COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Brar v. British Columbia (Securities Commission),* 2023 BCCA 432

Date: 20231127
Docket: CA48595

Between:

Ranvir Brar and Harjit Gahunia

Appellants
(Petitioners)

And

Alisa Smith in her Capacity as an Investigator Appointed under s. 142 of the *Securities Act*, R.S.B.C. 1996, c. 418

Respondent
(Respondent)

And

British Columbia Securities Commission

Respondent
(Applicant)

SEALED IN PART

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Abrioux
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated October 4, 2022 (*Brar v. British Columbia (Securities Commission)*, 2022 BCSC 1726, Vancouver Docket S225653).

Counsel for the Appellants:	M. Magaril
Counsel for the Respondents:	L.L. Bevan S.B. Hannigan
Place and Date of Hearing:	Vancouver, British Columbia October 24, 2023
Place and Date of Judgment:	Vancouver, British Columbia November 27, 2023

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Justice Marchand

Summary:

Petitioners were issued summonses to attend as witnesses in an investigation into various third parties pursuant to the Securities Act. Petitioners repeatedly refused to attend and Securities Commission commenced contempt proceedings. Prior to contempt proceedings, Petitioners filed a petition for judicial review of summonses objecting that they required more information than what they had received concerning the investigation. Chambers judge struck the petition on the basis that it was barred by a privative clause, s. 170 of the Securities Act. Alternatively, judge held that, in any event, any duty of procedural fairness owed to the Petitioners was "minimal" and had been discharged in the circumstances.

Held: Appeal dismissed. The weight of authority suggests that privative clauses are not a complete bar to judicial review on grounds of procedural fairness. Chambers judge therefore erred in finding that s. 170 barred the petition for judicial review. In light of that error, the CA engages the judicial review by 'stepping into the shoes' of the Court below. The summonses issued in this case represented a preliminary stage in the Commission's process that did not decide or prescribe rights, powers, privileges, immunities, duties or liabilities of the Appellants. To require the Commission to produce a record of the basis for issuance of the summonses at a preliminary stage would compromise the investigative process. The duty of fairness owed to the Appellants was minimal, and had been met in this case.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The respondent Ms. Smith is an investigator appointed pursuant to s. 142 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "Act".) Between October 2020 and January 2021, she issued summonses to the petitioners herein, Messrs. Brar and Gahunia, requiring them to attend as witnesses before an investigator in relation to an investigation commenced by the second respondent, the British Columbia Securities Commission (the "Commission".) Section 142 of the Act provides an investigator with the same power to summon witnesses as the Supreme Court of British Columbia has with respect to civil actions.

[2] The investigation was commenced by means of an investigation order ("IO") dated October 10, 2018 and amended on January 22, 2019. Following some correspondence between counsel, and the rescheduling of some interviews at their request, counsel for Messrs. Brar and Gahunia notified Ms. Smith that they would not attend the interviews. They gave no explanation. Certificates of non-appearance

were issued by the court reporter on December 15, 2020 in Mr. Brar's case, and December 16, 2020 in Mr. Gahunia's case.

[3] Shortly thereafter, Ms. Smith issued a second summons under s. 144 of the Act for an interview to take place by video conference on January 7, 2021 in Mr. Brar's case and January 11 in Mr. Gahunia's case. When Mr. Brar did not appear for the final interview as scheduled, a second certificate of non-appearance was issued on January 7, 2021. Mr. Gahunia advised that he would not attend for later scheduled dates and a second certificate of non-appearance in his case was issued on January 29. Shortly thereafter, Mr. Magaril was retained as counsel by the proposed witnesses.

[4] In June 2021, the Commission commenced contempt proceedings against Messrs. Brar and Gahunia. The proceeding was ultimately scheduled for three days commencing October 12, 2022, but on July 12, the two proposed witnesses filed a petition seeking judicial review of Ms. Smith's decision to summons them under s. 144. Their amended petition was filed in the Supreme Court on September 2, 2022 and sought the following relief, namely:

> 1. Pursuant to s. 2(2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("*JRPA*") an order, in the nature of *certiorari* reviewing the decision(s) of Alisa Smith, in her capacity as an investigator appointed under s. 142 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "Decision Maker" and the "Securities Act" respectively) exercised between on or about 01/OCT/2020 to on or about 07/JAN/2021 to summon each of the Petitioners for an interview, under oath, pursuant to s. 144(1) of the Securities Act (the "Decision").
> 2. Before the hearing of the balance of the petition, and pursuant to s. 17 of *JRPA*, an order directing that the Decision Maker file in this Court a copy of the "record of proceeding" of the Decision - as that term is defined in s. 1 of *JRPA*.
> 3. Pursuant to s. 7 of *JRPA*, an order setting aside the Decision without remitting it back to the Decision Maker to reconsider the Decision, or alternatively, with remitting the matter back to the Decision Maker to reconsider the Decision in accordance with ss. 5 and 6 of *JRPA*.
> 4. An order, pursuant to the Court's inherent jurisdiction, anonymizing the names of the Petitioners.
> 5. And such further and other relief as to this Honourable Court may seem meet and just.

