rest of the visit. In addition she had heard of another well publicized Commission investigation taking place at that time and she felt that case was notorious in her community, so any activity by the Commission at her home might have a risk of connecting her family to a notorious case in the minds of others. Finally, the day of the visit was the third anniversary of the death of Ms. Executive's mother.

[57] Based upon all of the factors related to the visit to the family home, the Applicants suggest that it is proper to draw an inference that the purpose of the visit was to intimidate Ms. Executive. At a minimum the Applicants say that no proper motive can be identified for conducting the home visit at all and especially the manner in which it unfolded.

[58] The Executive Director elected not to introduce evidence regarding the motivation and strategy behind the visit to the family home. The Executive Director denies that the investigator acted inappropriately or in an intimidating way and that was supported by the evidence of the accompanying police officer who attended the home visit. Submissions were made on behalf of the Executive Director regarding some obvious points in response to the Applicants' concerns. For example, it was submitted that an investigator might continue to knock on a door and ring a doorbell because no one was answering the door. In addition it is noted that the door was a heavy, wooden door and it would be necessary to speak loudly to be heard through the door. Finally it was submitted that there would be no reason for the investigators to be aware of the specific circumstances of Ms. Executive which made her sensitive to the impacts of the visit on that particular day. We agree with these submissions.

[59] The Applicants assert that, especially given the decision of the Executive Director to not call evidence explaining the motivation and strategy behind the home visit, it is appropriate for us to draw an inference that the motivation was improper. It is true that much of the evidence which comes before this tribunal and which has been collected from the subjects of investigations is collected in the course of formal interviews. Such interviews are often conducted in the Commission's offices with the subject of the interview accompanied by counsel and after appointments have been arranged. Having said that, it does not follow that it is improper for investigators to seek to interview someone at their home without an appointment. Objectively, there is not a sufficient basis in the evidence to infer an improper purpose and we do not draw such an inference.

[60] The fourth significant concern raised by the Applicants is that investigators have not interviewed the investment advisor who would be expected to have knowledge of the nature, duration and independence of the family trust and the circumstances surrounding certain key trading instructions. The Applicants again emphasize that the Executive Director has not provided any evidence of why this allegedly material witness has not been interviewed.

[61] On this issue, the Executive Director's argument is that the investigation is not over and it is not for this panel to micro manage investigations or to force investigators to reveal significant details about status and plans for their investigation while the investigation is ongoing. We agree.

[62] Each application of this type needs to be considered in its own context and all factors relevant to the public interest should be brought into the balance during the evaluation of a section 171 application.

[63] The *Branch* decision is clear that investigations are a significant tool for the discovery and deterrence of breaches of the Act. Investigations under the Act can be time consuming, complex and disruptive to those who are compelled to cooperate. To some extent those who choose to participate in public markets should expect that they will be disrupted in certain circumstances.

[64] In the present case, the Order was properly granted and it is not argued that an initial basis was lacking for the investigation. The plain language of the Order makes clear that the scope of the investigation (and therefore what is relevant) is broader than a single trade in the Issuer between the Applicants.

[65] We have considered the background facts and they confirm that there are issues present which justify investigation. There is an obvious public interest in learning the truth about certain trading in the Issuer. Shareholders in the Issuer who made trades around the date of the key press release have a specific interest in the truth. All participants in public markets have a more general interest in the maintenance of confidence that trading is conducted with integrity and without advantage to insiders.

[66] For instance, the evidence suggests that shortly before the Issuer published a news release setting out what would likely be viewed in the market as bad news, a material instruction to sell shares of the Issuer was placed by the family trust as mentioned above. We do not find the steps taken by the investigators in light of that information to be surprising or outside the scope of the Order.

[67] In order to be effective, investigators need independence to follow leads and to explore new avenues which emerge as information is collected. The primary restraints on the scope of investigations are the limitation period in the Act and the parameters set by the terms of the investigation orders. There is a very significant public interest in letting investigations run their course within those authorized parameters. Implicitly, this suggests that Applicants must establish very significant competing public interest factors before the Commission should revoke an investigation order.

