IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Attorney General) v. BridgeMark Financial Corp.,* 2020 BCSC 1704

Date: 20201110
Docket: S1914058
Registry: Vancouver

IN THE MATTER OF A STATED CASE UNDER s. 43(2) of the *Administrative Tribunals Act*, S. B.C. 2004, c. 45 and s. 4.1 of the *Securities Act,* R.S.B.C 1996, c. 418

Between:

Attorney General of British Columbia

Applicant

And

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, Sway Capital Corp., David Matthew Schmidt, Detona Capital Corp., Altitude Marketing Corp., Ryan Peter Venier, Tryton Financial Corp., Abeir Haddad, Tavistock Capital Corp., Jarman Capital Inc., Scott Jason Jarman, Northwest Marketing and Management Inc., Denise Marie Trainor, Randy White, Escher Invest SA, Hunton Advisory Ltd., Kendl Capital Limited, Bertho Holdings Ltd., Saiya Capital Corporation, Tara Kerry Haddad, Tollstam & Company Chartered Accountants, Albert Kenneth Tollstam

Respondents

And

Party A, Party B, Party C, Party D and Party E

Respondents

And

British Columbia Securities Commission

Respondent

And

The Executive Director for the British Columbia Securities Commission

Respondent

Before: The Honourable Madam Justice Jackson

Reasons for Judgment

Counsel for the Applicant:	M.B. Rankin (via videoconference)
Counsel for the Respondents Sway Capital Corp., David Matthew Schmidt, Tavistock Capital Corp. and Bertho Holdings Ltd.:	D. Yaverbaum (via videoconference)
Counsel for the Respondent The Executive Director for the British Columbia Securities Commission:	Randy J. Kaardal, Q.C. P. Heisler (via videoconference)
Counsel for the Respondents Lukor Capital Corp. and Justin Edgar Liu:	L.J. Smith (via videoconference)
Counsel for the Respondents Altitude Marketing Corp., Ryan Peter Venier, Albert Kenneth Tollstam and Tollstam & Company Chartered Accountants:	S. Marescaux (via videoconference)
Counsel for the Respondents Randy White, Escher Invest SA, Hunton Advisory Ltd. And Kendl Capital Limited:	T.M. Tomchak (via videoconference)
Counsel for the Respondents BridgeMark Financial Corp., Jackson & Company Professional Corp. and Anthony Kevin Jackson:	P.J. Sullivan (via videoconference)
Counsel for the Respondents Tryton Financial Corp., Abeir Haddad, Saiya Capital Corporation, Tara Kerry Haddad and Party E:	B. Richdale R.A. Sim (via videoconference)
Counsel for Non-Parties Michael Tietz and Duane Loewen:	P.R. Bennett M. Mounteer R. Mogerman N.J. Kovak (via videoconference)
No other appearances	
Written Submissions Received:	November 6, 2020
Place and Date of Hearing:	Vancouver, B.C. October 29, 2020
Place and Date of Judgment:	Vancouver, B.C. November 10, 2020

[1] By Notice of Assignment dated January 14, 2020, I was assigned as the case management judge for this Stated Case, referred to the Court by the British Columbia Securities Commission ("Securities Commission") on the request of the Attorney General of British Columbia ("AGBC") under s. 43(3) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. The Stated Case asks this Court to determine the following two questions of law:

1) Is s. 151 of the *Securities Act,* R.S.B.C. 1996, c. 418 consistent with s. 8 of the *Canadian Charter of Rights and Freedoms* [*Charter*]?

2) If the answer to question 1 is no, does s. 151 of the *Securities Act* constitute a reasonable and demonstrably justified limit under s. 1 of the *Charter*?

[2] Justin Edgar Liu and Lukor Capital Corp. (collectively the "applicants") apply for an order sealing two documents the Securities Commission has advised it intends to file as part of the record (the "Costin Memos"), making them accessible only to counsel of record, parties of record, or by further order of this Court (the "Sealing Order Application").

[3] The Sealing Order Application is supported by BridgeMark Financial Corp., Jackson & Company Professional Corp., and Anthony Kevin Jackson. The Executive Director for the Securities Commission takes no position. The AGBC also takes no position but filed a response addressing the legal framework. The other parties to the Stated Case did not file responses to the Sealing Order Application.

