

BRITISH COLUMBIA SECURITIES COMMISSION

Section 171 of the *Securities Act*, RSBC 1996, c. 418

Citation: Re BridgeMark, 2020 BCSECCOM 346

20200826

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

Decision

Panel	Audrey T. Ho Judith Downes	Commissioner Commissioner
--------------	-------------------------------	------------------------------

Submissions completed	July 24, 2020
------------------------------	---------------

Decision date	August 26, 2020
----------------------	-----------------

Counsel

	For 
---	--

Graham R. MacLennan
James K. Torrance

For the Executive Director

¹ The original style of cause in this matter included Beleave Inc. and Speakeasy Cannabis Club Ltd. On June 11, 2019 and on May 4, 2020, considering it would not be prejudicial to the public interest, the executive director discontinued the proceedings against Beleave and Speakeasy, respectively. Therefore, the style of cause has been amended to refer only to the remaining respondents.

Rulings and Reasons

I. Introduction

- [1] On April 16, 2020, [REDACTED] (Applicant 1), applied to the Commission, under section 171 of the *Securities Act*, RSBC 1996, c. 418 for orders:
- (a) to revoke in whole or in part, Commission freeze order [REDACTED] issued with respect to Applicant 1's bank account at a certain bank, on the basis that to do so would not be prejudicial to the public interest, or
 - (b) in the alternative, to revoke or vary that freeze order on the basis that Applicant 1 would undertake to pay the frozen funds into trust with its counsel and such funds would not be dealt with without further agreement between Applicant 1 and the executive director or an order by the Commission, and
 - (c) such further and other relief the Commission considers proper or not to be prejudicial to the public interest.
- [2] On April 24, 2020, [REDACTED] (Applicant 2) applied to the Commission, under section 171 of the *Securities Act*, RSBC 1996, c. 418 for orders:
- (a) to revoke in whole or in part, Commission freeze order [REDACTED] issued with respect to the Canadian and US bank accounts of Applicant 2 at a certain bank, on the basis that to do so would not be prejudicial to the public interest, or
 - (b) in the alternative, to revoke or vary that freeze order on the basis that Applicant 2 would undertake to pay the frozen funds to the Canadian Revenue Agency (CRA) for unpaid taxes, and
 - (c) such further and other relief the Commission considers proper or not to be prejudicial to the public interest.
- [3] On April 24, 2020, [REDACTED] (Applicant 3) applied to the Commission, under sections 151(6) and 171 of the *Securities Act*, RSBC 1996, c. 418 for orders:
- (a) to revoke in whole or in part, Commission freeze orders [REDACTED] issued with respect to Applicant 3's accounts at three brokerage firms, and two additional freeze orders issued with respect to Applicant 3's accounts at [REDACTED] (collectively, the Brokerage Freeze Orders), on the basis that to do so would not be prejudicial to the public interest, or
 - (b) in the alternative, to revoke or vary the Brokerage Freeze Orders on the basis that

Applicant 3 would undertake to transfer the frozen assets from all the brokerage accounts that have been frozen into one brokerage account at [REDACTED] which will remain frozen, and

(c) to revoke in whole or in part, a freeze order issued with respect to a property in [REDACTED], B.C. that is partially owned by Applicant 3, on the basis that to do so would not be prejudicial to the public interest, and

(d) such further and other relief the Commission considers proper or not to be prejudicial to the public interest.

[4] In these reasons, we refer to the applicants collectively as “the Applicants”, and all the freeze orders collectively as “the Freeze Orders”. We refer to the three applications collectively as “the Applications”.

[5] The executive director opposed all the Applications and asked that they be dismissed in their entirety.

[6] The Applications were heard entirely in writing. The Applicants made written submissions and filed or relied on up to seven affidavits.

[7] The executive director made written submissions and relied on five affidavits of a staff investigator.

[8] The hearing of the Applications was bifurcated. One of the legal arguments advanced by the Applicants for revoking the Freeze Orders in their entirety is that it is not prejudicial to the public interest to revoke freeze orders issued in relation to allegations that do not involve a contravention of the Act (the Common Issue). The Common Issue was also advanced by other respondents in these proceedings in separate applications to revoke freeze orders issued against those respondents. The Applicants participated in a joint hearing (in writing) with those other respondents with respect to the Common Issue. On July 10, 2020, we dismissed the Applications on the basis of the legal arguments posed by the Common Issue, for the reasons set out in 2020 BCSECCOM 254 (the Common Issue Decision).

