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

Citation: Re Application 20220610, 2023 BCSECCOM 264 Date: 20230523

Re Application 20220610

Panel	Gordon Johnson	Vice Chair
	Deborah Armour, KC	Commissioner
	Audrey T. Ho	Commissioner
Hearing Date	January 23, 2023	
Submissions Completed	January 26, 2023	
Date of Decision	May 23, 2023	

Appearing

Derek Chapman Deborah Flood Jillian Dean	For the Executive Director
Joseph Saulnier	For the Applicant

Decision

I. Introduction

[1] This is an application by an individual (Applicant) under section 171 of the *Securities Act*, RSBC 1996, c. 418 (Act). The Applicant requests that we consider whether the continuation of freeze orders (Freeze Orders) and registered charges (Charges) that are in place affecting the Applicant's property is in the public interest, and make an order revoking or varying the Freeze Orders and Charges. The executive director opposes the application and submits that continuation is in the public interest.

[2] No notice of hearing has been issued against the Applicant and it is not certain that a notice of hearing will be issued in the future. No public allegations have been made against the Applicant. As a result, the Applicant applied to have this application resolved on an anonymized basis. That application was not opposed by the executive director and we agreed this application should proceed on an anonymized basis. We have, to the extent reasonably possible, attempted to explain our decision below in language which respects our decision to proceed without indirectly disclosing the identity of the Applicant.

II. Factual and Procedural Background

[3] In October of 2018, an investigation order was made in relation to the conduct of a group of individuals and companies, including the Applicant. The investigation order was amended, in January 2019, in order to expand its scope.

[4] The initial focus of the investigation has been on whether the group of individuals and companies (Trading Group) conducted a market manipulation of the securities of four companies that the executive director has referred to as the issuer subjects (Issuer Group).

[5] The executive director's investigation is ongoing.

[6] The Freeze Orders and Charges were issued or registered in April of 2019. At the date of the hearing of this application, the most recent evidence indicates that the assets which were subject to them and their estimated value were:

Frozen brokerage accounts	**$3,600,000.00**
Frozen bank accounts	**$12,000.00**
Equity in real estate asset	**$180,000.00**
Equity in a second real estate asset	**$460,000.00**
Total	**$4,252,000.00**

[7] On June 10, 2022, the Applicant brought this application asking that the Freeze Orders be revoked or varied and that the Charges against the Applicant's assets be removed. The application triggered a hearing *de novo* into whether the existing orders are in the public interest. The executive director then delivered new evidence beyond what was relied on at the time the commission issued the Freeze Orders and Charges. Further submissions were then exchanged between the parties. The hearing in this matter was set and later adjourned.

[8] The hearing proceeded *in camera* and was completed on January 26, 2023.

III. Applicable Law

A. Applicable Legislation

Section 171 application

[9] The commission has the discretion to make an order revoking or varying a decision under section 171 of the Act if it considers that to do so would not be prejudicial to the public interest. Section 171 reads:

> **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.

[10] Under section 1(1) of the Act, a "decision" in relation to the commission includes an "order… made under a power or right conferred by this Act or the regulations". The Applicant seeks the

revocation or variation of the Freeze Orders and Charges, and this application follows the executive director's opposition to that request.

B. Party A Decision

Threshold issue

[11] In *Party A v. British Columbia (Securities Commission),* 2021 BCCA 358, our Court of Appeal considered the commission's dismissal of section 171 applications (the underlying applications) brought by certain members of the Trading Group to revoke the freeze orders that were in place against them. As with the case before us now, the underlying applications involved freeze orders issued by the commission pursuant to section 151 of the Act, a section subsequently repealed by legislative amendments that came into effect in 2020. The Applicant was not a party to the underlying applications or the *Party A* proceeding.

[12] The commission had dismissed the underlying applications after concluding that the evidence before it indicated the possibility of multiple serious breaches of the Act with the potential of serious harm to investors and issuers if the frozen amounts were not maintained.

[13] On appeal, the Court held, in the *Party A* decision, that it was clear that the commission was satisfied there was sufficient evidence to raise the reasonable possibility that the investigation could show breaches of the Act leading to monetary consequences against the appellants. The Court held that the manner in which the commission approached the evidence was equivalent to determining that it raised a serious question that the investigation could show breaches of the Act leading to financial consequences against the appellants.