[5] In their petition, Messrs. Brar and Gahunia asserted that the power to issue a summons to compel an interview is a "statutory power" as defined in s. 1 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("*JRPA*"). They objected that the decision had been made without notice to them and was based on a record they were unable to access; that the decision was "silent as to the legal test used, and what evidence, if any, was considered by the Decision Maker"; and that it was made "without any reasons, or alternatively without sufficient reasons that allow meaningful review through a judicial review." Under the heading "Factual Basis", the petitioners purported to reserve the right to add to their grounds once they had received the "record of proceeding":

> 14. The Petitioners anticipate that upon production of the record of proceedings, … additional grounds to challenge the Decision may be revealed and that this Petition may need to be amended to give proper notice of those grounds. Out of respect for the Decision Maker, the Petitioners are not making allegations in this Petition that may be clearly unsupported by the record of proceedings.

They also stated:

> 18. Here the Decision Maker made the Decision to [summons] the Petitioners, without a known mechanism for the Petitioners to internally challenge that decision short of bringing this judicial review. There are no published or oral reasons given to the Petitioners to support the Decision, and no known articulable legal test that [led] to the Decision. The Decision also fails to articulate what evidence was considered by the Decision Maker, and there is no known mechanism for obtaining the record of the proceedings. Taken together, the Decision was procedurally unfair as it failed to offer the Petitioners any meaningful opportunity to participate, review, or understand the evidence and process that lead to the issuance of the Decision. [Emphasis added.]

Finally, the petitioners pleaded that the decision in question was unreasonable within the meaning of that term as amplified in *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65.

[6] Also on September 2, 2022, the petitioners filed an application to amend their petition by adding considerable argument to the existing pleading. One new item was their objection that the Commission had specified that the proposed interviews would take place via video conference — an aspect that in the petitioners' analysis

raised a “jurisdictional” issue. The application to amend was before the chambers judge below but was not mentioned in her reasons. I have nevertheless considered the expanded arguments fully on appeal, since they were advanced in this court by the petitioners.

[7] In her response (also filed September 2, 2022) to the petition, Ms. Smith provided an “overview” of her position:

> 2. The petition arises in the context of the Commission’s petition proceedings, filed in June 2021, under s. 144(2) of the *Securities Act*, …(the Contempt Proceedings). The Contempt Proceedings seek orders that the same individuals who are the petitioners in this proceeding (collectively referred to as the Witnesses) are in contempt of court for failing to attend before a Commission investigator in response to a summons issued under s. 144(1) of the *Securities Act*. The petitioners have made no substantive response to the Commission’s allegation that they are willfully refusing to comply with a summons issued under the *Securities Act*.
>
> 3. This petition discloses no cause of action and is abusive, frivolous and vexatious for the following reasons:
>
> (a) the proceeding is expressly barred by s. 170 of the *Securities Act*;
>
> (b) there is an alternative remedy available to the Witnesses, which is to apply under the *Supreme Court Civil Rules* for an order quashing the summons, which the Witnesses have not done; and
>
> (c) the petition discloses no factual or legal basis upon which the British Columbia Supreme Court could consider an application for judicial review.

It does not appear that the Commission itself filed a response.

[8] Between September 2 and September 13, several additional filings were made. Ultimately, there were four applications before Madam Justice Murray in the Supreme Court:

1. An application by Ms. Smith for an order striking out the petition, without leave to amend, pursuant to R. 9-5(1) of the *Civil Rules*;

2. An application by Messrs. Brar and Gahunia pursuant to s. 17 of the *JRPA* to compel Ms. Smith to file a “record of proceeding” relating to the decision to call them as witnesses before the Commission;

3. An application by Messrs. Brar and Gahunia seeking a declaration that ss. 170(1) and (2) are unconstitutional and that they ought to be 'read down' to permit applications for judicial review; and

4. An application by Messrs. Brar and Gahunia seeking a disclosure order in the contempt proceedings requiring the Commission to disclose "all documents and materials in its possession that were created, or reviewed, or relied upon by [the investigator] acting under the [IOs] prior to issuing the underlying summonses…".

[9] On September 16 and 22, 2022, Murray J. heard the first three applications. In reasons indexed as 2022 BCSC 1726, she granted Ms. Smith's application to strike and dismissed the petitioners' second and third applications. The fourth was ultimately adjourned and reset for hearing before Madam Justice Shergill. It was heard together with an application for a declaration that s. 144(2) of the Act was invalid. In reasons indexed at 2023 BCSC 1122, Shergill J. dismissed both applications.

Statutory Provisions

[10] Before reviewing the chambers judge's reasons, I set out below the relevant provisions of ss. 144 and 170 of the Act:

> 144 (1) An investigator appointed under section 142, 143.1 or 147 has the same power
>
> (a) to summon and enforce the attendance of witnesses,
>
> (b) to compel witnesses to give evidence on oath or in any other manner,
>
> (b.1) to compel witnesses to preserve records and things or classes of records and things, and
>
> (c) to compel witnesses to provide information or to produce records and things and classes of records and things
>
> as the Supreme Court has for the trial of civil actions.
>
> (1.1) A summons under subsection (1), or a demand under that subsection to produce records, property, assets or things or a class of records, property, assets or things, must be served personally on the witness or, if the witness cannot be conveniently found, may be left for the witness at the individual's last or usual residence with an

occupant of the residence who appears to be at least 16 years of age.

(2) The failure or refusal of a witness

(a) to attend,

(b) to take an oath,

(c) to answer questions,

(c.1) to preserve records and things or classes of records and things in the custody, possession or control of the witness, or

(d) to provide information or to produce the records and things or classes of records and things in the custody, possession or control of the witness

makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

. . .

