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

Citation: Re Enna M. Keller, 2022 BCSECCOM 29 Date: 20220131

**Enna M. Keller**

| | | |
|---|---|---|
| **Panel** | Gordon Johnson | Vice Chair |
| | Deborah Armour, Q.C. | Commissioner |
| | James Kershaw | Commissioner |
| **Hearing Date** | July 22, 2021 | |
| **Submissions Completed** | January 7, 2022 | |
| **Date of Decision** | January 31, 2022 | |
| **Appearing** | | |
| Laura Bevan<br>Gillian Thiel, Articling Student | For the Executive Director | |
| Patricia A.A. Taylor | For Enna M. Keller | |

## Decision

## I. Introduction

[1] This is an application by Enna Keller (Applicant) under section 171 of the *Securities Act*, RSBC 1996, c. 418 (Act) to vary a sanctions decision the Commission issued against the Applicant. That decision is indexed as *Re EagleMark et al.*, 2017 BCSECOMM 42 (Sanctions Decision). The Applicant seeks to vary the administrative penalty ordered by the panel in the amount of $2.42 million to $250,000.

[2] The Applicant seeks to have evidence admitted that was not before the original panel at either the liability or sanctions stages of the original proceedings. We heard the application to introduce that evidence as part of the hearing on the application to vary the administrative penalty.

[3] The Applicant also seeks an order under section 172 of the Act prohibiting the executive director from executing against property in the name of the Applicant until after her death.

## II. Factual Background

[4] The panel in the liability decision made on August 22, 2016 (2016 BCSECCOM 288) (Liability Decision) found that the Applicant:

a) perpetrated fraud contrary to section 57(b) of the Act;

b) contravened a cease trade order of the Commission dated October 1, 2009 (CTO);

c) contravened a temporary order of the Commission dated December 9, 2011 (TO); and

d) contravened section 34 of the Act by trading in securities without registration and without any available exemptions.

[5] In the Sanctions Decision, the Applicant was ordered to resign any position she held as a director or officer of any issuer or registrant and that permanently:

a) the Applicant cease trading in, and be prohibited from purchasing, any securities and exchange contracts;

b) the Applicant be prohibited from becoming or acting as a director or officer of any issuer or registrant;

c) all exemptions under the Act, the regulations or a decision do not apply to the Applicant;

d) the Applicant be prohibited from becoming or acting as a registrant or promoter;

e) the Applicant be prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and

f) the Applicant be prohibited from engaging in investor relations activities.

[6] The Sanctions Decision under section 162 of the Act, also ordered that the Applicant pay to the Commission an administrative penalty of $2.42 million. It is that ruling that the Applicant seeks to vary.

[7] The misconduct that was the subject of the Liability and Sanctions Decisions related to a BC reporting issuer known as Lexicon Building Systems Ltd. (Lexicon) that was involved in the construction industry. In 2009, the Commission issued a cease trade order (CTO) against Lexicon for failure to file financials and shortly thereafter it was delisted by the Canadian National Stock Exchange. Also in 2009, Lexicon was petitioned into bankruptcy.

[8] Another respondent in the liability and sanctions proceedings, Richard Lian (Lian), devoted time and effort in attempting to resolve various issues of Lexicon. After the issuance of the CTO and the bankruptcy of Lexicon, Lian and the Applicant launched a “Friends and Family Program” (FFP) through which

investors would purportedly make a loan to EagleMark Ventures LLC (EagleMark), a company controlled by Lian, in exchange for the eventual receipt of shares and warrants in Lexicon. The money raised was ostensibly to contribute to operating costs, debts and liabilities of Lexicon while Lian was endeavouring to have Lexicon removed from bankruptcy and to rectify impediments to raising monies while the CTO was in place.

[9] Approximately $3.2 million was raised under the FFP from approximately 315 persons, almost half of whom resided in British Columbia. Of the $3.2 million raised, approximately $180,000 was repaid to FFP participants who demanded the return of their funds and approximately $600,000 was used to pay liabilities, expenses and debts of Lexicon. The balance of approximately $2.4 million was expended by Lian for matters unrelated to Lexicon.

[10] The panel did not make an order against the Applicant pursuant to section 161(1)(g) of the Act (often called a disgorgement order) because she received less than $US50,000 from the FFP proceeds and the amounts she did receive may have been to reimburse her for expenses she incurred on behalf of Lexicon.