[14] The Court of Appeal also set out an analytical framework for applications that seek to vary or revoke a freeze order issued during an investigation. The Court held that the commission's public interest mandate requires it to conduct a preliminary assessment of the evidence in support of the freeze order.

[15] That preliminary assessment proceeds in two parts. The first part of the test is an assessment of the evidence against an evidentiary standard which is low and flexible but requires more than mere speculation or suspicion. The second part of the test is an assessment of all relevant public interest factors.

[16] The Court of Appeal, at paragraphs 207 – 209, concluded as follows with respect to the threshold and relevant factors for a freeze order:

> What is necessary prior to a s. 151(1)(a) order being made is that an investigation must either be in place under ss. 142 or 147 or proposed under s. 142. It is necessary that the Commission conduct a preliminary assessment of the evidence and conclude that it raises a serious question that the investigation could show breaches of the *Act* leading to financial consequences in the form of penalties or claims against the owner of the assets. Mere speculation will not be enough. The Commission will rely on its expertise, experience and common sense in assessing the evidence and in drawing any available reasonable inferences arising from the evidence.
>
> Additionally, the Commission must be satisfied that the issuance of the asset freeze order is in the public interest by considering all factors relevant to the case at hand. The public

> interest includes not only protection of the public, but also public confidence in the markets. Public confidence will often require the Commission to take into account the interests of the asset owners and to recognize that an asset freeze order is extremely intrusive.
>
> There can be any number of factors relevant to the public interest in a given case, depending on the circumstances. A non-exhaustive list of factors that may be relevant in a given case includes: the seriousness and scope of the allegations; the stage of the investigation and any urgency; the scope and value of the assets to be frozen in relation to the potential claims or penalties; the potential consequences of the order on the asset owner or other parties; and the strength of the evidence in support of the asset freeze order. Other factors may also be relevant, including whether there is a link between the assets and the wrongful conduct, a risk of dissipation of assets, or other security for the potential claims or penalties. These are not mandatory criteria that must be analyzed in a checklist fashion, but simply examples of factors that may be relevant to the public interest analysis.

Onus on Section 171 Application

[17] When a freeze order was obtained in circumstances that did not give the asset owner an opportunity to be heard, the executive director bears the onus on a section 171 application of establishing that the evidence raises a serious question that the investigation could show breaches of the Act leading to financial consequences against the asset owner and that the public interest will be served by the continuation of the order, taking into account relevant public interest factors. It is up to the executive director to decide whether to try to establish this with the same evidence as was placed before the commission when the original order was made or to provide additional evidence.

[18] The proper approach for the commission on a section 171 application to revoke or vary an asset freeze order that was obtained without notice to the asset owner, is to take a fresh look at whether continuation of the order is in the public interest based on the evidence and circumstances known at the time of the section 171 application. The matter should be treated by the commission as a new hearing, without according deference to the original freeze order.

Market manipulation

[19] Section 57(a) of the Act in force at the relevant time stated that a person "must not, directly or indirectly, engage in or participate in conduct relating to securities or exchange contracts if the person knows, or reasonably should know, that the conduct results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or exchange contract."

[20] As the commission wrote in *Re Lim*, 2017 BCSECCOM 196, at paragraph 100, section 57(a) of the Act requires the executive director to establish four elements in order to prove a contravention of that section:

- did the conduct of the respondent relate to securities or exchange contracts?
- was there either (or both) a misleading appearance of trading activity in, or an artificial price for, that security or exchange contract (what we will refer to as the form of the manipulation)?

- was there the requisite causal connection between the respondent's conduct and the form of the manipulation (i.e. did the respondent, directly or indirectly, engage in conduct that results in or contributes to the form of the manipulation?) and
- did the respondent have the requisite mental state for the contravention (i.e. did the respondent know, or should they have reasonably known, that their conduct had the requisite causal connection to the form of manipulation?)

