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

Citation: Re Application 20230310, 2024 BCSECCOM 380 Date: 20240903

Re Application 20230310

Panel	Deborah Armour, KC	Commissioner
	James Kershaw	Commissioner
	Jason Milne	Commissioner
Submissions completed	July 19, 2024	
Decision date	September 3, 2024	

Parties

Aneka Jiwaji	For the Executive Director
Joven Narwal, KC	For the Applicant

Ruling and Reasons for Ruling

I. Introduction

[1] This panel was to hear, on September 3, 2024, an application by the Applicant pursuant to section 171 of the *Securities Act,* RSBC 1996, c. 418 (Act) to revoke certain Commission orders. On August 27, 2024, the respondent requested that the section 171 matter be heard in writing. Counsel for the executive director consented to this request. On August 29, 2024, the panel granted the respondent's request and will hear the section 171 application in writing.

[2] Prior to a decision in that application, the Applicant, pursuant to section 171 of the Act, seeks to vary our ruling of June 7, 2024 (Previous Decision) and seeks various anonymization orders and to restrict public access to the file.

[3] This is our ruling on the Applicant's application to vary the Previous Decision and to restrict public access.

II. Background

[4] On March 10, 2023, the Applicant filed an application to vary three preservation orders (Preservation Orders) issued by the Commission on February 17, 2023 (Preservation Order Application).

[5] On March 31, 2023, the executive director filed materials opposing the Preservation Order Application.

[6] On April 12, 2024:

a) The Applicant and its directors filed an application seeking orders that the Preservation Order Application be held *in camera*, that its style of cause and

the names of the applicants be anonymized, and that the hearing materials be sealed (First Anonymization Application), and

b) The Applicant filed written submissions in the Preservation Order Application seeking revocation of the Preservation Orders.

[7] On May 2, 2024, the executive director filed submissions responding to the First Anonymization Application and replying to the Applicant's submissions on the Preservation Order Application.

[8] On May 10, 2024, the Applicant filed submissions replying to the executive director's May 2, 2024 materials on the First Anonymization Application.

[9] The Applicant did not file any affidavits or seek to have any evidence entered in support of the First Anonymization Application.

[10] On June 7, 2024, this panel issued the Previous Decision. We found that the Applicant had failed to meet its onus to establish that a party or witness would be unduly prejudiced if the orders sought were not granted. We noted in the Previous Decision that it was possible that the Applicant, by filing the appropriate affidavit material, would be able to meet its onus.

[11] The panel delayed publication of the Previous Decision to allow the Applicant time to take any steps it saw fit in light of that decision.

[12] On June 28, 2024, the Applicant filed a new application seeking a section 171 ruling varying the Previous Decision (New Application). In support of the New Application, the Applicant filed an affidavit of a director of the Applicant (Affiant).

[13] On July 11, 2024, the executive director filed submissions opposing the Applicant's New Application. The executive director did not file affidavit material with those submissions.

[14] On July 19, 2024, the Applicant filed a Reply to the executive director's submissions. Later that day, the Applicant filed an amended Reply. We refer only to the amended version of The Applicant's Reply.

III. Applicable law

A. Application to Vary the Previous Decision

[15] Section 171 of the *Securities Regulation,* B.C. Reg. 196/97 states:

> **Discretion to revoke or vary decision**
>
> **171** If the commission, the executive director or a designated organization considers that to do so would not be prejudicial to the public interest, the commission, executive director or designated organization, as the case may be, may make an order revoking in whole or in part or varying a decision the commission, the executive director or the designated organization, as the case may be, has made under this Act, another enactment or a former enactment, whether or not the decision has been filed under section 163.

[16] BC Policy 15-601 - Hearings, section 1.2 provides:

> **1.2 General Principles**
> The Commission holds administrative hearings, which are less formal than the courts. **The Commission's goal is to conduct its proceedings fairly, flexibly and efficiently.** The procedures set out in this Policy are in furtherance of this goal and the provisions of this policy are to be interpreted in light of this goal. **Where the circumstances require a variation of the procedures set out in this policy in order to achieve this goal, the Commission may do so.**

[17] BC Policy 15-601 - Hearings, section 2.1 provides:

> **2.1 Procedures** – The Act and Regulation prescribe very few procedures the Commission must follow in hearings. Consequently, the Commission is the master of its own procedures, and can do what is required to ensure a proceeding is fair, flexible and efficient. In deciding procedural matters, the Commission considers the rules of natural justice set by the courts and the public interest in having matters heard fully and fairly, and decided promptly.