[11] On December 9, 2011, the Commission issued a temporary order (TO) against EagleMark, Lian and Keller ordering that all persons cease trading in the FFP securities and that EagleMark, Lian and Keller cease trading in any securities or exchange contracts. At least $400,000 was raised from the FFP participants after issuance of the TO.

[12] As stated above, the original panel issued the Liability Decision in August 2016 and the Sanctions Decision in February 2017.

[13] In 2017 after the Liability Decision was issued, the Commission commenced collection proceedings in the Supreme Court of British Columbia (Collections Proceedings) and obtained a certificate of judgment against the Applicant for the $2.42 million administrative penalty (Enforcement Judgment). The Enforcement Judgment was registered (Charge) against real property located in Burnaby, BC (Property) where the Applicant has resided since the 1970s.

[14] On February 11, 2018, the Applicant applied under section 171 of the Act to revoke the Sanctions Decision. She made it clear that she was also seeking to have the findings relating to her misconduct set aside. The application for the most part, simply challenged the findings of the panel. There were two new circumstances that occurred after the Liability Decision was issued, the first being that the subject company was dissolved and the second that a new company was registered.

[15] On May 22, 2018, the panel dismissed the application for revocation (2018 BCSECOMM 164) (Revocation Decision). It concluded that the new circumstances did not affect the findings in the Liability Decision. It remained the

case that the Applicant had committed fraud and contravened a cease trade order, a temporary order and section 34 of the Act. The panel also found that there was no basis to revoke or vary the Sanctions Decision.

[16] The Commission applied to the Supreme Court of British Columbia for a determination of the Applicant's interest in the Property. On March 12, 2021, Mr. Justice Coval sitting as registrar, determined that the Applicant had a 50% interest in the Property (Property Interest Decision).

***Role of the Applicant***

[17] The original panel found that the Applicant was the predominant face of the FFP acting as the contact person for participants. As a former director and CEO of Lexicon, the Applicant had detailed knowledge about Lexicon's corporate history, governance, products, marketing, manufacturing and affairs. She collected monies from FFP participants and provided information to them.

[18] The panel noted that her testimony that she expended considerable amounts of her own money in trying to resolve Lexicon's issues was not challenged. They noted that she had no access to the FFP funds once they were sent to Lian.

[19] The Liability Decision cites an example of a communication sent by the Applicant and says that it was "one of many deceptive communications to FFP participants demonstrating that they were not told that the use of their funds was unrestricted or totally at the discretion of Lian." The Liability Decision also gives examples of communications sent by the Applicant to allay concerns about the status of Lexicon and also to suggest urgency in making further payments into the FFP.

[20] After the Commission commenced its investigation into the Applicant and others, the Applicant sent an email to FFP participants reporting that she had had a very successful meeting with the Commission to clear her of any wrongdoing. She reported that Commission officers said that she and Lian, along with all shareholders and lenders, should be greatly rewarded by Lexicon for all their efforts and hard work. The Commission investigators denied making any such statements.

[21] The Liability Decision found that the Applicant committed numerous acts of deceit and deception against the participants in the FFP. It also found that the Applicant knew what she was doing in all of the deceitful acts and therefore had the necessary *mens rea* for deceit and fraud. She was aware that the monies of the FFP participants were at risk and she knew or ought to have known that Lian had only expended a small portion of the funds raised through the FFP on matters which she represented to FFP participants was the intended use of the funds.

[22] The Applicant engaged in numerous acts and conduct in furtherance of the trading in the securities through the FFP after the CTO was issued and in so doing contravened the CTO. She continued with those acts and conduct after the issuance of the TO and accordingly, she also contravened the TO.

[23] The Applicant traded in securities through her acts without being registered to do so and therefore contravened section 34 of the Act.

[24] In determining the appropriate sanctions for the Applicant, the panel considerations included the following:

a) her misconduct was at the very upper end of seriousness as it resulted in millions of dollars being dissipated by Lian;

b) she actively facilitated the fraud including by distributing to FFP participants' emails containing false and misleading information;

c) she attempted to alleviate concerns with false platitudes about progress being made;

d) her fraudulent misconduct was essential to the success of the FFP scheme;

e) without her efforts, Lian would likely have been unable to recruit investors; and

f) her breaches of the CTO, TO and of section 34 were also serious and contributed to the losses of the FFP participants.