[21] The commission in *Re Lim* at paragraph 106 agreed with the Alberta Securities Commission in *Re Coastal Pacific Mining Corp.,* 2016 ABASC 301, where it held as follows about an "artificial price":

> [49] The evidence here persuades us that the capital market generally, and specific investors who bought Coastal shares in the period of the promotional campaign, were misinformed and misled about the merits of Coastal as a business enterprise, and therefore about the inherent value of a Coastal share. The news release campaign described above communicated supposed good news – extremely good news – about Coastal's supposed mining business when that business was not, in reality, being pursued in a serious way. The sudden burst of near-daily (or more-than-daily) news releases from Coastal in the relevant period, and the highly optimistic (at best) content of at least the 1 November 2010 news release (the only one in evidence), conveyed a sense that good things were happening to Coastal, and happening quickly. A similar impression was communicated even more frenetically by the concurrent email campaign, which (as evident from the quoted email of 1 November 2010) also touted an anticipated, vastly higher, share price.
>
> [50] It is clear that this vigorous (but misleading) promotional campaign artificially stimulated investor interest in, and demand for, Coastal shares. Investors bought Coastal shares at higher prices and in higher volumes. That actual trading activity, reported to the market, undoubtedly reinforced the impressions communicated by the promotional campaign. As seen from the table above, trading prices and volumes reached markable levels.
> …
>
> [52] We find that the prices at which Coastal shares traded from 20 October into November 2010 were artificial, and that this artificiality was directly attributable to the promotional campaign undertaken during that period. As we concluded above, Coastal itself was among the participants in that campaign.

[22] The commission in *Re Lim* at paragraph 122, also agreed with the Alberta Securities Commission in *Re Podorieszach,* [2004] A.S.C.D. 360, where it described an "artificial price" as a price that differs from that price that would result from the market operating freely and fairly on the basis of information concerning true market supply and demand:

> In our view, the meaning [of artificial price] can best be determined by considering it in the context of the [Alberta] Act and the framework of securities regulation established by the Act.…that framework is designed to protect investors and to foster fair, efficient capital markets and confidence in those markets, all of which turn on the integrity with which the market and market participants operate. Key to that market integrity is that the market be able to operate on real information…in this context, an artificial price can be described as a price that differs from the price that would result from the market operating freely and fairly on the basis of information concerning true market supply and

> demand…If, however, demand or supply is distorted, then price will likely also be distorted—no longer reflective of real market demand and supply, it will be artificial.

[23] In *Re Lim*, in addition to a misleading tout sheet promotional campaign, the commission held at paragraph 123 that there was also a constraint on the supply side of the issuer's securities that assisted in creating, or contributed to, the artificial price for those securities.

IV. Positions of the Parties

A. Executive Director

[24] The executive director emphasizes that in *Party A*, the Court of Appeal described the applicable evidentiary standard as "low and flexible".

[25] The executive director submits that the required evidentiary threshold has been met. The executive director relies on evidence which he says establishes that:

- the Trading Group secretly controlled the Issuer Group;
- members of the Trading Group were involved in preparing news releases and arranging promotional campaigns regarding activities of the Issuer Group and that many of those news releases were promotional and in some instances misleading;
- members of the Trading Group were active traders in the Issuer Group's securities around the times of the various news releases and profited from the trading; and
- members of the Trading Group retained others to assist in promotional campaigns which coincided with their own activities.

The executive director submits that the Trading Group's secret control of the Issuer Group, combined with the misleading news releases and promotional campaigns, appears to have been part of a market manipulation scheme that created an artificial price of the shares of the Issuer Group members.

[26] The executive director submits that the evidence raises a serious question that the investigation could show that the Applicant is a member of the Trading Group and participated in the alleged market manipulation. Although he agrees that the evidence against the Applicant is more limited than exists regarding certain members of the Trading Group, the executive director submits that the evidence is sufficient to raise a serious question that the Applicant played a part in the Trading Group obtaining secret control of the Issuer Group, traded in securities of the Issuer Group during the market manipulation scheme and generated net trading profits of almost $1.3 million. There is evidence that the Applicant had advanced notice of, and even helped draft, some of the news releases which, the executive director submits, appear to have been calculated to drive trading in the securities of members of the Issuer Group. There is also evidence that the Applicant was party to a business deal involving one company in the Issuer Group.