[9] These are our rulings and reasons on the remainder of the Applications, i.e. on grounds other than the Common Issue.

II. In camera application

[10] The Applicants applied to have the Applications dealt with *in camera*. The executive director supported the *in camera* application and also applied to limit distribution of the materials filed in the Applications to the Applicants, the executive director and the Commission Hearing Office.

[11] The other respondents in the proceedings were given notice of the Applications, as well

as notice of the procedural applications referred to in paragraph 10 and the positions of the Applicants and executive director respecting the procedural applications. No application has been made to date by the other respondents to participate in the Applications or to seek access to the Application materials.

- [12] The submissions and materials filed by the Applicants and the executive director for the purpose of the Applications mostly consisted of personal or sensitive financial information relating to the Applicants or other persons, and focused on the factual issues specific to the Applicants raised in the Applications and the Freeze Orders. Any distribution of that material beyond the Applicants, the executive director and the hearing panel, likely would have necessitated redaction of much of the documents.
- [13] With that in mind, and given that any orders we may grant to revoke or vary the Freeze Orders are specific to the Applicants and that freeze order proceedings are not typically public in the same way that temporary order proceedings are typically public processes, we order that the Applications proceed *in camera*.
- [14] The result of our order is that the Applicants and the executive director were not required to circulate their application materials beyond themselves and the Commission Hearing Office, for the purpose of these section 171 applications, and the redaction of the Applicants' names and other information that might identify them in these reasons. To be clear, our order does not preclude the same materials eventually being disclosed to all parties in these proceedings where appropriate.

III. Background

- [15] On September 14, 2018, as amended on January 4, 2019, Commission staff obtained an investigation order, under section 142 of the Act, against a large number of subjects named in the order including the Applicants.
- [16] On November 26, 2018, the executive director issued temporary orders and a notice of hearing (2018 BCSECCOM 369) against 62 respondents including the Applicants.
- [17] Applicant 3 is [REDACTED].
- [18] In the notice of hearing (NOH), the executive director alleged that the non-issuer respondents named in the NOH (including the Applicants) had engaged in conduct that is abusive to the capital markets, and that the issuer respondents named in the NOH illegally distributed securities in violation of section 61 of the Act. There is no allegation that the Applicants or any other non-issuer respondent breached any specific provision of the Act.
- [19] The temporary orders have since been varied and extended by the Commission on multiple occasions. [REDACTED]

██████████.

[20] The Commission also found there was no *prima facie* evidence that Applicants 1 and 2 engaged in conduct that raises significant public interest concerns, and the temporary orders against them lapsed in January 2019. With respect to Applicant 2 specifically, the Commission found there was no evidence that Applicant 2 had participated in any of the private placements or cash swaps with the issuer respondents or sold shares of the issuer respondents at a discount. However, there was evidence that Applicant 2 either (or both) entered into a consulting agreement with one or more of the issuer respondents or received a cash payment from one or more of the issuer respondents. See: *Re BridgeMark Financial*, 2019 BCSECCOM 14 (at para. 39).

Freeze orders and LTO charges

[21] Between September 2018 and February 2019, the executive director applied for and the Commission issued a large number of freeze orders with respect to bank accounts and brokerage accounts of various respondents including the Applicants. The Commission also registered charges in the Land Title Office against properties of various respondents including one of the Applicants.

[22] As at December 11, 2019, the Commission had released more than 50% of these frozen assets. None of the frozen assets of the Applicants were released.

[23] With respect to the Applicants, the Commission issued the freeze orders listed in paragraphs 1-3 above with respect to multiple brokerage accounts and bank accounts of the Applicants, and registered a charge in the Land Title Office against a property partially owned by Applicant 3.

[24] According to affidavit evidence filed by the Applicants, the bank account frozen by ██████████ ██████████ is the only bank account of Applicant 1. Further, as a result of the Freeze Orders, Applicant 1 is unable to conduct any transactions in its only bank account and Applicant 3 is unable to buy and sell securities in the normal course.

[25] In affidavits filed by the Applicants, Applicant 3 deposed that Applicant 2 is technically insolvent at this time, that it is overdue on previous tax filings to CRA and the amount it owes for income tax exceeds the amount of funds in the frozen bank accounts of Applicant 2. No specific amount was provided. No documentary evidence was provided. Applicant 3 further deposed that the lack of documentation was because “taxes [*sic*] have not been filed yet”.