(4) A witness giving evidence at an investigation conducted under section 142, 143.1 or 147 may be represented by counsel.

. . .

170 (1) No action or other proceeding for damages lies and no application for judicial review under the Judicial Review Procedure Act may be instituted against the commission, a member of the commission, an officer, servant or agent of the commission, a designated organization, a director, officer, servant or agent of a designated organization, an auditor oversight body, a director, officer, servant or agent of an auditor oversight body, an employee appointed to administer this Act or any person proceeding under

(a) an order, a written or oral direction or the consent of the commission,

(b) an order of the minister made under this Act, or

(b.1) a delegation or authorization referred to in section 167.2 (1) (a) or (b),

for any act done in good faith in the

(c) performance or intended performance of any duty, or

(d) exercise or the intended exercise of any power,

under this Act, including a duty or power referred to in section 167.2 (1) (c), or for any neglect or default in the performance or exercise in good faith of that duty or power.

(2) No person has any remedies and no proceedings lie or may be brought against any person for any act done or omission made as a result of compliance with this Act, the regulations or any decision rendered under this Act.

(Section 170 was first enacted as s. 152 of the *Securities Act*, S.B.C. 1985, c. 83.)

[11] I also note the definitions of "statutory power" and "statutory power of decision" provided by s. 1 of the *JRPA*:

> "statutory power" means a power or right conferred by an enactment
>
> 1. to make a regulation, rule, bylaw or order,
> 2. to exercise a statutory power of decision,
> 3. to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
> 4. to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
> 5. to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;
>
> "statutory power of decision" means a power or right conferred by an enactment to make a decision deciding or prescribing
>
> 1. the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
> 2. the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,
>
> and includes the powers of the Provincial Court. [Emphasis added.]

[12] Also relevant is the definition of "record of the proceeding" in the *JRPA*, which term is said to include:

> (a) a declaration by which the proceeding is commenced;
>
> (b) a notice of a hearing in the proceedings;
>
> (c) an intermediate order made by the tribunal;
>
> (d) a document produced in evidence out of a hearing before the tribunal subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;
>
> (e) a transcript, of the oral evidence given at a hearing;
>
> (f) the decision of the tribunal and any reasons given. [Emphasis added.]

[13] Finally, s. 17 of the *JRPA* provides:

> On an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision, the court may direct that the record of the proceeding, or any part thereof, be filed in the court.

Chambers Judge's Reasons

[14] The chambers judge began her reasons by describing the law applicable to an application to strike a pleading under R. 9-5 of the *Civil Rules*. No issue is taken with her description of that law. She did not address the burden of proof in this context, but the law is clear that it lies on the party seeking the strike order: see *Foresters Life Insurance Company v. Bingham Group Services Corp.* 2019 BCSC 556 at para. 47; *Hildebrand v. Fox* 2008 BCCA 434 at para. 21. In this case, then, the onus lay on the respondents Ms. Smith and the Commission.

[15] Beginning her analysis at para. 11, the judge described the four arguments made by the respondents in favour of striking the petition, namely:

> 1. The proceeding is barred by s. 170 of the *SA* [the Act] and as such, discloses no reasonable claim under R. 9-5(1)(a);
> 2. The petitioners have not availed themselves of the alternative remedy of applying to quash their summons under R. 12-5(39) of the *Supreme Court Civil Rules*, making the petition unnecessary, scandalous and vexatious as per R. 9-5(1)(b) and abusive as per R. 9-5(1)(d);
> 3. The petition discloses no factual or legal basis upon which the court can consider an application for judicial review and is therefore frivolous and vexatious pursuant to R. 9-5(1)(b); and
> 4. The petition may delay the fair hearing of the contempt proceedings, contrary to R. 9-5(1)(c).

[16] She set out the relevant portions of ss. 144 and 170, noting in particular that s. 170 grants "immunity" to an investigator acting in good faith in the performance of his or her duties. (No bad faith is alleged in this case.) The petitioners submitted that s. 170 cannot remove the Court's power to review actions of the investigator for "legality, fairness and reasonableness", relying in particular on *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Hyson* 2017 NSCA 46. As the chambers judge noted, that case involved the denial of long-term disability ("LTD") to an employee of the government of Nova Scotia by a board established by a

negotiated agreement — not by statute — to administer a disability trust fund. Although the LTD plan contained a clause that purported to prohibit any court challenge of a decision of an administrator to the effect that an employee was not disabled, the agreement and related documents made it clear that the decision-maker, the Medical Board, had to "heed the principles of procedural fairness and natural justice". The Court of Appeal observed:

> As noted in *Baker [v. Canada(Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817], "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (at para. 25). Here, the Board's decision is highly important to Ms. Hyson. It is determinative as to whether she will be entitled to disability benefits, a decision with significant and long term import to her financial security. This factor also points to a higher level of procedural fairness. [At para. 40.]

The Court found that since the Medical Board had in the course of its deliberations obtained and considered information unknown to the petitioner, the duty of procedural fairness had not been met. The matter was remitted to the Board for rehearing.

[17] The chambers judge found that *Hyson* was not comparable to the case at bar, given that it arose in a very different context from that of an investigation under the *Securities Act*. She disagreed with the petitioners' argument that despite s. 170, courts can "review for fairness." In her analysis:

> ... I disagree. Absent an allegation of bad faith, the privative clause shields the respondent investigator from any action including this judicial review. The petitioners do not allege bad faith. Nor do they advance any evidence that suggests same.
>
> As such s. 170 of the *SA* is a complete bar to the petition. Accordingly, the petition must be struck pursuant to R. 9-5(1)(a). [At paras. 16–17.]