[27] The executive director points to evidence that the Applicant's mother and brother also owned securities in members of the Issuer Group and generated trading proceeds from trading in those securities. Although the value of the Applicant's assets frozen by the Freeze Orders and Charges significantly exceeded $1.3 million, there is evidence that the combined net trading proceeds generated by the Applicant, his brother and mother approximated $3.75 million. The executive

director submits that the Freeze Orders and Charges are proportional when measured against that amount.

[28] The executive director points to some items of evidence, especially evidence of employment of the brother of the Applicant by a member of the Issuer Group and the addition of that brother to the benefits plan of a member of the Trading Group, to support the proposition that there are unexplained connections between the Applicant's family and the Trading Group. The executive director suggests all of the evidence supports an inference that the Applicant controlled or beneficially owned the shares in the Issuer Group held by his brother and mother. To further support that suggestion, the executive director provided evidence of significant cash payments between the Applicant and the Applicant's brother, some of which were identified contemporaneously as a "return of capital". The executive director suggests that further evidence to support an inference about control or beneficial ownership of Issuer Group shares might be uncovered during the balance of the investigation.

[29] The executive director relies upon the following extracts from the commission's decision in *Re Application 20211018*, 2022 BCSECCOM 418, and submits that those conclusions apply here as well:

> [64] Commission investigations such as this one are complex and time-consuming. Once an investigation is commenced, information is amassed and then evaluated and analyzed before decisions are taken on whether additional information is required and whether and which offences will be alleged. Once allegations have been crystallized in a notice of hearing, the executive director will be much better placed than he would be at any earlier stage to argue his case for the maintenance of a freeze order. Even then, however, the threshold evidentiary standard remains the same. What may change with the stage of the investigation is the panel's assessment of the relevant public interest factors.
>
> [65] The executive director rightly emphasizes that the investigation in this matter is not finished. No notice of hearing has yet been issued. At this point, no allegations have been made. The executive director submits that the evidence amassed to date in the Commission's investigation points to certain breaches of the Act, but the work of analyzing the evidence and crystallizing the allegations against the Applicant is not yet complete.
>
> …
>
> [78] The investigation was commenced more than three years ago but is not yet complete. An investigation like this one, which involves numerous issuers and trading subjects, is complex, and necessarily takes considerable time to conclude.

[30] The executive director submits that some of the Applicant's conduct might also amount to insider trading under section 57.2 of the Act, potentially creating liability against the Applicant either as a trader on inside information or as a tipper of others. The executive director did not provide significant analysis of the evidence which would support this allegation, nor whether (and how) the financial sanctions against the Applicant might change if the insider trading allegation were proven in addition to or in lieu of the market manipulation allegation.

[31] The executive director submits that the claims by the Applicant of hardship are not supported by the evidence. The executive director notes that the Applicant's evidence indicates that the Applicant has access to significant amounts of liquid assets.

[32] The executive director says that consideration of the public interest factors suggested by the Court of Appeal in *Party A* strongly supports the continuation of the Freeze Orders and Charges.

B. Applicant

[33] The primary arguments made by the Applicant were that the evidence connecting the Applicant to any possible misconduct is weak, that the amount frozen is disproportionate to the quantum of any financial sanctions which might eventually be ordered against the Applicant and that the Applicant is encountering hardship as a result of the Freeze Orders and Charges.

[34] The Applicant acknowledges that there is some reasonable body of evidence suggesting that there may have been a breach of the Act by some members of the Trading Group. However, the Applicant submits that the evidence against him specifically is tenuous. The Applicant submits that the issue before us in this section 171 application is whether the "investigation could show breaches of the Act leading to financial consequences against the asset owner". In this case the asset owner is the Applicant, who is the subject of the Freeze Orders and Charges.

[35] The Applicant submits that the executive director has not led sufficient evidence to raise a serious question that the investigation could show that he breached provisions of the Act even on the low threshold required to support freeze orders during the investigatory stage. He submits that for some of the essential elements there is no evidence.

[36] The Applicant submits that to support a potential breach of the market manipulation provisions of the Act, the executive director must show there is sufficient evidence to raise a serious question that the investigation could show:

a) the Applicant engaged in conduct related to the shares of the Issuer Group;
b) his conduct resulted in or contributed to a misleading appearance of trading activity or an artificial share price; and
c) he did so knowingly.

