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

Citation: Re Application 20240119, 2024 BCSECCOM 351 Date: 20240809

**Re Application 20240119**

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| **Panel** | Audrey T. Ho | Commissioner |
| | Gordon Johnson | Vice Chair |
| | Marion Shaw | Commissioner |
| **Hearing date** | July 18, 2024 | |
| **Submissions completed** | July 18, 2024 | |
| **Ruling date** | August 9, 2024 | |

**Appearing**

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|---|---|
| Deborah W. Flood<br>Matthew Smith | For the Executive Director |
| Joven Narwal, KC | For [redacted] |
| Emily Thorpe<br>Rebecca Sim | For [redacted] |

**Ruling**

## I. Background

[1] On January 10, 2024, the executive director issued a notice of hearing against [redacted] (the Corporate Respondent) and [redacted] (the Applicant), alleging contraventions of section 50(1)(d) of the *Securities Act*, 1996, c. 418 (the Act).

[2] On January 15, 2024, the Applicant asked the executive director to withhold publication of the notice of hearing as he expected to apply for an order protecting his identity.

[3] On January 19, 2024, the Applicant formally applied to the commission under section 171 of the Act for orders setting aside and revoking the executive director's decision to publish the notice of hearing and to issue a news release of the notice of hearing, and a direction that the said publication and issuance be suspended and/or the Applicant's identity be anonymized pending a determination of his application.

[4] The notice of hearing was posted on the commission website on January 19 for a brief moment before it was taken down. It remains unpublished at this time.

[5] On February 5, 2024, the Applicant filed an amended notice of application alleging abuse of process by the executive director and seeking a stay of the proceedings against the Applicant and other remedies. The Applicant also seeks non-publication of the proceeding and/or

anonymization of his identity until the Amended Application has been fully and finally adjudicated.

[6] The alleged abusive conduct includes an allegation of unexplained inordinate delay in the investigation. In support of that allegation, the Applicant seeks to qualify Joseph Groia, founder and principal of Groia & Company Professional Corporation, as an expert "in the field of securities regulation and other forms of regulation including professional discipline", and to enter into evidence a written report from Groia (the Groia Report) as an expert report. In that report, Groia opines that there has been an unreasonable or inordinate delay in the context of the executive director's investigation leading up to the issuance of the notice of hearing.

[7] The executive director opposes the admission of the Groia Report. The Corporate Respondent takes no position.

[8] On July 18, 2024, we heard the parties' oral submissions on the sole issue of whether to admit the Groia Report into evidence. The Applicant and the executive director both made submissions. The Corporate Respondent was represented by counsel at the hearing, but made no submissions.

[9] Our analysis and ruling on this issue are set out below.

## II. The parties' positions

### *The parties' overall positions*

[10] Both parties agree that the criteria for the admission of expert evidence are set out by the Supreme Court of Canada in *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9, on page 20, as follows:

> Admission of expert evidence depends on the application of the following criteria:
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> 1) relevance,
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> 2) necessity in assisting the trier of fact,
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> 3) the absence of any exclusionary rule, and
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> 4) a properly qualified expert.

[11] The Applicant points to the fact that this tribunal is not bound by the rules of evidence (as set out in section 173(c) of the Act), and submits that we need not strictly follow the *Mohan* criteria. Having said that, the Applicant accepts that there has to be some basis of relevance, necessity and a qualified expert before we should admit something as expert evidence.

[12] The executive director submits that the Groia Report is not admissible. He challenges the qualifications and objectivity of Groia and the completeness and accuracy of Groia's review. He also submits that the Groia Report is not relevant or necessary.

### *The parties' positions on the criterion of necessity*

[13] On the criterion of necessity, the Applicant accepts that necessity means the purported expert evidence has to be more than just helpful, but says absolute necessity is not required. He submits that the Groia Report is necessary for our consideration of the timelines of enforcement

activities in this particular investigation, as the executive director has only provided the most elementary of explanations and context.

[14] The Applicant also submits that while this tribunal has expertise respecting the nature and timing of investigations within our own sphere of activities, we may not be best qualified to rule on whether the delay is, objectively, reasonable or acceptable when assessed within the broader context of other securities and regulatory investigations within Canada. He submits that an independent practitioner familiar with Ontario securities and other regulatory proceedings could bring a more illuminating perspective to the issue of inordinate delay.

[15] The Applicant also points to the Court of Appeal's acceptance of Groia's expert report on the potential harm to a subject should the fact of a commission investigation become broadly known, in *Party A v. British Columbia Securities Commission*, 2020 BCCA 88, in order to underscore the probative value of the Groia Report in this proceeding.

[16] The executive director submits that Groia's opinion exists entirely within the four corners of the panel's own expertise. Groia does not have any special or unique expertise or experience that the panel does not have. The executive director also argues that the Groia Report entirely usurps the panel's function as trier of fact. Groia reviews the disclosure record in this matter, along with publicly available investigation benchmarks and caselaw, to ultimately opine that the investigation was inordinately delayed. This is the very issue that this panel must decide.

[17] The executive director cites the following passage from Justice Sopinka in *Mohan*, on page 23, adopting the words of Justice Dickson (as he then was) in a prior decision of that Court:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. [Case citation omitted]

[18] Justice Sopinka went on to say, on page 24:

> There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

[19] Citing the above passages from *Mohan*, the Ontario Superior Court of Justice stated, in *R. v. H.L.*, 2017 ONSC 5599, at paragraph 6:

> The necessity precondition is perhaps the salient characteristic of expert evidence. If expert evidence is not of substantial assistance to the finder of fact to the point of necessity, it is overborne by the dangers it brings with it. Evidence which does not clear the necessity threshold could pose serious dangers to the integrity of the process and cannot be permitted.