[26] Prior to the Applications, the Applicants had applied to the executive director for revocations or variations to the Freeze Orders to allow the following:

- (a) Applicant 1 would pay the frozen funds into trust with its counsel and the funds would not be dealt with without further agreement with the executive director or an order from the Commission, and the freeze order on Applicant 1’s bank

account would be revoked.

- (b) Applicant 2 would pay a portion of the frozen funds into trust with its legal counsel and that portion would not be dealt with without further agreement with the executive director or an order from the Commission, and the freeze order on Applicant 2's bank accounts would be revoked.
- (c) Applicant 3 would transfer all assets in the frozen brokerage accounts into one brokerage account such that the assets would remain frozen in that one account while allowing Applicant 3 to trade securities in the remaining accounts.

[27] The executive director declined all of the requests.

IV. The law

Section 151 of the Act

[28] All of the Freeze Orders were issued under section 151 of the Act, which was recently repealed.

[29] At the time the Freeze Orders were issued, section 151 of the Act stated, in part,

(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,
- (b) it or the executive director proposes to make or has made an order under section 161 in respect of a person,
- (c) criminal proceedings or proceedings in respect of a contravention of this Act or the regulations are about to be or have been instituted against a person and the commission considers the proceedings to be connected with or to arise out of a security or exchange contract or a matter relating to trading in securities or exchange contracts, or out of any business conducted by the person,
- (d) a person fails or neglects to comply with financial conditions applicable to the person under this Act, or
- (e) it proposes to apply or has applied to the Supreme Court for an order under section 157, or the Supreme Court has made an order under section 157.

(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 ... that proceedings are being or are about to be taken that may affect land ... belonging to the affected person.

(6) The commission may, in writing, revoke or modify a notice given under subsection (5) and, if a notice is revoked or modified, the commission must send a copy of the written revocation or modification to the land title office ...

(7) A notice sent under subsection (5) or a copy of a written revocation or modification under subsection (6) must be registered or recorded against the lands ... mentioned in it and has the same effect as the registration or recording of a certificate of pending litigation or a caveat.

[30] Significant amendments to the Act came into force on March 27, 2020. Section 151 of the Act was repealed on that date and the Commission's freeze order powers under that section were replaced by new and broader preservation order powers under sections 164.04 to 164.08 of the Act.

[31] The parties made their submissions after the 2020 Act amendments came into force. None of them referenced these amendments in those submissions.

Section 171 of the Act

[32] Section 171 of the Act sets out that the Commission may revoke or vary, in whole or in part, a decision that the Commission has made when it considers that to do so would not be prejudicial to the public interest.

[33] Commission Policy 15-601 Hearings and Commission decisions on section 171 applications make clear that an applicant under section 171 must establish that they have new and compelling evidence, or that there has been a significant change in circumstances since the decision, or that for some other reason it would not be prejudicial to the public interest for the Commission to revoke or vary a previous decision. See: *Re Oei*, 2019 BCSECCOM 255.

Case law

[34] The purpose and application of the Commission's freeze order power under the Act was considered extensively by the Commission in *Amswiss Scientific Inc.* [1992], COR

#92/026. After finding that the purpose of the Act is to “regulate trading in securities and protect the public interest”, the Commission went on to review the purpose of the freeze order provision in the Act then in place (section 135), which was in all material respects the same as section 151 under which the Freeze Orders were issued, and concluded as follows (at pp. 21-22):

In our view, the purpose of section 135(1) is to preserve property for persons who may have common law or statutory claims to or interest in it, for example by way of rescission or damages under Part 14 of the Act.

The discretion accorded to the Commission to invoke this power to freeze is limited by the purpose of the Act, and specifically by the conditions outlined in section 135(1)(a) to (e). Although there is no specific reference to the public interest in section 135, in our view, the Commission may only exercise the powers under this section where it considers that there is some connection to trading in securities and that an order is in the public interest.

...

The immediate effect of a freeze order is to maintain the status quo, ensuring that the frozen property is not dissipated or destroyed before the Commission is in a position to determine what, if any, further steps or orders in the public interest should be made under the Act.

...