[37] The Applicant took us through the executive director's evidence in some detail and suggested innocent explanations for much of the evidence. He submits that there is insufficient evidence of a false or misleading appearance of trades, there is no evidence of flurries or wash trades or artificial share prices, let alone that the Applicant contributed to those actions. He further submits that there is little or no evidence of specific trading or share prices at all.

[38] The Applicant acknowledges that the executive director is not required to provide evidence for every element of the alleged breaches but pointed out that the investigation has been ongoing for four years and there is still a lack of evidence on essential issues. He submits that the strength of the evidence is an important factor in considering the public interest, and the lack of evidence militates in favour of revoking the Freeze Orders and Charges.

[39] As it relates to the public interest consideration of proportionality, the Applicant took particular efforts to challenge any inference that because he and his brother exchanged funds between themselves and, together with their mother, invested in the Issuer Group and profited from their trades, it therefore follows that the amount of the trading profits of the mother and brother should be included in assessing the appropriate value of the Applicant's assets to be frozen.

[40] The Applicant placed moderate emphasis on the argument of specific hardship, acknowledging that there is evidence that the Applicant continues to have access to unfrozen assets. However, the Applicant placed considerable emphasis on the argument that in any instance when millions of dollars of assets are frozen for a period of several years, some level of general hardship should be inferred. In addition, the Applicant pointed to specific evidence that the bank which the Applicant had a long term relationship with has asked the Applicant to close all accounts at that bank and repay amounts totaling over $500,000, including mortgages on the properties frozen by the Charges. The Applicant submits that is evidence of hardship caused by the Charges as their existence will make it difficult for him to re-mortgage or sell his properties.

V. Analysis

A. Has the evidentiary threshold been met?

[41] Section 171 of the Act allows the commission, where it "considers that to do so would not be prejudicial to the public interest," to revoke or vary a decision of the commission made under the Act.

[42] Our task is to determine whether, in all the circumstances existing at the time of this application, and taking all relevant factors into account, revocation or variation of the Freeze Orders and Charges would be prejudicial to the public interest.

[43] The Court of Appeal in *Party A* articulated the threshold test we are to apply: is the evidence sufficient to raise a serious question that the investigation could show breaches of the Act leading to financial consequences against the Applicant by way of monetary claims or penalties under the Act? If we find that that test is met, we are then to consider whether the public interest is best served by the maintenance or the revocation or variation of the Freeze Orders and Charges.

[44] As was stated by the Court in *Party A* at paragraph 179, the "evidentiary standard remains low and flexible." The Court specified that the evidence must amount to more than mere suspicion or speculation but need not rise to the level of *prima facie* evidence or proof on a balance of probabilities. In so doing, the Court recognized that the question is considered at the investigatory stage and so may encompass a broad range of circumstances.

[45] At this stage we are not making any findings of fact for the purpose of liability under the Act. That will be done following a hearing on the merits, if the investigation ultimately leads to the issuance of a notice of hearing by the executive director against the Applicant. At this time, we are only making a preliminary assessment of whether the evidence before us is sufficient to raise a serious question that the investigation could show breaches of the Act leading to monetary claims and penalties against the Applicant. To the extent that we have formed conclusions and made determinations in this matter, we have done so based on the threshold set out in *Party A*

and only for the purpose of deciding whether the Freeze Orders and Charges should be maintained at this time.

[46] While the executive director has not yet made any formal allegations against the Applicant, the executive director led the panel in significant detail through the preliminary evidence relating to the conduct of the Applicant that has been amassed in the course of the commission's investigation, as outlined in this decision.

[47] We have approached this evidentiary stage of the test by first analyzing whether there is a serious question that the investigation could show that some members of the Trading Group breached the Act by conducting a market manipulation. Then we turned to the question of whether the evidence established a serious question that the investigation could show that the Applicant was a party to that breach. Finally, we considered whether there is, on the evidence that was shown to us, a serious question that the trading conducted in the names of the Applicants' relatives was actually nominee trading for the benefit of the Applicant.