[4] Michael Tietz and Duane Loewen, proposed representative plaintiffs in *Tietz v. BridgeMark Financial Corp.*, BCSC Action No. S-197731, filed a response to the Sealing Order Application setting out their opposition, but stated they would withdraw that opposition if the sealing order included certain terms.

[5] At the hearing, counsel for the applicants advised me that the Court of Appeal's judgment in a related appeal proceeding was scheduled to be released on November 2, 2020. Leave was granted to make further submissions on that decision, which has now been released and indexed as *British Columbia (Securities*

Commission) v. BridgeMark Financial Corp., 2020 BCCA 301 ("*BridgeMark Decision*"). The applicants provided further written submissions dated November 6, 2020, and I have considered them in coming to my decision.

[6] In reasons for judgment issued April 3, 2020, indexed as 2020 BCSC 527, I ordered the applicants to provide two days' notice of the Sealing Order Application by following the procedure described in the Court's Practice Direction PD-56, namely completing and submitting the notice form on the Publication Ban Notification page of the Supreme Court website (www.bccourts.ca/supreme_court/publication_bans/application.aspx). I am satisfied the requisite notice was given.

APPLICABLE LEGAL PRINCIPLES

[7] The court's inherent jurisdiction includes the power to grant a sealing or confidentiality order: *Duhamel v. Financial Institutions Commission*, 2018 BCSC 601 at para. 35. In order to persuade the court to exercise its discretion in favour of making such an order, an applicant must satisfy the two-part test set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance*), 2002 SCC 41 at paras. 53–54 [*Sierra Club*], by establishing:

1. the order is necessary in order to prevent a real and substantial risk grounded in the evidence, which poses a serious threat to an important interest in the context of litigation because reasonably alternative measures will not prevent the risk; and

2. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[8] A commercial interest can constitute an important interest warranting the protection of a sealing order; however, courts must be cautious in determining what constitutes an "important commercial interest": *Sierra Club* at para. 56. In order to

qualify as an important commercial interest, the interest in question must transcend the interest which is merely specific to the party requesting the order; it must also involve a public interest in confidentiality: *Sierra Club* at para. 55. The open court principle only yields "where the public interest in confidentiality outweighs the public interest in openness": *F.N. (Re*), 2000 SCC 35, at para. 10.

[9] In considering whether the real and substantial risk can be managed by "reasonably alternative measures", the court is required to consider not only whether reasonable alternatives to a confidentiality order are available, but also terms or approaches that limit a confidentiality order as much as is reasonably possible while preserving the important commercial interest in question: *Sierra Club* at para. 57.

IS THERE AN IMPORTANT COMMERCIAL INTEREST AT RISK?

[10] In their notice of application the applicants state that "[i]f the Costin Memos are made public, there is a real and substantial risk to the [a]pplicants' commercial interest." At the hearing, they expanded on that statement by arguing that the filing of the Costin Memos creates a serious threat of a real and substantial risk of harm to their reputation and, as a consequence, their financial viability, due to the stigma that the public may associate with the applicants' involvement in an investigation by the Securities Commission.

[11] The applicants also argue harm to an important commercial interest can be reasonably inferred from the circumstances of the Stated Case and the general public interest engaged and inherent in the statutory obligation imposed under s.11 of the *Securities Act* to keep confidential all information obtained or provided under authority of the *Securities Act*:

> **Obligation to keep information confidential**
>
> **11** (1) Every person acting under the authority of this Act must keep confidential all facts, information and records obtained or provided under this Act, or under a former enactment, except so far as the person's public duty requires or this Act permits the person to disclose them or to report or take official action on them.

> (2) Subject to subsections (3) and (4), the facts, information and records referred to in subsection (1) must be released to the Ombudsperson at the request of the Ombudsperson.
>
> (3) All facts, information and records that are obtained
>
> (a) from a law enforcement agency, or
>
> (b) pursuant to an investigation under this Act,
>
> must only be released to the Ombudsperson if the Ombudsperson first produces the written consent of
>
> (c) the law enforcement agency, or
>
> (d) the person from whom the facts, information or records were obtained pursuant to the investigation,
>
> to release the facts, information or records.
>
> (4) All facts, information and records that could lead to the identification of an informant under this Act must only be released to the Ombudsperson if the person to whom the Ombudsperson makes the request first obtains the written consent of the informant to release the facts, information or records.