Like a section 144(2) temporary cease trade order or a section 73 halt order, a freeze order enables the Commission to respond immediately to information that, in its opinion, warrants regulatory intervention to prevent or minimize prejudice to the public interest. Often, it is necessary to take these steps before any investigation is commenced or concluded. The ability of the Commission to act in this fashion is necessary to instil and maintain public confidence in the integrity of the capital markets.

[35] The Commission went on to say, at pp. 34-35:

Considering the paramountcy of the public interest in securities regulation, we conclude on balance that the legitimate expectations of the public [i.e. for the Commission to have and use its discretionary powers to protect the public interest] are more compelling than any expectation of undisturbed possession of property which the Respondents may have had.

[36] The Commission’s view of the purpose of the freeze order provision as stated in *Amswiss* was quoted with approval by the British Columbia Court of Appeal in *Exchange Bank & Trust*, 2000 BCCA 389.

[37] That court also quoted with approval the following passage from the underlying decision of the Commission regarding the evidence in support of freeze orders (at para. 12):

One of the grounds for making an order under section 151 appears to require nothing more than the existence of an investigation order, or the intention to issue one. However, a freeze order generally has far more serious and immediate consequences than an investigation order. Property of the alleged wrongdoers is immediately affected and the property of innocent third parties can be captured in the freeze. The Commission must therefore consider the seriousness of the allegations and the evidence supporting them so it can weigh the threat to the public interest against the potential consequences of the order.

That said, freeze orders are often made at a very early stage of an investigation. They are not determinative of the facts in issue; they are made to preserve property until the facts can be established, either through investigation or through a hearing before the Commission.

[38] The evidentiary burden the executive director must overcome in supporting a recommendation that a freeze order be issued in the first instance is not a high hurdle. See: *Re Application to revoke certain orders No. 2*, 2019 BCSECCOM 416 (at para. 45).

Position of the Applicants

[39] First, the Applicants submitted that there have been significant changes in circumstances since the issuance of the Freeze Orders:

- 1) The investigation is no longer in its early stages. After more than 17 months since the issuance of the investigation order, it is reasonable to conclude from the fact that the executive director has not amended the NOH to include allegations of specific breaches of the Act by the Applicants, that the executive director continues to investigate the Applicants in relation to “conduct that is abusive to the capital markets.”
- 2) The Commission has released more than half of the assets initially frozen. It is difficult to reconcile that during an ongoing investigation except and unless the nature of the allegations no longer requires the preservation of property for the purposes of issuing monetary sanctions against the respondents, or other recovery under common law or statutory claims.

[40] Second, the purpose of a freeze order under section 151 is to preserve assets for persons who may have common law or statutory claims to or interests in it under the Act. The purpose is not to prevent a respondent from conducting business in a bank account or participating in the capital markets, nor to act as a cease trade order. Applicants 1 and 3 submitted that such is the effect of the Freeze Orders on them because it is highly unlikely they could open new bank accounts or brokerage accounts given the extensive media coverage of the allegations against them in these proceedings.

[41] In support of those assertions, the Applicants tendered affidavit evidence that two specific banks had indicated they do not want Applicant 3 as a customer and a number of unnamed local brokerage firms had told him it would not be possible to open new

accounts given the media coverage surrounding these proceedings.

- [42] Third, with respect to the freeze order issued against Applicant 2's bank accounts, Applicant 2 submitted that it was improperly issued in the absence of any evidence that Applicant 2 participated in any private placement or cash swap with any issuer, sold shares of any issuer at a discount, or acted contrary to the public interest. In considering the present section 171 application by Applicant 2, the Commission should consider the allegations and the evidence supporting those allegations so it can weigh the threat to the public interest against the potential consequences of the freeze order; the absence of any such evidence is a significant factor supporting the present application. Additionally, Applicant 2 argued that it should not be prevented from meeting its obligations as they become due.

Position of the executive director

- [43] The executive director submitted extensive evidence to support his contention that Applicant 3 was ██████████ in the "cash swap" transactions that we had found to *prima facie* raise significant public concerns. The executive director alleged and submitted evidence that the Applicants (and other respondents related to Applicant 3) received significant prepaid consulting fees from issuers, and that Applicants 1 and 2 were vehicles that Applicant 3 used in the scheme with no meaningful difference among them for the purpose of the scheme. The executive director asserted that it would be prejudicial to the public interest to revoke or vary the Freeze Orders in any way.
- [44] With respect to Applicant 2 specifically, the executive director submitted that Applicant 2 did not provide any evidence as to the specifics of its tax obligations, nor any evidence as to why these obligations are due now.
- [45] With respect to the fact that the Commission had released some of the frozen assets of other respondents, the executive director argued that is irrelevant as we have to consider if it would be prejudicial to the public interest to revoke or vary the Freeze Orders with respect to the Applicants.