[48] Before turning to the specific evidence before us, it is useful to identify what activities are often present in a type of market manipulation commonly called a "pump and dump" scheme. In a typical pump and dump scheme, we would generally be able to identify steps taken by respondents to take control of an issuer or to take ownership of a significant portion of the issuer's shares, often through nominees. We would expect that soon afterwards there would be evidence of some form of promotional campaign to pump up the issuer's share price. That might be coupled with an increase in the volume of trading largely directed and conducted by the respondents or nominees. Finally we might see indications that the respondents and nominees "cashed out" of the issuer at a profit in the course of the increased trading activity.

[49] Turning to the question of whether the evidence established a serious question that the investigation could show that members of the Trading Group breached the Act by conducting a market manipulation, we conclude that the answer is yes. The evidence which raises a serious question about the existence of a manipulation in breach of the Act includes the following:

a) members of the Trading Group and family members acquired ownership and control of 32% of Issuer Group member R;

b) members of the Trading Group and family members acquired ownership and control of 34% of Issuer Group member B;

c) members of the Trading Group and family members acquired ownership and control of 53% of Issuer Group member C;

d) members of the Trading Group and family members acquired ownership and control of 61% of Issuer Group member V;

e) one member of the Trading Group sent an email in March of 2017 referencing how "We took over the deal about 4 months after [Issuer Group member R] went public in 2015" and "Long story short: we got rid of the entire board, capital markets people

and eventually the Founder/CEO. In December of 2015 we recruited a killer CEO...", all of which indicated the taking of control of Issuer Group member R by the Trading Group without any of them being publicly identified as holding any position of control;

f) the "killer CEO" was interviewed and she indicated that members of the Trading Group were involved in every decision of Issuer Group member R, even though they were not on the board of that issuer;

g) Trading Group members were involved in preparing a promotional slide deck for Issuer Group member R and promotional news releases related to that issuer;

h) Trading Group members arranged for Issuer Group member R to retain consultants to promote Issuer Group member R, and promotional materials were disseminated by the consultants and circulated further by members of the Trading Group;

i) members of the Trading Group sent emails which indicated they were actively trading shares in Issuer Group member R during the promotion and were to at least some extent coordinating the trading. The emails included comments such as "Hopefully we can find more pockets that can take another 5M shares down, even at 15";

j) Members of the Trading Group emailed each other spreadsheets identifying some of the trading proceeds and allocating amongst each other Issuer Group shares and the promotional costs of assistance in generating promotional and trading activity;

k) several members of the Trading Group and their relatives earned significant profits from the trading in Issuer Group member R; and

l) at least some aspects of the same pattern of obtaining substantial shareholding positions, obtaining control of the issuer without that control being visible, the orchestration and funding of promotional campaigns, the circulation of spreadsheets showing the allocation of Issuer Group shares, the sharing of trading profits and the sharing of promotional costs between Trading Group members and family members exist for Issuer Group members B, C and V.

[50] We also find that there is evidence sufficient to raise a serious question that the investigation could show that the Applicant was involved and profited from the trading. That evidence includes:

a) the Applicant acquired significant share ownership of and was active in trading in each member of the Issuer Group and, from that trading, the Applicant generated net trading proceeds of almost $1,300,000;

b) the Applicant was a Vice President of the corporation which was at the center of the Trading Group;

c) the Applicant received many of the promotional news releases related to the promotion of the Issuer Group by the Trading Group. Although there is no evidence that the Applicant commented on many of those news releases, he did provide some drafting input;

d) the Applicant was the sole director of a company incorporated very shortly before an announcement by Issuer Group member B that it was acquiring that company in a transaction which was announced in a highly promotional manner and which was connected to the promotional activities that occurred during the period of the relevant trading; and

e) the Applicant was named in some of the spreadsheets circulated between Trading Group members detailing their trading revenue, share allocation and sharing of promotional costs.