In the alternative, the judge said she was satisfied that the petition did not disclose a reasonable factual or legal basis upon which the Court could consider an application for judicial review, and was therefore "unnecessary" within the meaning of R. 9-5(1)(b). (At para. 18.)

[18] The petitioners' argument concerning procedural fairness was based primarily on a claim that they had not been provided with any information regarding what the investigator wished to question them about. The judge noted, however, that in fact they had been provided with some information about the subject-matter of the investigation: the summonses they received in October 2020 named the parties who were the *subjects* of the investigation and the petitioners were given a copy of the IO and Amended IO specifying what the subjects were being investigated for. In addition, the Commission had told the petitioners that they themselves were *not* subjects of the investigation.

[19] The petitioners contended, however, that they were owed a duty of fairness that went farther than requiring that they be given the information they had received. In their submission, procedural fairness required at a minimum that they be told "the basis of the issuance of the summons and its relevance to the subject and scope of the investigation". Again, the chambers judge did not agree. She noted the decision of the Ontario Supreme Court in *Ontario (Securities Commission) v. Biscotti* (1988) 40 B.L.R. 160, where it was said that the duty of fairness was "perhaps at its lowest in proceedings which are purely investigatory" (at para. 174); and *Morabito v. British Columbia (Securities Commission)* 2022 BCCA 279, where this court ruled that the statutory scheme of the *Act* places investigation orders — which are obviously more significant to the interests of a *subject* than that of a *witness* — at the low end of the spectrum of procedural fairness. (At para. 85).

[20] Based on these authorities, the judge inferred that any duty of fairness owed to witnesses who are not the targets of an investigation was "minimal". She then concluded:

> Overall I find that the petition is based on groundless assertions that the investigator's action in issuing the summonses was unfair and unreasonable. The petitioners' concession that they need to examine the investigator's file to search for a basis for their claims is proof of this.
>
> I conclude that the petition discloses no reasonable claim and must be struck pursuant to R. 9-5(1)(a) and (b). [At paras. 23–24; emphasis added.]

She added:

> Having considered all of the evidence, the submissions and the jurisprudence, I am satisfied that the petition must be struck pursuant to R. 9-5(1)(a) and (b).
>
> It follows that the petitioners' applications for disclosure and for a declaration pursuant to the *Constitutional Questions Act*, R.S.B.C. 1996, c. 68, filed September 2, 2022 are dismissed. [At paras. 25–26.]

On Appeal

[21] In their factum, the petitioners Messrs. Brar and Gahunia assert that the chambers judge erred as follows:

1. In misstating the legal test for striking a petition for judicial review under Rule 9-5(1)(a) and, to the extent of the provisions' overlap, 9-5(1)(b);
2. In prematurely granting the application to strike prior to production of the record of proceedings;
3. In incorrectly shifting the burden of proof to the appellants to establish that the petition should not be struck;
4. In incorrectly holding that s. 170 of the *Securities Act* constitutes a "complete bar" to the appellants' petition, both in the absence of the record and contrary to authority regarding the scope and reach of similar privative clauses, in particular where a breach of procedural fairness and/or error of jurisdiction is alleged;
5. In incorrectly holding that the appellants had failed to establish that the respondent owed them a duty of fairness, both in the absence of the record and contrary to/in the absence of authority regarding the duty's existence and scope in the circumstances;
6. In stating, contrary to logic and without providing reasons, that given that the application was struck on the basis of s. 170 of the *Securities Act*, it followed that the application for a declaration as to the constitutionality of s. 170 must be dismissed; and
7. In mischaracterizing statements by appellants' counsel to conclude that the appellants had "conceded" that they need to examine the investigator's file to search for a basis for their claims.

[22] With respect to the seventh ground of appeal concerning what the judge referred to as the petitioners' "concession" that they needed to examine the investigator's file to find a basis for their claims, I consider that whether this was a concession or simply a statement is a matter of semantics that would make no difference to the result in this case.

[23] This leaves six substantive questions on the appeal, which I would reframe as follows:

1. Did the chambers judge misstate the legal test for striking a petition for judicial review?

2. Did the chambers judge err in striking the petition prior to the production of a record of proceedings?

3. Did the chambers judge incorrectly shift the applicable burden of proof to the petitioners in deciding the petition should be struck?

4. Did the chambers judge err in holding that s. 170 of the Act constituted a "complete bar" to the petition?

5. Assuming s. 170 does not constitute a complete bar, did the chambers judge err in holding that the applicable level of procedural fairness is "minimal"?

6. Did the chambers judge err in ruling that the issuance of the summonses did not in the circumstances of this case rise to the level of unfairness comprehended by the duty of fairness?

Since the final two are obviously related and engage largely the same authorities, I will address them as part of one broader analysis rather than in separate compartments.

Analysis

Standard of Review

[24] The applicable standard of review is not controversial. It was recently described by this court in *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission*) 2021 BCCA 67. Madam Justice Dickson for the Court described it succinctly as follows:

> On an appeal from a judicial review, an appellate court must determine whether the reviewing judge identified the appropriate standard of review and applied it correctly. In undertaking this exercise, this Court steps into the

> shoes of the lower court and focuses on the administrative decision rather than the decision of the reviewing judge. Although the reasons of the judge below may be instructive and worthy of respect, an appellate court owes no deference on an appeal from a decision on judicial review: *Murray Purcha & Son Ltd. v. Barriere (District)*, 2019 BCCA 4 at paras. 3, 16, citing *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–46; *Glacier Resorts Ltd. v. British Columbia (Minister of Environment)*, 2019 BCCA 289 at para. 47. [At para. 56; emphasis added.]