V. Analysis

- [46] The applicable test in a section 171 application is whether it would be prejudicial to the public interest to revoke or vary the Freeze Orders.
- [47] The Applicants bear the burden of proof.

Purpose of section 151

- [48] Our analysis of the law and our view of the purpose of section 151 are set out in the Common Issue Decision. We remain of the same view.
- [49] Similarly, we remain of the view that while the discretion in section 151 is necessarily broad and flexible, the power should only be exercised in keeping with its purpose, consistent with a contextual and purposive approach to find meaning that is harmonious

with the objectives of the Act.

[50] In this analysis, we have considered the purpose of section 151 (even though it has been repealed) because the Freeze Orders were issued under that section.

[51] As stated in *Amswiss*, the purpose of a freeze order under section 151 is to preserve property for persons who may have common law or statutory claims to or interests in it under the Act. In assessing whether it would be prejudicial to the public interest to revoke or vary a freeze order issued under that section, we need to keep that purpose in mind.

Applicants' requests to revoke the Freeze Orders in their entirety

[52] With respect to the arguments described in paragraph 39 above, we had considered and dismissed similar arguments in the Common Issue Decision, and we reach the same conclusions here. For the reasons stated in the Common Issue Decision, which we adopt:

- 1) It is not reasonable to conclude that the absence of allegations of specific breaches of the Act at this time must mean that the executive director is continuing to investigate the Applicants only in relation to conduct contrary to the public interest.
- 2) The fact that the Commission has revoked or varied freeze orders with respect to other respondents is not relevant to our deliberations in these Applications. Our task is to assess whether it is prejudicial to the public interest to revoke or vary freeze orders with respect to each specific Applicant here based on the evidence before us pertaining to that Applicant. That is what we have done.

[53] Applicant 2 also submitted that the freeze order with respect to it should be revoked on the basis that it was issued without factual foundation.

[54] Aside from these arguments, the Applicants did not provide any evidence of significant changes in circumstances, nor any new and compelling evidence, nor other evidence, that it would not be contrary to the public interest to revoke the Freeze Orders in their entirety.

[55] Accordingly, aside from Applicant 2's revocation request on the basis of the lack of factual foundation, which we will address below in a later section, we dismiss the Applications to revoke the Freeze Orders in their entirety.

Applicant 3's request to vary the Brokerage Freeze Orders

[56] The purpose of a freeze order is to maintain the status quo to ensure that frozen assets are not dissipated or destroyed. Provided that the assets currently frozen by the Brokerage Freeze Orders remain preserved on the same terms and conditions and for the same purpose, we do not find any meaningful distinction (nor any erosion of the status quo) between whether those assets are held in their current frozen accounts, or moved to another account that is subject to an equivalent freeze order. Put another way, the

purpose of the Brokerage Freeze Orders is met by preserving the assets in the accounts, and not by preserving the accounts where the assets currently reside.

- [57] We agree with the Applicants that the purpose of a freeze order is not to prevent a respondent from otherwise conducting business or participating in the capital markets pending the holding of a hearing into the substantive allegations. If the executive director considers it necessary and in the public interest to limit a respondent's ability in that regard prior to the substantive hearing, the executive director may make (and apply to extend) temporary orders against the respondent under section 161(3) of the Act. Indeed, in these proceedings, the executive director has done so.
- [58] We are persuaded by the Applicants' evidence that it likely would be difficult for Applicants 1 and 3 to open new bank or brokerage accounts in British Columbia at this time. If so, a freeze order on all of the existing accounts of an Applicant likely would constrain the Applicant's ability to conduct business or participate in the capital market beyond the scope of the temporary orders (if any) issued against it.
- [59] For the reasons stated, we find there is no prejudice to the public interest in moving all of the currently frozen assets in the brokerage accounts covered by the Brokerage Freeze Orders into one single brokerage account that is subject to an equivalent freeze order so that the frozen assets remain frozen on the same terms and conditions and for the same purpose, and revoking the Brokerage Freeze Orders on the remaining brokerage accounts once the asset transfers are completed.
- [60] We note that the executive director is free to apply for new orders at any time to preserve additional assets that are deposited into the "unfrozen" accounts in the future.
- [61] Accordingly, we grant the variation order sought by Applicant 3. We direct Applicant 3 to submit to the Commission Hearing Office and the executive director a draft order for that purpose, and encourage the parties to agree on the wording of the draft order prior to filing it with the Commission Hearing Office. If they are unable to agree, we direct Applicant 3 to so advise the Commission Hearing Office, and the panel will provide further direction to the parties about making submissions.