[12] The applicants acknowledge there is no direct evidence of any such risk of harm but they argue such harm can be reasonably inferred based on the conclusion of Justice Saunders in *Party A v. British Columbia (Securities Commission*), 2020 BCCA 88 at para. 5:

> I am satisfied that there is potential harm to the appellants, who are the applicants today, should the fact of the investigation become broadly known. I am also satisfied that there is potential harm to the public at large from knowledge of the fact of the investigation without information as to the content of the investigation or where it is likely to lead. For example, the public at large may respond in the capital markets to information that turns out to have little impact.

[13] The circumstances of this application are distinguishable from the application before Saunders J.A. In *Party A*, the applicant filed an extensive supporting affidavit, including expert opinion evidence about the potential harm to the particular applicants in that case. The applicants argue the *Party A* decision enables me to take judicial notice that an important commercial interest is at risk whenever litigation threatens the disclosure of materials revealing investigations by the Securities Commission. I disagree. The *Sierra Club* test refers to harm “well grounded in the

evidence": *Sierra Club* at para. 46. Judicial notice of such harm is the antithesis of harm being well-grounded in the evidence.

[14] Even if the alleged harm was well-grounded in the evidence, in my view the nature of that harm is merely specific to the applicants and does not include harm encompassing a public interest component, which is necessary to constitute an important commercial interest sufficient to warrant a sealing order. The applicants rely on a decision of former Information and Privacy Commissioner David Loukidelis in *Re British Columbia Securities Commission Investigation Records,* 2000 CanLII 14417 (BC IPC), and the Court of Appeal's decision in *Shapray v. British Columbia (Securities Commission)*, 2009 BCCA 322, as support for their argument on the public interest component. However, both cases are distinguishable on their facts.

[15] *Re British Columbia Securities Commission Investigation Records* involved the Commissioner's review of the Securities Commission's refusal to provide requested information on the basis that its release could reasonably be expected to cause harm by revealing a confidential source of law enforcement information and impairing the effectiveness of the Securities Commission's investigative techniques and procedures. Similarly, in *Shapray*, the issue was whether disclosure of certain information would adversely impact the integrity of the Securities Commission's investigative process.

[16] The Securities Commission is an agent of the government with a mandate of protecting the public interest: *Securities Act*, s. 5(1); *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at para. 92, 123 D.L.R. (4th) 462. As a consequence, the public nature of the harm at issue is apparent in those cases but is lacking in the application before me. In essence, the applicants' argument is that a statutory obligation of a public body to maintain confidentiality of information, in and of itself, is sufficient to elevate a merely private commercial interest into one which embodies a public interest. I reject that argument.

[17] The applicants also argue the dismissal of the Sealing Order Application would undermine an interlocutory order of the Court of Appeal made in a related

proceeding. The applicants applied in chambers and were granted a stay, pending appeal, of the Securities Commission's decision in *Re BridgeMark Financial*, 2019 BCSECCOM 331, to release two affidavits, each containing information that significantly overlaps with the Costin Memos, to a law firm representing proposed representative plaintiffs. However, as already noted, the *BridgeMark Decision* was delivered on November 2, 2020, in which a division of the Court of Appeal dismissed the appeal and therefore the interlocutory stay order is now spent. In their supplementary written submissions, the Applicants argue the *BridgeMark Decision* has no bearing on the Sealing Order Application. In any event, dismissal of the Sealing Order Application would not interfere with the efficacy of an order of the Court of Appeal.

[18] After considering the evidence before me, the material filed and the submissions made, I conclude the applicants have failed to discharge their burden under the first stage of the *Sierra Club* test to establish there is an important commercial interest at risk. As a result of my conclusion, it is not necessary for me to address whether reasonable alternatives to a sealing order are available, or to undertake the proportionality analysis called for under the second stage of the *Sierra Club* test, and I decline to do so.

[19] The Sealing Order Application is dismissed.

"Jackson J."