[51] Although we have concluded that there is a serious question raised that the investigation could show a breach of the Act by the Applicant, the evidence is less clear regarding whether the accounts of the Applicant's family members were nominee accounts of the Applicant. The primary evidence which the executive director relied on to suggest that the accounts in question were beneficially owned or controlled by the Applicant is as follows:

a) initially, the Applicant was the investment advisor for the family members whose accounts are now alleged by the executive director to have been nominee accounts;

b) during the relevant period, the Applicant's brother transferred to him a total of approximately $860,000 by way of many transfers, a number of which were identified in the memo line as "Return of Capital", perhaps indicating that the money used by the brother to buy Issuer Group shares was in fact money that belonged to the Applicant and the money transfer was evidence of returning that capital to the Applicant; and

c) the Applicant lives in a property owned by his brother, perhaps indicating that some assets owned in the name of the brother actually belong to the Applicant.

[52] We have considered all of the above evidence and we have considered the larger context, but we conclude that we have not seen sufficient evidence to raise a serious question that the investigation could show that the Applicant controlled or beneficially owned the securities in the Issuer Group held by his brother and mother. Some of the evidence of the brother's involvement with the Trading Group suggests that the brother might have had direct involvement in some of the Trading Group's activities, but that does not support an inference that the Applicant controlled or owned the securities in the Issuer Group held in the brother's name. With respect to the securities in the mother's name, the evidence is that during the relevant time, it was the brother and not the Applicant who had trading authority with respect to the mother's account. The fact that the Applicant was the investment advisor to his mother and brother at the brokerage firm where the Applicant worked does not logically lead to an inference that he controlled or beneficially owned the assets in those accounts.

[53] The evidence of money transfers between the brothers might possibly be explained by joint involvement in improper trading activity directed by the Applicant. However, it appears that the brothers were sharing use of other assets and may have other financial dealings together. As a result a transfer of funds between the two brothers, even if labeled as a return of capital, is not convincing to us. This is so even when considered in the context of other evidence which raises suspicions that the trading accounts of the brother might have been nominee accounts for the Applicant. There might be many other explanations.

[54] Just as we are not suggesting that misconduct by the Applicant has been proven at this preliminary stage, we are not suggesting that the executive director will never be able to prove misconduct by him, or that he controlled or beneficially owned the Issuer Group securities held by his family members. The investigation will continue and the evidence will lead to the proper conclusions at the time of the hearing. Our conclusions are that the evidentiary threshold specified by the Court of Appeal in *Party A* and discussed by the panel in *Re Application 20211018* has been satisfied with respect to the Applicant's alleged direct involvement but not with respect to the Applicant's alleged participation indirectly through family members.

B. The Public Interest

[55] We turn then to consider whether the public interest is best served by the maintenance or the revocation or variation of the Freeze Orders and Charges.

[56] As noted in *Party A*, there can be any number of factors relevant to the public interest in a given case, depending on the circumstances. We summarize below our conclusions with respect to the following relevant factors: the seriousness and scope of the potential allegations; the stage of the investigation and any urgency; the scope and value of the assets to be frozen in relation to potential claims or monetary penalties; the potential consequences of the orders on the asset owner or other parties; the strength of the evidence in support of the asset freeze order; any link between the assets and the wrongful conduct; the risk of dissipation of assets; and any other security for the potential claims or penalties.

[57] With respect to the seriousness and scope of the potential allegations, we find that market manipulation is a very serious breach of the Act. As stated by the Court of Appeal at paragraph 116 of *Party A*, the "purpose of securities legislation includes three goals: protection of the investing public, which is the primary goal; capital market efficiency; and ensuring public confidence in the system". Market manipulation strikes at the foundations of securities regulation, undermining the integrity of the capital markets and destroying investor confidence. The possible misconduct in this case is very serious, which favours maintaining the Freeze Orders and Charges, or at least significant portions of them.

[58] With respect to the stage of the investigation, the Court of Appeal in *Party A* had this to say:

> [287] I agree with the appellants that the passage of time and the status of the investigation, as of the time of the s. 171 application as compared to the s. 151(1)(a) application, are relevant factors for the Commission to consider on the s. 171 application. The passage of time may result in a different weighing of the various public interest factors. For example, a long delay without much progress in an investigation might cause the Commission to take a more critical look at the executive director's evidence in

support of the order and to give more weight to the impact of the order on the affected party.

[59] We agree that this investigation has been ongoing for a considerable time, but we note as well that investigations of this type are complex and time-consuming. This is especially true in cases like this one where there are a large number of subjects and events involved in the investigation. We should leave the executive director further time to complete the investigative process. At the same time, we need to avoid relying on what is little more than speculation at this point, and we need to properly balance all of the relevant factors.