[68] The Applicants submit that various evidence is sufficient for us to draw an inference that the investigators were motivated by an improper purpose. We have stated in each instance why we do not find it appropriate to make that inference.

[69] We have carefully considered each of the bases upon which the Applicants say we should set aside the Order. We have concluded that none of those bases, either singly or taken together, are sufficient to support a conclusion that the public interest favours bringing the investigation to an end. We find that it is not in the public interest to revoke or vary the Order.

IX. Re-opening application

A. The parties' positions

[70] The Applicants submit that the fresh evidence is relevant to the panel's disposition of the section 171 application. They say that the fresh evidence is a further indication that the investigation, and now the news about a pending notice of hearing, are tools for the Executive Director to extract a settlement from them. They further say that, consistent with the misconduct at issue in the section 171 application, the Executive Director is now intent on wrongly circumventing this panel's deliberations and disrespects the Applicants' entitlement to a meaningful ruling on that application. Specifically, the Applicants allege in their notice of application:

> 21. There are realistically only two possible explanations for the Executive Director apparently (suddenly) being in a position to issue a Notice of Hearing less than *three days* after the *in camera* hearing of this Application concluded. Neither possibility does the Executive Director any credit. Either:
>
> (a) the Executive Director was ready all along to issue a Notice of Hearing but withheld it in order to support his position that the investigation was, on the facts as they existed at the time of the hearing, effectively immune from the panel's review; or
>
> (b) the Executive Director was waiting to see how the hearing went and, once it appeared to have gone poorly and that his decision to ignore the Applicants' evidentiary record may have backfired, he hurried up to try to issue the Notice of Hearing in the midst of the panel's deliberations to circumvent the panel's apprehended ruling.
>
> 22. It may not be necessary for the panel to determine which of these possibilities is correct. That is because both are deplorable, and both ought to be denounced by the panel.

[71] The Applicants, in a footnote in their application to re-open, admit a third possibility, namely, that the Executive Director in the ordinary course completed the investigation coincidental to the completion of the hearing. They dismiss this possibility as unrealistic.

[72] The Executive Director asserts that the communications are privileged and protected from disclosure and admissibility into evidence. The Executive Director also asserts that the test for re-opening the main application and admitting new evidence has not been met and that, in any event, this panel does not have the jurisdiction to restrain the Executive Director from issuing a notice of hearing.

B. The law regarding adducing new evidence

[73] The Applicants and the Executive Director have together put before us several tests which might apply to the issue of whether the hearing should be opened so that we can receive and consider the evidence regarding the post hearing discussion of the pending notice of hearing.

[74] One possible test is that from *R. v. Palmer*, 1980 1 S.C.R. 759 at 775. In *Palmer*, the following four factors were considered in the context of an application to adduce fresh evidence on appeal from a criminal conviction:

a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;

b) the evidence must be relevant in the sense that it bears upon a decision or potentially decisive issue in the trial;

c) the evidence must be credible in the sense that it is reasonably capable of belief; and

d) the evidence must be such that if believed it could reasonably be expected to have affected the result, when considered with the other evidence already adduced.

[75] Another possible test is the approach which was applied by a Commission panel in *Foresight Capital Corporation (Re)*, 2006 BCSECCOM 529. There the panel indicated that an application to admit new evidence after the close of a hearing would require an explanation for why the new evidence was relevant and why it was not reasonably possible to provide it during the hearing.

[76] Another possible test is that from *Re Deyrmenjian*, 2019 BCSECCOM 93. In that case, after the panel made its Findings but before the sanctions hearing, some of the respondents sought to introduce new evidence in a s. 171 application seeking to revoke or vary part of the Findings made against them. The panel in that proceeding set out the following requirements, each of which must be met:

a) the new evidence was
   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 liability hearing;
   iii. "compelling" in that if the panel had the evidence at the time of the liability hearing, the panel would decide the liability findings against the applicants differently; and

b) it would not be prejudicial to the public interest to revoke the panel's findings against the applicants.