[25] Specifically as it related to the administrative penalty, the panel clearly based its decision on both specific and general deterrence when it said "the orders must (i) demonstrate the consequences of the respondents' inappropriate conduct to other market participants, and they must also (ii) deter the respondents from engaging in future misconduct themselves." As it related specifically to the Applicant, the panel said that, for the purposes of both specific and general deterrence, her misconduct needed to result in a significant administrative penalty, given the finding that her fraudulent misconduct "was essential to the success" of the scheme (see Sanctions Decision at para. 73). In reviewing previous decisions of the Commission and the conduct of the Applicant as a whole, the panel found in the Sanctions Decision that an administrative sanction similar to the amount lost by participants in the fraudulent scheme was warranted.

***New evidence and changed circumstances Applicant seeks to rely on***

[26] The Applicant tendered the following evidence that was not before the original panel:

a) Affidavit #1 of Enna Keller in the Collections Proceedings made June 27, 2018;

b) Affidavit #1 of Peter Keller (husband of the Applicant) in the Collections Proceedings made June 27, 2018;

c) Affidavit #1 of Peter Anthony Keller (son of the Applicant) in the Collections Proceedings made October 23, 2019; and

d) Affidavit of Enna Keller made October 16, 2020.

[27] The additional information in the above affidavits upon which the Applicant seeks to rely is summarized as follows:

a) the Applicant and her husband made and lost substantial investments in Lexicon and related companies;

b) the Applicant was a director and CEO of Lexicon from 1993 to 2007. She was paid by way of shares for those services;

c) the Applicant's husband passed away in 2018 at the age of 78. The Applicant says this has left her without any income with the exception of annual income in the amount of less than $15,000 in the form of her Canadian Pension Plan benefits;

d) prior to his death, Peter Keller Sr. transferred his interest in the Property to his two sons;

e) the Applicant will lose the ability to house herself if the executive director takes steps in the Collections Proceedings against the Property;

f) criminal proceedings taken against her following her breach of the TO have caused her embarrassment and anguish;

g) she was not aware that the panel could order an administrative penalty against her in excess of the amount sought by the executive director;

h) had she been aware of the potential for an order substantially in excess of that which the executive director sought, she would have filed materials showing her net worth, her husband's personal investment in Lexicon and the EagleMark investment and her ability to pay any amount; and

i) the panel did not seek submissions on whether they should impose an administrative penalty greater than that sought by the executive director.

## III. Applicable Law

[28] The submissions received require us to review the nature of section 171 of the Act, the test for the admissibility of fresh evidence and the extent to which a party's expectations must be considered by a hearing panel in order to ensure that the hearing is conducted fairly.

[29] Section 171 of the Act provides the Commission with the discretion to vary or revoke a Commission 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.

[30] BC Policy 15-601 *Hearings* sets out procedures for hearings under the Act. Section 9.10 provides guidance on section 171 applications. It says, in part:

> (a) **Discretion to revoke or vary** – Under section 171 of the Act, the Commission may revoke or vary a decision it has made….
>
> Before the Commission changes a decision, it must consider that it would not be prejudicial to the public interest to do so. If a panel of the Commission is considering its own decision, this usually means that **the party 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….** [emphasis added]
>
> A party must apply to the Commission in advance of the hearing and demonstrate why the evidence that was not before the original decision maker is new and compelling, and should be admitted. The Commission will hear submissions from all parties. In some circumstances, the Commission may hear the application to introduce new evidence as part of the hearing to revoke or vary a decision. In that case, it will receive the evidence for the purposes of determining if it meets the test to be admitted.

[31] The wording in Policy 15-601 was expanded in May 2020 to read as above. Prior to that time, it read:

> (a) **Discretion to revoke or vary**- A party may apply to the Commission for an order revoking or varying a decision. Generally, the Commission does not hold a hearing; it considers written submissions and makes its decision. Before the Commission changes a decision, it must consider that it would not be prejudicial to the public interest. This usually means that the party must show the Commission new evidence or a significant change in circumstances.

[32] While the change in wording in Policy 15-601 includes the concept of the need for any new evidence to be compelling, that requirement is reflected in the relevant cases (discussed below) that predate the new wording.

[33] The Applicant relies on section 172 of the Act to have a condition placed on the executive director preventing him from executing on the Property. That section reads:

> **172** The commission or the executive director may impose any conditions, restrictions or requirements the commission or executive director considers necessary in respect of any decision made by the commission or executive director.