[60] We have considered the executive director's arguments regarding the potential that breaches of the insider trading provisions of the Act will be proven. We were pointed to very little of the law or evidence which would be needed to establish insider trading. In addition, we did not see an argument establishing how the potential orders for payment under 161(1)(g) or 162 of the Act would be materially different if an insider trading allegation is proven rather than or in addition to a market manipulation allegation. As a result we have not placed material emphasis on the insider trading submission which was made.

[61] Turning to the issue of proportionality, we conclude that the value of the assets frozen by the Freeze Orders and Charges appear to exceed the financial sanctions which might reasonably be expected to be imposed against the Applicant at the end of a hearing. Although a hearing panel might ultimately reach a different conclusion, it would not be unreasonable based on the evidence before us to expect that a section 161(1)(g) order could follow in an amount of approximately $1,300,000, the amount of the trading profit earned by the Applicant. In addition there could be a significant order made for an administrative penalty. It is very difficult to predict what amount of penalty a panel would find appropriate given that we are not yet at the stage where the investigation is complete. It is not speculative to say that the payment order made might be equal to the benefit gained by the Applicant if the conduct alleged against the Applicant is proven. Our conclusion is that continuing to freeze assets with a value of $2,600,000 would not be disproportionate, based on the evidence before us today.

[62] Turning to the issue of the impact of the Freeze Orders and Charges on the Applicant or third parties, there is no evidence of harm being caused to third parties. The Applicant argues that he is being caused hardship by the continuation of the Freeze Orders and Charges. He refers to evidence that all of his accounts at his bank are being closed and he will have difficulty refinancing the mortgages on the properties subject to the Charges or selling them.

[63] There is evidence tendered indicating the Applicant has an annual income of $330,000 and $470,000 in cash and securities in unfrozen accounts. The executive director tendered evidence which also suggests that the Applicant has additional unfrozen liquid assets and more than enough unfrozen liquid assets to repay his bank debts.

[64] We do recognize that there is always some prejudice caused to parties whose assets are frozen, and we do take that reality into account. It is our duty to revoke or vary a freeze order whenever the public interest factors, including harm to an applicant, do not support maintaining the existing freeze order. However, we find that the Applicant has not established undue hardship.

[65] Turning to the issue of the strength of the evidence, we do not give that factor significant weight at this stage because the investigation is not yet complete and because the evidence presented is sufficient for the conclusions we have reached applying the evidentiary threshold set out in the *Party A* decision. It is not necessary for us to go further than that.

[66] Turning to the issue of a link between the specific assets frozen and the alleged breach of the Act, as set out in the *Party A* decision (at paragraph 203), there is no need for such a link in order to justify the continuation of a freeze order. If a link existed, that would be an additional reason to maintain a freeze order, but there is no requirement to show a link as a condition to continuing a freeze order.

[67] Similarly, as set out by in the *Party A* decision (at paragraph 205), there is no need to show a risk of dissipation of assets to justify the continuation of a freeze order.

VI. Conclusion

[68] We find that, in all the circumstances existing at the time of this application, and taking all relevant factors into account, the revocation of the Freeze Orders and Charges would be prejudicial to the public interest.

[69] However, we find that the total value currently frozen is not proportionate to the potential penalties that might flow from the breaches of the Act based on the evidence currently before us. This is an appropriate case to put significant weight on the issue of proportionality in the balancing of all of the public interest factors. As a result we order that the Freeze Orders and Charges be varied to limit the total amount frozen to $2,600,000, with all other terms of the Freeze Orders and Charges remaining unchanged.

[70] We ask that the parties seek to agree on the assets to be unfrozen, the form of an appropriate order to implement this decision and submit it to the panel for approval. The panel is available to resolve any disagreements about the implementation of this decision.

May 23, 2023

For the Commission

Gordon Johnson
Vice Chair

Deborah Armour, KC
Commissioner

Audrey T. Ho
Commissioner

**On May 25, 2023, the panel issued a correction to the Decision. The revisions are incorporated in paragraphs 1 and 10.*