Applicant 1's request to vary freeze order

- [62] Similarly, we do not see any meaningful distinction (or erosion of the status quo) between maintaining the frozen funds in Applicant 1's bank account, or transferring those funds to a trust account held by its legal counsel, provided the trust account is subject to an equivalent freeze order to ensure the funds remain preserved on the same terms and conditions and for the same purpose as the existing freeze order. Put another way, the status quo is maintained whether the frozen funds are held in a bank account of Applicant 1 that is subject to a freeze order, or in a trust account of Applicant 1's legal counsel that is subject to an equivalent freeze order.
- [63] Applicant 1 had requested that the existing freeze order be replaced by an undertaking

from Applicant 1's legal counsel to the effect that the counsel will hold the frozen funds in trust and not deal with them except with the agreement of the executive director. We find this proposed variation to the freeze order inappropriate, as it is the Commission, and not the executive director, that has the authority to issue, vary or revoke a freeze order.

- [64] We find there is no prejudice to the public interest in varying the existing freeze order to permit Applicant 1 to transfer all the funds in its frozen bank account into a specific trust account of Applicant 1's legal counsel in these proceedings that is subject to an equivalent freeze order relating to the funds at issue, and revoking the existing freeze order once that transfer has taken place.
- [65] Accordingly, we are prepared to grant such orders. Should Applicant 1 wish to proceed on that basis, we direct it to advise the Commission Hearing Office and the executive director, and to submit to the Commission Hearing Office and the executive director draft orders for that purpose. We encourage the parties to agree on the wording of the draft orders prior to filing them with the Commission Hearing Office. In the event that the parties cannot agree to the draft orders, we direct Applicant 1 to so advise the Commission Hearing Office, and the panel will provide further direction to the parties about making submissions.
- Applicant 2's request to revoke or vary freeze order***
- [66] With respect to Applicant 2's argument that the lack of evidence against it is a significant factor supporting its application, the fact that there was insufficient evidence to extend a temporary order against Applicant 2 is not determinative.
- [67] Temporary orders and freeze orders serve different purposes. It does not follow that because it is not necessary or in the public interest to extend a temporary order under section 161(3), it would not be prejudicial to the public interest to issue or revoke a freeze order issued under section 151. See: *Re Zhu* 2012 BCSECCOM 377 (para. 71) and *Zhu v. BC (Securities Commission)* 2013 BCCA 248 (para. 59).
- [68] The test for the extension of a temporary order is different from, and has a higher threshold than, the test for the issuance of a freeze order.
- [69] The extension of a temporary order requires *prima facie* evidence of conduct (by those involved in it) that raises significant public interest concerns. See: *Re BridgeMark Financial*, 2019 BCSECCOM 14 (para. 27).
- [70] On the other hand, section 151 clearly states that an order under section 151 may be made under subsection (1)(a) if the Commission "proposes to order an investigation ..., or during or after an investigation". As noted in *Amswiss*, the requirement to issue an order under section 151 is that there is some connection to trading in securities and that the order is in the public interest.
- [71] The allegation against Applicant 2 is that it participated in or facilitated the alleged "cash

swaps” by purporting to be a consultant when it was not, and by accepting consulting fees from an issuer respondent financed by distribution proceeds when no or little consulting services had been or were intended to be performed. There is no question that this allegation (and Applicant 2’s alleged conduct, if proven) has connection to trading in securities.