[20] The executive director also refers to *Mithaq Canada Inc. (Re)*, 2024 ONCMT 9 (at paragraph 29), where the Ontario Capital Markets Tribunal declined to admit an unnecessary expert report:

> The issues in Hibben's report are for us to decide. Hibben bases his opinions on his review of various documents, including continuous disclosure documents, board presentations, and investor communications. This Tribunal regularly reviews such documents, and decides issues like those that Hibben addresses, without assistance. The issues are squarely within the Tribunal's expertise. We do not need Hibben's opinions. We therefore ruled Hibben's report inadmissible.

## III. Analysis

[21] We agree with the parties that the criteria for the admission of expert evidence are as set out in *Mohan*. We also agree with the Applicant that this tribunal is not bound by the rules of evidence.

[22] We begin our analysis by considering the *Mohan* criteria. In doing so, we find it helpful to address first the criterion of necessity.

[23] We examined the content of the Groia Report. The information reviewed by Groia consists of:

a) the disclosure record in this proceeding,

b) publicly available investigation benchmarks, and

c) timelines between investigation and hearing gleaned primarily from caselaw,

all of which are either in evidence before us or can be put into evidence by the Applicant.

[24] Groia states that he considered the following factors in concluding that there has been inordinate delay:

a) administrative enforcement guidelines of securities regulators,

b) administrative enforcement guidelines or standards of the Federation of Law Societies of Canada, the Law Society Tribunal (Ontario), the College of Physicians and Surgeons of Ontario, and the Chartered Professional Accountants of Ontario (collectively, Other Regulators),

c) the complexity of the facts and issues in the case, and

d) the apparent length and causes of the delay.

[25] Groia's enforcement experience from working at the Ontario Securities Commission was from over 33 years ago. The securities cases and securities enforcement benchmarks considered by Groia to assess the lengths of investigations and complexity of cases were mostly over 20 years old. The cases dealt with contraventions such as insider trading, and failure to disclose *de facto* directors. The one recent securities enforcement case Groia cited was a decision of this tribunal and well within our expertise to assess.

[26] This tribunal conducts hearings into all manner of securities law contraventions, from the simple to the complex, from cases involving a single respondent to ones involving a large number of respondents. Virtually all enforcement hearings before this tribunal involve testimony from

commission investigators, who routinely give evidence as to the nature and scope of the investigations they conduct. This panel has current experience and British Columbia-specific expertise. Unlike a jury, we have the expertise and experience to assess the executive director's explanations (or lack thereof) for any period of inactivity in an investigation. We are well-versed in considering the lengths of investigations and whether causes for delays are justified, and in comparing the complexities of facts and issues involving market manipulations versus insider trading or other types of securities law contraventions. Groia does not have any special, unique or more current expertise or experience than this panel in securities enforcement proceedings.

[27] With regard to benchmarks and cases from Other Regulators, we find those comparisons to be marginally useful. First, there are marked differences between an investigation into an alleged market manipulation involving 26 subjects and an investigation into the professional conduct of licensed lawyers, doctors or accountants. Second, we need to assess if there has been inordinate delay in the specific circumstances of this case, with a contextual review of the investigation in light of a myriad of relevant factors that would typically include the nature of the case, its complexity, the number of subjects, the scope and complexity in any tracing of brokerage or bank account activities. As a result, the question of whether the alleged delay in this case is objectively reasonable or acceptable when assessed within the broader context of investigations by Other Regulators is of limited value. Finally, if we do not admit the Groia Report, the Applicant is not precluded from relying on those benchmarks and cases in his submissions.

[28] In this instance, we came to the same conclusion as the one reached by the Ontario Capital Markets Tribunal in *Mithaq*. The question of whether there has been unexplained inordinate delay in the investigation in this matter is the very question that this panel is charged with deciding after reviewing all the evidence. This is not the first time that a respondent has argued unreasonable delay before this tribunal (see: *Re Forum National*, 2019 BCSECCOM 257; *Re Application 20210107*, 2021 BCSECCOM 394). The issue is squarely within our expertise. We do not need Groia's opinion to form our own conclusion. The Groia Report is unnecessary and does not offer substantial assistance to the panel.

[29] Having reached that conclusion, we need not consider the other *Mohan* criteria.

[30] However, we are not bound by the rules of evidence, and we could admit as expert evidence a report that does not meet the *Mohan* criteria. But the reasoning underlying the caution against doing so, expressed by Justice Sopinka in *Mohan*, is sound and applies equally to administrative proceedings.

[31] In this instance, we do not find any material benefit in deviating from the *Mohan* test. We also note that the Applicant can provide to the panel the same factual information and make the same analysis and arguments as Groia in his report. The Applicant's counsel says he will do exactly that if we find the Groia Report inadmissible.

[32] There may be infrequent occasions where expert evidence, although not strictly necessary, will be admitted because it offers to a panel significant assistance in its deliberations. That is not the case here.

## IV. Ruling

[33] After considering the written and oral submissions of the Applicant and the executive director, we rule that the Groia Report is not admissible.

August 9, 2024

**For the Commission**

Audrey T. Ho
Commissioner

Gordon Johnson
Vice Chair

Marion Shaw
Commissioner