[25] Where a question of procedural fairness is raised, the standard is sometimes referred to as one of correctness. (See, e.g., *Mission Institution v. Khela* 2014 SCC 24 at para. 79, and the cases cited at para. 25 of *Murray Purcha & Son Ltd. v. Barriere (District)* 2019 BCCA 4.) Mr. Justice Hunter added in *Purcha*, however, that it was not clear that the concept of standard of review *applies at all* to an allegation of breach of procedural fairness (see para. 26), noting the comment of the Federal Court at para. 44 of *Canadian Pacific Railway Company v. Canada (Attorney General)* 2018 FCA 69 that "the standard of review is applied to consideration of *outcomes,* and, as a doctrine, is not applied to the *procedure by which they are reached*." (My emphasis.) Similarly, Binnie J. had stated for the majority in *C.U.P.E. v. Ontario (Minister of Labour)* 2003 SCC 29 that "The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas a standard of review is applied to the end product of his deliberations." (At para. 102.) And, in *Brooks v. Ontario Racing Commission* 2017 ONCA 833, the Court observed:

> Before turning to the issues, there is the question of the appropriate standard of review. When considering an allegation of a breach of procedural fairness or natural justice, no standard of review analysis is necessary. Rather, the court is only required to analyze whether the rules of procedural fairness or natural justice have been adhered to. ... [At para. 5; emphasis added.]

[26] The Court in *Purcha* concluded at para. 28 that whether expressed as a standard of review or simply the standard by which procedural fairness is assessed, no deference is owed to the decision-maker in determining whether the duty of procedural fairness has been met. Accordingly, in *R.N.L. Investments,* Dickson J.A. stated that the standard of review on questions of procedural fairness is "correctness, sometimes termed 'fairness'." (At para. 57.)

The Legal Test for Striking a Petition for Judicial Review

[27] As we have seen, the chambers judge enunciated, correctly, the test for striking a claim in an ordinary civil action under R. 9-5(1)(a) of the Supreme Court Civil Rules — whether it is "plain and obvious, assuming the facts pleaded are true, that the claim discloses no reasonable cause of action and has no reasonable prospect of success." (Citing *R. v. Imperial Tobacco Canada Ltd.* 2011 SCC 42 at para. 17.) With respect to R. 9(5)(1)(b), the judge quoted from para. 20 of *Willow v. Chong* 2013 BCSC 1083:

> Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule [R. 9-5(1)(b)] may be supported by evidence. [Quoted at para. 9.]

[28] The petitioners point out, however, that a somewhat different formulation applies where the application is to strike a *petition for judicial review* as opposed to a notice of civil claim. Mr. Justice Groberman for the Court described the difference in *E.B. v. Director of Child, Family and Community Services* 2016 BCCA 66:

> ... The test must be modified, somewhat, when the application is to strike a petition rather than a Notice of Civil Claim. A petition need not disclose a "cause of action", but must set out a foundation for a type of proceeding authorized to be brought by petition. Accordingly, the correct inquiry under Rule 9-5(1)(a) in this case is whether the petition disclosed the type of claim that may be brought by petition. [At para. 42; emphasis added.]

(See also *Ngalim v. Insurance Corporation of British Columbia* 2022 BCSC 1822 at paras. 7–9.)

[29] For their part, the respondents submit that the reasons of the chambers judge make it clear that she "understood this was a petition proceeding and not a claim" and that she applied the correct principles in applying the test under R. 9-5(1) to the petition for judicial review before her.

[30] I agree with the respondents that the chambers judge was clearly aware from the pleadings that Ms. Smith's issuance of the summonses depended on the provisions of the *Securities Act*, which gave her the authority to issue an IO, to issue summonses to Messrs. Brar and Gahunia to appear as witnesses, and then to initiate contempt proceedings against them when they failed to appear. The chambers judge quoted the relevant sections of the Act and found that the petition was barred by s. 170 absent an allegation of bad faith; and in the alternative, that the petition did not disclose "*a reasonable factual or legal basis upon which the court can consider an application for judicial review.*" (At para. 18; my emphasis.) In my respectful view, her analysis captured the essence of the necessary test for striking the petition.

[31] I would not accede to this ground of appeal.

Premature Striking Without Record?

[32] The petitioners assert that the chambers judge erred by prematurely granting Ms. Smith's application to strike when there was no "record of proceeding" before the Court. On this point, the petitioners relied on *Eidsvik v. Canada (Fisheries and Oceans)* 2011 FC 940. *Eidsvik* was an unusual case in that the (unrepresented) applicant was seeking judicial review of the Ministry's *course of conduct* in issuing fishing licenses to certain First Nations groups under a program that permitted them to sell the fish they caught. The Court found it "tempting" to agree with the Ministry that the application was an abuse of process, since the same issue had been decided by other courts, but acknowledged that if the applicant was able to "fully develop" the record before the Court and to state his case with greater precision, the conditions necessary for the Court to consider the Ministry's motion to strike would be met. (At para. 44.) I do not read *Eidsvik* as relevant to the production of any document qualifying as a "record of proceeding" (as defined in the *JRPA*) in this case. Rather, the Court was giving the applicant the opportunity to state his complaint more clearly so that the Court could determine whether it had already been addressed in the previous cases. Here, the petitioners are represented by counsel and their case is fully pleaded and developed.