[18] BC Policy 15-601 - Hearings, section 9.10 provides in part:

> **9.10 Post Hearing Applications - applications to vary and appeals of decisions**
> ***(a) Discretion to revoke or vary*** – Under section 171 of the Act, the Commission may revoke or vary a decision it has made, or that was made by a single commissioner. A party that is subject to a decision may apply to the Commission for an order revoking or varying the decision. Generally, the Commission conducts these hearings in writing; it considers written submissions and makes its decision.
>
> 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.** If the Commission is considering a decision made by a single commissioner, the Commission may consider other factors. [emphasis added]
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> …
>
> Reference: Party A v. British Columbia (Securities Commission), 2021 BCCA 358

B. Application for Anonymization

[19] Section 19 of the *Securities Regulation,* B.C. Reg. 196/97 states:

> **When hearing public**
> 19 (1) Subject to subsection (2), every hearing is open to the public.
>
> (2) If the person presiding considers that a public hearing would be unduly prejudicial to a party or a witness and that to do so would not be prejudicial to the public interest, the person presiding may order that the public be excluded for all or part of the hearing.

[20] BC Policy 15-601 - *Hearings,* section 8.4(a) provides:

> 8.4 Public attendance
> ***(a) Hearings are public*** – A hearing must be open to the public, unless the Commission considers that:
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> • a public hearing would be unduly prejudicial to a party or a witness and
> • it would not be prejudicial to the public interest to order that the public be excluded for all or part of the hearing

IV. Positions of the Parties

A. The Applicant

[21] The Affiant deposes that if this matter is made public:

- it would cause significant prejudice to the Applicant, to its investors and to the Affiant;
- the Applicant has already been negatively impacted by the Preservation Orders, as it was unable to make payroll and consequently had to let staff go;
- it could cause further harm to investors and negatively impact the Applicant's reputation by promoting speculation about unproven allegations of wrongdoings;
- it would cause serious and irreparable harm to the Affiant's reputation as a director of the Applicant;
- the public would be able to see that there is an investigation into the Applicant and this would unfairly invite speculation about unproven allegations and jeopardize the Affiant's business relationships;
- the thought of the application being public causes the Affiant extreme stress and anxiety as the Affiant would not be able to properly address the allegations or defend their reputation while the investigation is ongoing;
- it would jeopardize the ongoing investigation and unfairly cause irreparable reputational harm; and
- it would violate the Affiant's privacy interests and those of the Applicant.

[22] The Applicant submits that the harm that would be caused by the matter being made public is real, measurable and justifies anonymization.

[23] The Applicant accepts the presumption of an open hearing but submits that the principles underlying that concept need to be contextualized when applied to the investigative stage of a matter. The Applicant refers to criminal and law society matters where anonymization has been granted at the investigative stage.

[24] The Applicant points out that the fact that no Notice of Hearing has been issued is highly problematic as it prevents the Applicant from defending itself.

[25] The Applicant cites *Party A v. British Columbia (Securities Commission),* 2020 BCCA 88 where the Court recognized that the mere fact of disclosing the existence of the investigation would invite speculation, harm reputations and potentially impact capital markets based on incomplete information.

[26] In its Reply, the Applicant refers to section 148 of the Act which provides that the Commission may make an order, to protect the integrity of an investigation prohibiting the disclosure of certain information. The Applicant refers to similar provisions in Alberta

and Ontario. The Applicant also refers to an Ontario Securities Commission staff notice that indicates that, in most situations, there will be no disclosure by OSC staff of investigative information.

[27] The Applicant says that the only interpretation of the Previous Decision is that it afforded the Applicant an opportunity to produce fresh evidence. We will address that submission at this point in this decision to merely state that that interpretation is not accurate. For example, it also afforded the Applicant the opportunity to consider an appeal of the Previous Decision.

B. The Executive Director

[28] The executive director opposes the New Application.

[29] The executive director cites *Re Deyrmenjian*, 2019 BCSECCOM 93 at paragraph 28 where the Commission said that evidence in support of a section 171 application to vary a previous decision must be new and compelling. It must be new in the sense that it was not reasonably available for use by the applicant at the time of the original hearing and it will be compelling if it is evidence which, if provided at the hearing, would have resulted in a different outcome.