[77] Section 173 of the Act provides for a broad discretion to admit evidence from any party. However, that discretion must be exercised in a principled way. The tests which are referenced above were created to assist decision makers in balancing the benefits of receiving all relevant evidence from respondents who have been provided notice of a hearing under section 161 of the Act (or an accused in a criminal proceeding), against the administrative efficiency and fairness of achieving finality in an enforcement proceeding after receiving and testing the evidence. While the nature of the proceedings before us is different in that the Applicants are not respondents in a section 161 hearing (or the accused in a criminal proceeding), the tests for adducing new evidence in those circumstances provide guidance in the matter before us.

[78] Commission hearings are frequently lengthy and include testimony from multiple witnesses, including witnesses who travel from other jurisdictions. Hearings often include the admission of significant documentary evidence and cross examinations which reference the documents. It detracts from the objective of holding effective hearings if the hearings can be reopened easily. Although *Deyrmenjian* involved a party seeking to introduce new evidence to revoke or vary a decision after the decision was made and the Applicants are seeking to do so before a decision is made, we believe the same principles apply. It is not in the public interest to re-open and prolong a hearing to admit evidence that, at the end of the day, would not change the outcome of the hearing. As a result, we conclude that the *Deyrmenjian* test quoted above is the appropriate test for this application to re-open.

C. Analysis

[79] For the reasons stated in *Deyrmenjian,* it is practical to start by assessing the "compelling" aspect of the test as it can be determinative of the outcome of the analysis. We note that the proposed, imminent issuance of a notice of hearing would bring to an end the delay issue which was such a prominent part of this application. On the other hand we acknowledge the Applicants take the position that the fresh evidence is a further indication that the investigation, and now the news about the pending notice of hearing, are tools for the Executive Director to extract a settlement from the Applicants.

[80] In this instance, the Applicants offered three possible explanations for why the notice of hearing was ready so quickly after the hearing. They ask us to prefer the two that make inferences of improper motives on the part of the Executive Director. Issuing a notice of hearing under the Act is an exercise of discretion on the part of the Executive Director. There may be any number of factors considered by the Executive Director in determining when is the appropriate time to exercise that discretion. In this matter, we have very little, if any, evidence about the motivations of the Executive Director, and we find that there is insufficient evidence before us to infer what the Executive Director's motives were. Specifically, we are unable to infer, based on timing alone, any improper motive on the part of the Executive Director. There is simply insufficient evidence to conclude that the first two explanations are more likely than the third. Furthermore, there are potential legitimate explanations for the conduct in question besides bad faith and intentional misconduct; we are not compelled to infer the worst and we have not done so.

[81] For the same reasons, if we had the evidence of the Call at the time of the hearing and we considered that with all the other evidence before us, we still would not be able to infer any improper motive on the part of the Executive Director, and it would not have caused us to decide the section 171 application differently. It follows that we do not find the fresh evidence compelling. Given that, it is not necessary to address the other elements of the test for re-opening the hearing. The Applicants are not successful in meeting the *Deyrmenjian* test and we decline to admit the evidence of the Call.

[82] Finally, as part of the application, the Applicants sought an order from the Commission preventing the Executive Director from exercising his discretion under section 161 of the Act to issue a notice of hearing, for at least 60 days after this decision. The practical application of such an order would prevent a notice of hearing from being issued until after the appeal period in the Act relating to this decision expired.

[83] The Applicants did not address the issue of whether a panel of commissioners appointed under section 6 of the Act has the legislative authority to limit the discretion of the Executive Director under section 161 of the Act, where the panel has not found improper or unauthorized conduct on the part of the Executive Director. In the matter before us, there is insufficient evidence to find that the Executive Director, or his staff, has engaged in any improper conduct, been motivated by any improper purpose, or taken steps outside their authority under the Act. Given that, even if this panel has the authority to stay the Executive Director from issuing a notice of hearing for a specific amount of time, we find no reason to issue such an order in these circumstances.

X. Conclusion

[84] The section 171 application and the application to re-open are dismissed.

October 6, 2021

For the Commission:

Gordon Johnson
Vice Chair

Deborah Armour, QC
Commissioner

Audrey T. Ho
Commissioner