- [72] There is *prima facie* evidence that Applicant 2 entered into a similar consulting agreement at approximately the same time as the alleged cash swap transactions, with an issuer that we had found to have *prima facie* participated in those transactions. There is *prima facie* evidence that Applicant 2 was paid consulting fees by that issuer. There is also *prima facie* evidence that Applicants 1 and 2, and other respondents who are related to Applicant 3, entered into similar consulting agreements with and received significant fees from issuer respondents.
- [73] Although the Commission did not find *prima facie* evidence that Applicant 2 itself engaged in the conduct that raises significant public interest concerns, there is *prima facie* evidence that links Applicant 2 to the conduct that raises significant public interest concerns. As we stated in the Common Issue Decision, the investigations remain ongoing and the facts have not been established. As the investigation progresses, the executive director could amend the NOH to include further allegations and evidence of misconduct by Applicant 2.
- [74] Having weighed the very serious allegations against Applicant 2, the evidence supporting it, the purpose, nature and consequences of a freeze order, and the low threshold for the issuance of a freeze order, we are satisfied that there is sufficient evidence to warrant the freeze order on Applicant 2’s assets. We are satisfied that the freeze order on Applicant 2’s bank accounts is in the public interest.
- [75] In arguing that Applicant 2 should not be prevented from meeting its obligations when they become due, Applicant 2 relied on a decision of the BC Court of Appeal in *Silver Standard Resources Inc. v. Joint Stock Co.*, 1998 CanLII 6468.
- [76] That decision is distinguishable. In *Silver Standard*, the BC Court of Appeal considered when it is appropriate for a court to issue a “Mareva” injunction in a commercial dispute. The purpose and basis for granting a Mareva injunction is significantly different from the purpose and basis for issuing a freeze order under the Act.
- [77] A Mareva injunction is an equitable remedy intended to prevent a defendant from dissipating assets prior to the conclusion of a trial or action. The fundamental question in the consideration of a Mareva injunction is whether it is just and equitable in all the circumstances of the case. In *Silver Standard*, the Court approved a flexible approach that takes into account factors including the relative strengths of the parties’ cases, evidence of irreparable harm, potential effects on third parties, and factors affecting the public interest. Of note, the Court went on to say (at para 21):

... It is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgement he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgement if the injunction is not granted.

- [78] In contrast, as stated in paragraphs 34-35 above, the public interest protection mandate underpinning the Act prioritizes the preservation of assets of a potential wrongdoer by way of a freeze order, over a disruption to the rights of the property owner. There is no such mandate in adjudicating commercial disputes, which in most cases leads to a different weighing of the competing considerations as articulated in *Silver Standard*. *Silver Standard* is not applicable here.
- [79] Applicant 2's request to pay all of the frozen funds in its bank account to CRA would render the funds unavailable to other persons who are later found to have any claims or interests in those funds under the Act. That could prejudice those persons in light of Applicant 2's claim of technical insolvency.
- [80] It is well recognized that assets subject to a freeze order are not confiscated or seized but rather are preserved in the public interest pending the outcome of the executive director's investigation or subsequent revocation or variance. See: *Re application to revoke certain orders*, 2019 BCSECCOM 454 (para 29). Applicant 2 has provided no evidence of the prejudice to Applicant 2 or CRA if the freeze order remains in place.
- [81] Although Applicant 2 claimed to be "technically insolvent", we have no evidence as to what that means, whether that refers to a cash flow issue and whether Applicant 2 has other assets that could be used to pay any overdue taxes. Applicant 2 has provided no evidence of its financial circumstances, and minimal evidence of the specifics of its income tax obligations, when they come due, and the consequences if they are not paid at this time.
- [82] We have found that the freeze order is in the public interest. We also find there is insufficient evidence that varying the freeze order to allow Applicant 2 to pay the frozen funds to CRA would not be prejudicial to the public interest.
- [83] Accordingly, we dismiss Applicant 2's application to revoke or vary the Freeze Order with respect to its assets.

VI. Conclusions and rulings

- [84] We have granted the Applicant's *in camera* application.
- [85] We have dismissed the Applications to revoke the Freeze Orders in their entirety.
- [86] We are prepared to grant the application by Applicant 1 to vary the Freeze Order with respect to its assets, in the manner indicated in paragraph 65 above.

[87] We have granted the application by Applicant 3 to vary the Brokerage Freeze Orders.

[88] We have dismissed Applicant 2's application to revoke or vary the Freeze Order with respect to its assets.

August 26, 2020

For the Commission

Audrey T. Ho
Commissioner

Judith Downes
Commissioner