[33] The respondents submit that the petitioners' argument is grounded in an erroneous assumption that the decision to issue the summonses was the exercise of a "statutory power of decision" and is therefore subject to judicial review. (As seen at para. 10 above, s. 17 of the *JRPA* allows the Court to order the filing of a record of proceeding "on an application for a judicial review of a decision made in the exercise or purported exercise of *a statutory power of decision*" — a defined term.) They say further that the issuance of the summonses did not decide the "legal rights, powers, privileges, immunities, duties or liabilities of a person, or … the eligibility of a person to receive, or to continue to receive, a benefit or license, whether or not the person is legally entitled to it."

[34] In support, the respondents cite several cases in which courts have differentiated between "technical steps" taken by staff or other agents early in an investigative process that may or may not lead to more substantive decisions, and the ultimate decisions that do directly affect the rights of individuals. These cases include *McLean v. Township of Springwater* 2017 ONSC 520 at para. 23; *Barrington v. Institute of Chartered Accountants* 2004 CanLII 34623 at paras. 5–8 (Ont. S.C.); *Pierce v. Law Society of British Columbia* (1993) 103 D.L.R. (4th) 233 at para. 69; and *A Lawyer v. Law Society of British Columbia* 2021 BCSC 914 at paras. 92–3. In the latter case, for example, Mr. Justice Majawa ruled that:

> …the decision to issue the R. 4-55 Order is an administrative decision made in the preliminary stages of a statutory process. This decision to commence an investigation does not decide or prescribe any of the petitioner's legal rights, powers, privileges, immunities, duties or liabilities. The outcome of the Law Society's investigation pursuant to the R. 4-55 Order has not yet been determined. It may not proceed to the point where a decision is made that will effect or prescribe the petitioner's rights, powers, privileges, etc. The Law Society will only be in a position to make such a statutory power decision when, or if, the matter proceeds to a hearing panel. [At para. 97.]

[35] In my respectful view, similar reasoning applies in this case: Ms. Smith's decision to issue the summonses to the petitioners was made in the "preliminary stages of a statutory process." Although the summons might be said to create a "duty", no existing rights, powers or privileges of the petitioners are being decided or prescribed. The petitioners are simply being asked to answer questions, with

counsel present, that may or may not assist in the investigation of the subjects. As this court stated in *Morabito,* while the Commission's investigators have "broad authority to 'investigate, inquire into, inspect and examine' records, transactions, property and relationships between individuals", they "do not have decision-making authority, and are empowered only to investigate and report their findings to the Commission." (At para. 8.)

[36] The definition of "record of proceeding" in the *JRPA* (quoted above at para. 12) also supports the notion that Ms. Smith's decision is not of the type intended to be the subject of judicial review. The definition does not purport to be exhaustive, but the documents listed are obviously those created at later stages of a process leading to or relating to a hearing. In particular, the reference to an "intermediate" order would suggest that an *initiating* document, where one exists, underlying a summons to a possible witness was not intended to be included.

[37] In the absence of any authority that provides substantive support for the petitioners' position, then, I am of the view that the decision of an investigator to summons possible witnesses in connection with an IO is not the kind of decision that is subject to judicial review. It is simply a step taken by the investigating staff of the Commission at the earliest stage of a process that may or may not lead to further steps with legal consequences for the subjects of the investigation. No such consequences affecting the *witnesses* have been suggested.

[38] Ordinarily, the petitioners' appeal could be decided on this basis. However, I acknowledge that whether a duty of fairness applies at the investigative stage is a question that has "changed over time" (see D.P. Jones and A.S. de Villars, *Principles of Administrative Law* (7th ed., 2020)) and that further evolution may yet occur. Accordingly, I would prefer not to decide this appeal on the basis of a conclusion that procedural fairness does not apply to Ms. Smith's decision to issue the summonses. Rather, I propose to decide the appeal on the merits of the broader issues of principle that occupied most of counsels' submissions — whether s. 170 bars judicial review and if not, whether the duty of procedural of fairness was

complied with in this case. I will therefore assume for purposes of these reasons that Ms. Smith's decision *is* one that is subject to judicial review, and to move to the remaining grounds of appeal.

Burden of Proof Shifted?

[39] The petitioners assert that the chambers judge erroneously shifted the burden of proof on the strike motion from the respondents to the petitioners. On this point, they note the statement at para. 21 of her reasons:

> That aside, the fundamental issue with this argument is that the petitioners have failed to establish that they are owed a duty of fairness. While the petitioners insist that there "must be a duty of fairness" that at a minimum includes advising them as to the basis of the issuance of the summons and "its relevance to the subject and scope of the investigation", they fail to provide a basis in law for that position. [Emphasis added.]

[40] I agree with the petitioners that the judge may have shifted the burden of proof, although it is unlikely to have made a difference to the final result. In any event, since this court on an appeal 'steps into the shoes' of the judge below, we are in a position to address the strike motion from the correct point of view — i.e., assuming the petition is valid unless *the respondents* persuade us that no duty of fairness is owed to the petitioners or that the petition must otherwise fail.