[34] As stated by the BC Court of Appeal in *Roeder v. BC Securities Commission*, 2005 BCCA 189, a section 171 application is not an appeal or an opportunity for a rehearing. The Applicant had the ability to seek leave to appeal pursuant to section 167(1) of the Act and did not avail herself of that opportunity. However, it is to be noted that *Roeder* also says that the discretion under section 171 is so broad that a panel could, where it sees fit, review the original hearing for fairness. We address the fairness issue below.

[35] As is the case here, in *Re Pyper*, 2004 BCSECCOMM 238, the respondent sought to vary sanctions ordered against him. The commission panel there stated:

> For an application under section 171 to succeed, the applicant must show us new and compelling evidence or a significant change in circumstances, such that, had we known them when we issued our sanctions decision, we would have made a different decision.

[36] In *Re Deyrmenjian*, 2019 BCSECCOM 93, the panel considered a number of cases where section 171 orders were sought. They amalgamated the tests used in those cases and arrived at the following factors that section 171 applicants have to establish:

a) the additional evidence must be

    i. relevant to the allegations in the notice of hearing

ii. "new" in that it was not reasonably available for use by the applicants at the time of the hearing

iii. "compelling" in that if the panel had been provided with the evidence at the time of the hearing, it would have decided differently; and

b) it would not be prejudicial to the public interest for the panel to revoke their findings.

[37] The *Deyrmenjian* panel went on to say that the "compelling" aspect of the case is more important than the consideration of whether the additional evidence was "new". If the evidence was not compelling, there was no need to determine whether it was "new". They also said that if the evidence was not compelling, it would be prejudicial to the public interest to vary or revoke the decision.

[38] We adopt the *Deyrmenjian* methodology below. While we adopt the test outlined above, we note that the legislation is clear that the Commission may also vary a decision under section 171 if there has been a "significant change in circumstances".

[39] Turning to the issue of how a party's expectations might influence what steps a hearing panel should take in order to conduct a fair hearing, a leading authority is *Moreau-Berube v. New Brunswick (Judicial Council)*, [2002] 1 SCR 249. In that case a provincial court judge had made some comments which suggested misconduct and the judge's conduct was initially brought before an inquiry panel. The inquiry panel's recommendation to the provincial judicial council was a reprimand. In spite of that the judicial council recommended to the provincial Lieutenant-Governor in Council that the judge be removed from office. The Judge sought judicial review, asserting that she had relied on the recommendation of the inquiry panel, she had legitimate expectations of the maximum penalty and fairness precluded a penalty which exceeded what had been recommended by the inquiry panel.

[40] The Supreme Court of Canada in *Moreau-Berube* ruled against the judge, stating in part:

> 78 I am not persuaded by any of these arguments. The doctrine of reasonable expectations does not create substantive rights, and does not fetter the discretion of a statutory decision-maker. Rather, it operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate expectation that a certain procedure would be followed: *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557; *Baker*, *supra*, at para. 26. The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. But it does not otherwise fetter the discretion of a statutory decision-maker in order to mandate any particular result: see D.

> Shapiro, *Legitimate Expectation and its Application to Canadian Immigration Law* (1992), 8 *J. L. & Social Pol'y* 282, at p. 297.
>
> 79 In the circumstances of this case, I cannot accept that the Council violated Judge Moreau-Bérubé's right to be heard by not expressly informing her that they might impose a sanction clearly open to them under the Act. The doctrine of legitimate expectations can find no application when the claimant is essentially asserting the right to a second chance to avail him- or herself of procedural rights that were always available and provided for by statute.

[emphasis added]

[41] In *British Columbia (Securities Commission) v. Research Capital Corp.*, 2004 BCCA 313, the British Columbia Court of Appeal adopted reasoning consistent with the reasoning in the *Moreau-Berube* decision. The respondent was one of a number of firms which had weaknesses in compliance procedures which resulted in the firm allowing trading in violation of cease trade orders. The firm admitted the facts alleged against it and made submissions about the appropriate sanction to be imposed. The only sanction formally sought by the executive director was a financial sanction, although the arguments in favor of the sanction sought were based on flaws in the compliance procedures of the firm. Contrary to the firm's expectations, the sanctions imposed included requirements that the firm change some of its compliance procedures. The firm sought leave to appeal. Leave was denied, in part because the adequacy of the firm's compliance procedures was the fundamental issue in the commission hearing.