[30] The executive director acknowledges that *Deyrmenjian* concluded that the requirement that the evidence be compelling was more important than that it be new.

[31] The executive director submits that the evidence in the New Application is neither new or compelling. It is not new as it was available to the applicant at the time that the Applicant brought the First Application. The executive director asserts that the evidence is not compelling as it is nothing more than bald assertions. There is nothing in terms of evidence of actual prejudice that would result from an open hearing.

[32] As for the Applicant's efforts for anonymization, the executive director notes that court proceedings are presumptively open. He cites the Supreme Court of Canada case of *Sherman Estate v. Donovan*, 2021 SCC 25 which says, at paragraph 38, that the person seeking to restrict access to the proceedings bears the onus to establish that open proceedings would pose a serious risk to an important public interest, that the order sought is necessary to prevent that risk and that the benefits of the order outweigh its negative effects. The Supreme Court of Canada said that the open court principle would only be overridden in exceptional circumstances.

[33] The executive director points out that the Affiant has not explained how speculation about wrongdoing could harm investors or the Applicant given that the Applicant is not a public company and its share price is not impacted by the sentiment of the market. He also asserts that the Applicant paused all fundraising when it halted redemptions and distributions and refers to an affidavit of the investigator in this regard.

[34] As for the evidence of the Affiant that having this matter made public could promote speculation about unproven allegations of wrongdoing, the executive director responds that the risk of speculation arises whenever allegations are made public.

[35] The executive director also submits that the Affiant is not in a position to opine on what would or would not compromise the investigation. He points out that if staff were concerned about this matter being made public, that evidence would be before the panel.

[36] In response to the Affiant's concern about potential prejudice to the Affiant's reputation with this matter being made public, the executive director says that the Affiant does not need to be named in the New Application decision.

[37] In response to the Affiant's concern about harm to the Affiant's and the Applicant's privacy interests, the executive director points to well-established law that the reasonable expectation of privacy in the securities context is low.

V. Analysis

[38] As we stated in the Previous Decision, hearings before the Commission are presumptively open to the public. As outlined in *Securities Regulation,* section 19, in order to grant the order sought by the Applicant, we must find that:

a) this matter being made public would be prejudicial to the Applicant or a witness; and
b) it would not be prejudicial to the public interest to order that this matter be anonymized.

[39] That is not the only hurdle that the Applicant must overcome. In order to succeed on this application, pursuant to section 171, the Applicant must show that it would not be prejudicial to the public interest to vary or revoke the Previous Decision.

[40] We note in this regard the non-permissive language in BC Policy 15-601, section 9.10:

> Before the Commission changes a decision, it **must** consider that it would not be prejudicial to the public interest to do so.

[41] To summarize and apply the two tests to this case, we must find that it would be prejudicial to the Applicant or the Affiant if this matter were to be public. We must also find that it would not be prejudicial to the public interest to revoke the Previous Decision and to have this matter anonymized.

[42] The language used in the following portion of section 9.10 of BC Policy 15-601 is permissive:

> 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…

[43] We are not able to say whether the evidence of the Affiant is new in the sense that it was unavailable to the Applicant at the time of the First Anonymization Application. It may have been. There is simply no evidence one way or the other. However, we agree with the panel in *Deyrmenjian.* It is more important that the evidence is compelling than that it is new.

[44] In addition, BC Policy 15-601, section 1.2 provides us with considerable flexibility in applying the procedures in the policy. As section 2.1 of that policy makes clear, we are masters of our own procedure. In applying those sections, we are focusing on the "compelling" aspect of the test in *Deyrmenjian.*

[45] In considering the evidence that is now before us, we note that the Affiant provides evidence that having this matter be public would cause significant prejudice to the Applicant, to its investors and to the Affiant. The Affiant goes further to attest that it could negatively impact the Applicant's reputation by promoting speculation about unproven allegations of wrongdoing. The Affiant also points out that the public would be able to see that there is an investigation into the Applicant which would unfairly invite speculation about unproven allegations and jeopardize business relationships.

[46] The Affiant also attests to extreme stress and anxiety the Affiant is undergoing in thinking about the hearing being public as the Affiant would not be able to properly address the allegations or defend their reputation as the investigation continues.