Effect of s. 170

[41] It appears from para. 16 of the chambers judge's reasons that she based her conclusion that s. 170 barred the application before her simply on its very broad wording. I agree that on its face, the provision does seem to bar *any* challenge to a decision made under the Act except a decision not made in good faith. But as the history of administrative law in Canada demonstrates, the existence of a privative or "preclusive" clause in legislation does not bar superior courts from reviewing (as they did historically by means of the writs of *certiorari* and *mandamus*), the exercise of administrative authority by public officials — whether for reasons relating to what used to be called "jurisdiction" or, in more modern times, relating to whether the decision is both justifiable and justified. (See *Vavilov* at para. 95.)

[42] It will be recalled that in *Vavilov*, the Court preserved a category of cases in which the standard of correctness applies in order to respect "the unique role of the judiciary in interpreting the Constitution and [to ensure] that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary" (at para. 53), while leaving all other questions subject to a standard of reasonableness. In the analysis of the majority, however, reasonableness review also has a constitutional purpose:

> ... to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law ... [At para. 82; emphasis added.]

The majority acknowledged that the requirements of procedural fairness in a given case will affect how a court conducts a reasonableness review (at para. 76) and went on to emphasize at para. 77 that the duty of fairness in administrative law is "'eminently variable,' inherently flexible and context-specific" — a proposition I will return to below.

[43] Ultimately, as noted by Donald J.M. Brown, Q.C. and John M. Evans in *Judicial Review of Administrative Action in Canada* (2023, loose-leaf ed.), it is "the responsibility of the courts, constitutionally located at arm's-length from the Executive, to ensure that governmental action complies with the law." (At §13:60.) Privative clauses, therefore, cannot completely insulate an administrative body from judicial review:

> … [C]ourts have been resistant to legislative provisions that limit or remove the jurisdiction of the superior courts to review the legality of governmental action, and have construed some preclusive clauses so narrowly as to give them minimal effect, if any. Even the most explicit provisions—the so called "no-*certiorari*" clauses—are interpreted as preserving the courts' power to set aside an administrative decision on the ground that it was made in excess of a tribunal's jurisdiction, including a breach of the duty of fairness. Indeed, preclusive clauses which are interpreted as protecting tribunals from all judicial review, even for jurisdictional error, are unconstitutional. [At §13:60; emphasis added.]

The authors cite *New Brunswick (Board of Management) v. Dunsmuir* 2008 SCC 9 at para. 31, and *Crevier v. Quebec (Attorney General)* [1981] 2 S.C.R. 220; see also

Vavilov at para. 24. Many other cases could be cited, but the weight of authority clearly supports the proposition that a privative clause such as s. 170 does not prohibit judicial review on the grounds of procedural unfairness. I therefore disagree, respectfully, with the chambers judge on this issue.

[44] Having done so, I do not find it necessary to consider the petitioners' alternative argument that the judge erred in dismissing the application to declare s. 170 unconstitutional. I turn now to the chambers judge's alternative conclusions, which engage the final two issues on appeal.

"Minimal" Level of fairness?

[45] The leading Canadian case on the content or "level" of procedural fairness required in judicial review is *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817. As seen earlier, the Court observed at para. 22 that the content of the duty is "flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected," citing *Knight v. Indian Head School Division No. 19* [1990] 1 S.C.R. 653 at 682. Speaking for the majority in *Baker*, Justice L'Heureux-Dubé noted various factors that are relevant to determining what is required in a given set of circumstances. The first of these was the "nature of the decision and the process followed in making it". In the majority's words:

> The more the process provided for, the function of the tribunal, the nature of the decision-making body and the determinations that must be made to reach a decision resemble judicial decision making, the more likely that it is that the more likely it is that procedural protections closely to the trial model will be required ….

Other factors were the statutory scheme, including whether an appeal procedure is provided; the importance of the decision to the individuals affected; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the decision-making agency itself. (See paras. 23–7.)

[46] Applying these criteria to the case at bar, the "nature" of the decision to summons witnesses in connection with an IO and the process followed in making

that decision, does not resemble judicial decision-making in any way. In *Morabito*, this court briefly summarized how investigations and hearings are initiated and how they proceed in practice under the Act, *The Securities Regulation* (B.C. Reg. 196/97) and the Commission's published policies. At para. 6, the Court noted that the investigative, adjudicative and enforcement functions of the Commission are kept separate and that under s. 7(4), an investigator may not be included in the panel sitting on the hearing. As well, it was noted that an IO may be made without prior notice to the subject thereof. Much more detailed provisions apply once the investigator has completed his or her report, and of course, at the hearing stage. Again as stated in *Morabito*:

> … the statutory scheme in this case, the *Baker* factors, and the relevant authorities place investigation orders made under s. 142 of the *Securities Act* at the low end of the spectrum of procedural fairness. In this sense, they may be distinguished from asset freeze orders. An investigation order is not "final" in any sense; it merely initiates an investigation that may or may not have legal consequences for the subject. *If and when* a hearing is ordered, the legal position changes: the subject is in jeopardy in the form of a penalty or other legal sanction under the Act. The subject is informed of the allegations against him or her and (as seen earlier) is obviously entitled to disclosure of the investigator's case, and to be heard — with or without counsel — and to testify and adduce evidence at the hearing.
>
> The evidentiary standard to be met for the issuance of an investigation order is a low one. As suggested in *Exchange Bank and Trust*, as long as some basis — as opposed to mere speculation — is shown for the possibility that a breach of the Act may have occurred, is occurring or may occur in future, the order may be made.
>
> …
>
> ... The legal significance of the investigation order to the subject is low in comparison to final orders made following a hearing, and in comparison to freeze orders. The latter types of order affect rights of the subject and potentially others. An investigation order may affect the privacy of the subject, but according to the Court in *Branch*, participants in securities markets can have little or no expectation of privacy in their investment activities. The Supreme Court has also recognized that investigations are basically the only tool available to government authorities in regulating the securities industry, where "asymmetries of information" are "endemic": *Branch* at paras. 77, 80. [At paras. 85–6 and 88; emphasis by underlining added.]