## IV. Positions of the Parties

### *The Applicant*

[42] The Applicant made a number of submissions at the section 171 hearing and in subsequent written submissions. They can be summarized as follows:

a) She should have been told the panel was considering an administrative penalty ten times what the executive director was seeking and been given the opportunity to make submissions on that point.

b) Had she known that was what the panel was considering, she would have led information about her financial situation.

c) This panel should now consider all of the "new" evidence and changed circumstances since the Sanctions Decision. In particular, the panel should consider the evidence regarding the Applicant's financial circumstances.

d) Had the panel had this new evidence and changed circumstances, there is a significant likelihood it would have reached a different decision.

e) The Applicant's financial circumstances are relevant to the principle of specific deterrence but not general deterrence.

f) This panel should consider the use to which funds raised pursuant to administrative sanctions can be put. Those uses are limited to costs involved in the administration and enforcement of the Act including education of the public. Those funds cannot be used to compensate investors. Therefore investors will not be negatively impacted if the amount of the administrative sanction is reduced.

g) The panel should weigh the impact of the administrative sanction on the Applicant against any prejudice shareholders would suffer if the variation is granted.

h) The *Moreau-Berube* and the *Research Capital* cases should be distinguished or limited. Those decisions arose in differing procedural contexts. In each of those cases the applicants were represented by counsel and, in the *Moreau-Berube* case, the applicant was a judge. The applicants in those cases should have recognized the full range of outcomes that were possible. This is contrasted to the Applicant's circumstances as an unrepresented individual who has provided evidence that she would have acted differently and made different submissions had she known of the potential for an administrative penalty of the magnitude imposed.

i) The Applicant also notes that *Moreau-Berube* provides some support for the legitimacy of certain expectations of parties to an administrative proceeding and for a duty of fairness which arises in relation to those expectations.

j) In the Applicant's opinion, the usual practice is that panels accept the recommendations of the executive director on sanctions.

***The executive director***

[43] The executive director asserts that the *Moreau-Berube* and *Research Capital* authorities apply here and establish that the applicant had no reasonable expectation to the effect that the range of financial sanctions was limited by the submissions made on behalf of the executive director. It is also submitted by the executive director that the warning given by the panel to the Applicant during the sanctions hearing was sufficient to alert the Applicant that she could not rely on those submissions to establish an upper limit on the financial sanction.

[44] The executive director submits the application for a variation of the administrative penalty should be dismissed as the evidence on the application is neither new nor compelling.

[45] Given the Applicant's grievous misconduct, it would be prejudicial to the public interest to vary the administrative penalty. That penalty is supported by the panel's finding that her misconduct was essential to the success of the fraudulent scheme. The panel noted that fraud is a very serious offence.

[46] The executive director countered a number of the submissions made by the Applicant. Specifically as it relates to her complaint that she was not given an opportunity to know the penalty that the panel was considering and to make submissions, the executive director points to examples in the hearing where the panel did just that. In addition, the panel made it clear to the parties that it was not constrained by the submissions of the executive director. In any event, the executive director says that this is not an appeal and such submissions are not relevant to this application.

[47] The executive director says that none of the evidence relied upon is relevant with one exception, namely, that the Applicant has been found to hold a 50% interest in the Property.

[48] Finally, the executive director says that there is no basis to conclude that the panel would have decided differently. To the contrary, the panel was very clear that her misconduct warranted a very significant administrative penalty.

## V. Analysis

***Is the additional evidence compelling?***

[49] As stated in Policy 15-601, it is incumbent on the Applicant to show new and compelling evidence or a significant change in circumstances. In keeping with that policy, we received the additional evidence for the purpose of determining if it meets the test for admission.

[50] Following the *Deyrmenjian* approach, the additional evidence, whether new or not or whether it is of changed circumstances, must be compelling. If it is not compelling, that is determinative of the application to vary.