[47] The evidence of the Affiant is not only concrete evidence of harm that could result to the Applicant and the Affiant, this panel finds such harm to be very plausible in these circumstances. As the British Columbia Court of Appeal stated in its decision in *Party A. v British Columbia (Securities Commission)*, 2021 BCCA 358 whether or not an evidentiary threshold existed in relation to freeze orders, as they were then known, issued or maintained during the investigatory stage:

> "[176] In the context of the statutory scheme and public interest mandate of the Commission, I am of the view that the legislature intended there to be some evidentiary threshold for the issuance and maintenance of asset freeze orders at an investigatory stage, pursuant to section 151(1)(a), linked to the purpose of an asset freeze order.
>
> [177] I concluded that the Commission is required to assess the evidence to determine if it is sufficient to raise a serious question that the investigation could show breaches of the Act leading to financial consequences against the asset owner by way of monetary claims or penalties under the Act."

[48] This panel is required to assess the evidence adduced by the executive director to determine if it is sufficient to raise a serious question that the investigation of the allegations raised in this matter could show breaches of the Act leading to financial consequences against the Applicant. The evidence so adduced is the very evidence that could be the root of plausible harm to the Applicant at this stage. This panel believes that this matter being public at this stage of the investigation could promote speculation about unproven allegations of wrongdoing. In doing so, it could cause significant prejudice to the Applicant and perhaps also to the Affiant. Accordingly, given the timing of this matter relative to an indeterminate investigation timeline and outcome, this panel is not blind to the possibility that this matter being made public on the variation application could be both stressful and anxiety-producing if allegations of wrongdoing are made public at a time when the Applicant is unable to rebut or defend against the substance of such allegations.

[49] The executive director has said that the evidence of the Affiant is merely bald assertions with nothing in terms of actual prejudice. While it is true that the Affiant has not particularized to any extent the prejudice that would result, we are not sure what more

could be said at this time prior to a notice of hearing being issued and this matter being made public.

[50] We agree with the executive director that there is no evidence before us that would support the conclusion that the investigation would be compromised if this matter were made public. Typically, such evidence would come from the executive director. There is no such evidence in this case. Hence, we are not concluding that this matter being made public would prejudice the investigation.

[51] As for the executive director's assertion that the name of the Affiant could be anonymized, that does not speak to any harm that the Applicant might suffer without anonymization. As we have concluded above, it is possible that the Applicant could suffer harm without anonymization.

[52] With regard to the executive director's submission that there is always a risk of speculation whenever allegations are made public, we again note that typically that occurs at the notice of hearing stage when respondents have the opportunity to defend themselves.

[53] We find the evidence of the harm that would result from the matter being made public to be compelling. We accept that there would be significant prejudice, particularly in the form of reputational damage to the Applicant and perhaps the Affiant. We also accept that the likelihood of emotional harm as outlined by the Affiant to be high.

[54] Applying the test in *Deyrmenjian,* we find that we would have issued the order sought in the First Anonymization Application had the evidence of the Affiant been before us at that time.

[55] That does not conclude our analysis. We must also consider the public interest and whether it would be prejudicial to the public interest to revoke the Previous Decision and grant the anonymization order.

[56] We find that the most compelling factors in considering the public interest are that this proceeding is still at the investigative stage and that it is possible that no notice of hearing will ever be issued. We cannot ignore the fact that the executive director sought and obtained the Preservation Orders *ex parte* and in a closed hearing. It is somewhat problematic that, but for the Applicant seeking to set aside the Preservation Orders, the investigation would remain non-public. In weighing the public interest, we also accept the submission of the Applicant that it would be difficult for the Applicant to defend itself at an open hearing without the opportunity that a hearing on the substantive allegations set forth in a notice of hearing affords.

[57] The executive director has cited an Alberta Securities Commission case for the proposition that the expectation of privacy in securities-related cases is low. We note that case is distinguishable from this one insofar as a notice of hearing had already been issued in the Alberta case.

[58] There may well be other cases at the pre-notice of hearing stage where it would be prejudicial to the public interest if the matter was not made public. That is not the case

here. We find that it would not be prejudicial to the public interest to revoke the Previous Decision and to grant the anonymization order.

VI. Conclusion

[59] The Previous Decision of this panel is revoked and the New Application is granted:

a) the ruling and reasons of the section 171 hearing in writing will be anonymized;
b) the style of cause and the names of the Applicant and the Affiant will be anonymized; and
c) the hearing materials will be sealed.

until such a time as a Notice of Hearing is issued.

September 3, 2024

For the Commission

Deborah Armour, KC
Commissioner

James Kershaw
Commissioner

Jason Milne
Commissioner