[51] We find that none of the additional evidence or changed circumstances is compelling when considered either singly or in the aggregate. We have the following specific comments:

a) The Applicant's evidence of her lack of knowledge that the financial sanction could be so high is not compelling in light of the statement by the panel that they were not bound by the submissions of any party (this is discussed in additional detail below);

b) While we acknowledge that the passing of the Applicant's husband was tragic, it was reasonably foreseeable that at some point in time after the Sanctions Decisions he would cease being able to work either through old age, incapacity or, as happened here, death. It was also reasonably

foreseeable that her husband's inability to work and provide for the family for any reason would have an adverse impact on her financial wellbeing.

c) The Applicant has submitted that steps taken to execute the judgment in the Collections Proceedings against the Property will result in a hardship against her sons. We reject this submission. The Property Interest Decision confirmed the Applicant's 50% undivided interest in and to the Property. The Charge is limited to her interest. The nature of the underlying respective ownership interests of the Applicant and her sons in and to the Property may impact the value and marketability of any such interest and may limit the ability of the Commission to execute successfully against her interest alone. Notwithstanding such practical limitations, any execution proceedings against the Applicant cannot affect the sons' interest and will be limited in effect to her interest in and to the Property.

d) The Applicant may not be able to remain in the house on the Property as a result of the execution proceedings. Any hardship such outcome would visit upon the Applicant, is a direct and consequential result of her wrongdoing.

e) Similarly, any embarrassment or emotional distress she has suffered from the criminal proceedings stemming from the breach of the TO is the result of her wrongdoing, and is not a compelling factor when determining if the administrative penalty should be varied.

f) As for the investments that the Applicant made and lost in Lexicon, it is not new evidence or a change in circumstances insofar as it had occurred prior to the Sanctions Decision.

[52] None of the additional evidence causes us to conclude that the original panel would have reached a different decision on the administrative penalty if it had had that evidence before it. As the Applicant has acknowledged, while the financial situation of a respondent might be relevant to specific deterrence, it is not relevant to a consideration of the appropriate sanction to meet the goals of general deterrence.

[53] It is clear that what was most relevant to the panel was the seriousness of the actions of the Applicant. We know from the Liability and Sanctions Decisions that the panel considered the Applicant just as instrumental as Lian was found to be in the loss suffered by the investors. As they stated "Without her efforts, Lian would likely have been unable to recruit Lexicon shareholders and other investors to send their funds to Lian and his corporations."

[54] The Applicant seeks to vary the sanction ordered by the original panel, arguing in part that if she had known the outcome, she would have made different submissions. However, when given the opportunity to provide submissions as to

what the appropriate sanction should be at the original hearing, the Applicant chose not to do so. Instead, the Applicant focused on her position that the Commission's findings were in error. In her oral submissions on sanction, the Applicant made irrelevant arguments attempting to shift blame to Commission staff and asserted she had done nothing wrong (Sanctions Decision at paras. 10-16) Applications made under section 171 are an opportunity to introduce new and compelling evidence, or a significant change in circumstances. They are not intended to provide a respondent a second chance at making submissions when they were properly afforded that opportunity at first instance.

[55] Based on the unequivocal language in the Sanctions Decision and the nature of the additional evidence presented, we do not find the additional evidence to be compelling.

[56] We dismiss the application to admit the additional evidence and to vary the administrative sanction.

***Would it be prejudicial to the public interest to vary the Sanctions Decision?***

[57] While we can dismiss this application solely on the basis of the failure to provide additional compelling evidence, we find it important to speak to the issue of the public interest.

[58] The onus is on the Applicant to establish that it would not be prejudicial to the public interest to vary the Sanctions Decision.

[59] The Applicant submits that in considering whether it would be prejudicial to the public interest to vary the Sanctions Decision, we should also consider her circumstances. We have done so. As we have stated above, we do not find the additional evidence of the Applicant's circumstances to be compelling. In any event, in balancing the Applicant's circumstances against the impact of reducing the administrative penalty, we find that the balance lies in favour of maintaining the Sanctions Decision as is.

[60] The Applicant has urged us to weigh the impact of the administrative sanction on the Applicant against any prejudice shareholders would suffer if the variation is granted. She says that shareholders would not suffer as none of the monies collected pursuant to an administrative sanction go back to investors. That misconstrues the test. The prejudice to the public interest that would result from a reduced sanction occurs because the goal of general deterrence would be greatly diminished. The public interest lies in taking steps to ensure misconduct such as that of the Applicant, does not occur in the future.

[61] We find that it would be prejudicial to the public interest to vary the Sanctions Decision. Doing so would reduce its general deterrent impact, something the panel placed significant weight on, given the Applicant's very serious wrongdoing directly resulting in the loss of $2.42 million to investors.

***Fairness and natural justice***

[62] The Applicant has also submitted that we should consider the administrative law principles of fairness and natural justice. As noted above, *Roeder* states we have that ability given the broad discretion in section 171. Given that, we have considered the submissions of the Applicant on fairness. She says that she did not know the case she had to meet and was therefore denied an opportunity to make full answer and defence because she was not specifically told the panel was considering an administrative penalty several times greater than that sought by the executive director.

[63] We find that the submissions of the Applicant relating to fairness and natural justice are not sufficient to justify varying the Sanctions Decision for the following reasons:

a) The panel made it abundantly clear they were not in any way fettered by the submissions of any of the parties thus highlighting for the Applicant and the other parties that they could well make a decision that was higher than that sought by the executive director. The panel chair stated during oral submissions on sanction:

> I also want to make the point that the decision on sanctions is that exclusively of the panel. We take into consideration the written and oral submissions of the parties, but we are not bound or limited in any way by those submissions. We have the authority to issue sanctions under sections 161 and 162 of the B.C. Securities Act and we will deliberate on those matters accordingly with having regard to the submissions, but not bound by them.
>
> [emphasis added]

Further, the panel asked if there were any questions with regard to that broad discretion of the panel. The Applicant neither questioned the statements by the panel at that time nor sought clarification on sanctions later in the proceedings. We find that it was made clear to the Applicant that the panel was not bound by or otherwise limited by the submissions of the executive director on the issue of sanctions.

b) Even if we fully accept that the Applicant believed the original submissions made by counsel for the executive director regarding sanctions created an upper limit on what sanction could be imposed by the original hearing panel, that is not sufficient to support the variation sought. It also requires that the Applicant's expectations remained reasonable even after the original panel unequivocally alerted the Applicant that she could not rely on the submissions of the executive director as the source of any limit.

c) We have considered the submissions of counsel for the Applicant in this regard, including her submissions seeking to distinguish the *Moreau-Berube* case, and we do not find those submissions to be persuasive. Even for an unrepresented respondent it would be hard to interpret statements such as those made by the original panel as anything other than a warning to the respondent that consideration was being given by the panel to the imposition of a sanction higher than what was being sought by the executive director. We find that the expectations that the Applicant has put forth were not reasonable in all of the circumstances.

d) In the course of the sanctions hearing, the panel specifically gave the Applicant the opportunity to make submissions. Instead of making any submissions with regard to sanctions, the Applicant focused her comments on challenging the findings of wrongdoing.

e) In her affidavit evidence, the Applicant says that she would have lead evidence as to her financial circumstances had she known about the size of the administrative award she was facing. We are not able to reconcile that statement with what happened at her earlier application to revoke the Sanctions Decision. She knew about the size of the award at that point and did not lead any evidence or make any submissions with regard to her financial situation. Instead, she again took the opportunity to challenge the panel on its findings regarding wrongdoing.

f) As to the submission of the Applicant that she should have been told that the panel was considering a sanction ten times that requested by the executive director, the *Moreau-Berube* decision establishes that panels are under no obligation to advise respondents of the range of sanctions that they are considering. Such a suggestion would inappropriately fetter the panel's discretion. In any event we have found that the warning which was given in this case was sufficient, in the circumstances, to alert the Applicant to the type of risk which she says she was not aware of..

g) The Applicant stated in her written submissions that the usual practice is for panels to accept the recommendations of the executive director. That is simply not the case. In fact, panels often impose sanctions that are different from those put forth by the executive director. Again, to do otherwise would be an improper fettering of the discretion of panels to impose sanctions they see fit.

***Section 172 application***

[64] The Applicant has asked that, in the event that we let the administrative penalty stand, we impose a condition under section 172 of the Act prohibiting the executive director from executing against the Property until after her death. It is questionable as to whether we have the jurisdiction to issue such an order as it would effectively stay execution in the Collections Proceedings. In making such

an order, we would, in effect, be putting a condition on the Enforcement Judgment rather than on any order that the Commission has made.

[65] We do not need to decide the jurisdictional issues raised by such submission as we decline to make an order prohibiting the executive director from executing against the Property until after her death. Administrative penalties would cease to have their intended specific and general deterrence value if respondents were able to postpone the impacts of such administrative penalties until after their death.

## VI. Conclusion

[66] In conclusion, the applications to admit fresh evidence, to vary the administrative sanction and to place a condition on the execution of judgment in the Collections Proceedings, are all dismissed.

January 31, 2022

**For the Commission**

Gordon Johnson
Vice Chair

Deborah Armour, Q.C.
Commissioner

James Kershaw
Commissioner