[47] Returning to the remaining factors listed in *Baker*, the importance of the investigator's decision to summons witnesses should normally be low, given that they are simply being asked to answer questions and are not the subjects of the

investigation. The petitioners did not assert any special circumstance that would displace this assumption. Further, reasonable members of the public would not, in my view, expect at the first stage of the investigation that prospective witnesses would be provided with information, if any existed, relating to how the Commission expects to proceed *if* a hearing is ultimately ordered.

[48] Another seminal decision relevant to the case at bar is *British Columbia Securities Commission v. Branch* [1995] 2 S.C.R. 3. It arose in the securities context, although its primary focus was a challenge under ss. 7, 8 and 13 of the *Charter*. For purposes of their analysis, the majority, *per* Sopinka and Iacobucci JJ., reviewed the purposes of securities legislation generally and of investigations under the Act in particular. The majority wrote that:

> ... The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry. Often such inquiries result in proceedings which are essentially of a civil nature. The inquiry is of the type permitted by our law as it serves an obvious social utility. Hence, the predominant purpose of the inquiry is to obtain the relevant evidence for the purpose of the instant proceedings, and *not* to incriminate Branch and Levitt. ... [At para. 35; emphasis by underlining added.]

The majority went on to observe that persons involved in the business of trading securities “do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation. It is widely known and accepted that the industry is well regulated.” (At para. 58.) The majority also endorsed the comments of Wilson J. in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 S.C.R. 425 that “At some point the individual’s interest in privacy must give way to the broader state interest in having the information or document disclosed.” (*Branch* at para. 59.)

[49] Justice L'Heureux-Dubé, concurring in *Branch*, also stressed the public importance of a well-regulated securities industry and the necessity for the ability to compel the attendance of witnesses "given the profound asymmetry of information facing securities regulators, the close relationship between such investigatory powers and the obligations voluntarily undertaken by those participating in this regulated activity, and the lack of a less intrusive alternative means to investigate and deter market irregularities and improper conduct by market players." (At para. 82.) She continued:

> I find additional support for this conclusion in the following four considerations: (1) these kinds of inquiries are purely administrative in nature and do not adjudicate upon the guilt or innocence of the subject of the investigation; (2) it is generally a matter of speculation at the time of the testimony to know whether the compelled witness is speaking for himself or for the company, and whether the information disclosed could lead the state to take action against the individual or the company; (3) at the outset of an investigation, it is often uncertain whether any breach of the law has even occurred and, if so, whether any persons summoned may be implicated in this breach; and (4) even if the individual is shown by the investigation to be implicated in a breach and the state decides to take further action, it is far from certain that this action will entail the possibility of a deprivation of liberty, thereby bringing the state action within the purview of s. 7 of the *Charter*.... [At para. 83; emphasis added.]

[50] In *Morabito*, this court considered both *Baker* and *Branch* in analyzing the content of the duty of procedural fairness applicable to the issuance of an IO. I set out again the Court's words:

> An investigation order is not "final" in any sense; it merely initiates an investigation that may or may not have legal consequences for the subject. If and when a hearing is ordered, the legal position changes: the subject is in jeopardy in the form of a penalty or other legal sanction under the Act. The subject is informed of the allegations against him or her and (as seen earlier) is obviously entitled to disclosure of the investigator's case, and to be heard — with or without counsel — and to testify and adduce evidence at the hearing.
>
> The evidentiary standard to be met for the issuance of an investigation order is a low one. As suggested in *Exchange Bank and Trust*, as long as some basis — as opposed to mere speculation — is shown for the possibility that a breach of the Act may have occurred, is occurring or may occur in future, the order may be made. ... [At paras. 85–6; emphasis added.]

[51] The Court also suggested at para. 89 some "practical" considerations that militated in favour of the conclusion that the subject of an investigation is not entitled to require the Commission to justify an IO before the investigation has been completed. Placing the onus on the Commission, it was said, would normally require the investigator to disclose what the investigation had shown so far and what he or she expected it would show as it progressed. Such disclosure might open the door for the subjects of such orders to take evasive action and many investigations would grind to a halt or bog down into "pre-hearings" that would delay and distract the Commission from completing the investigation. (At para. 89.)

[52] I also note an older case, *British Columbia (Securities Commission) v. Imbeault* 1998 CanLII 1716 (B.C.S.C.) in connection with the 'practicalities' of summonsing witnesses. In that instance, Mr. Justice E.R.A. Edwards had before him four respondents who had been served with summonses to appear and answer questions under s. 144. One argument made on their behalf was that they might have "nothing material to offer by way of evidence respecting the matters under investigation." In response, the Commission argued that the investigator "had to start somewhere" and that the Commission's investigative powers under the Act could be defeated if a prospective witness, by remaining silent and ignoring a summons, could "shift the onus to the [Commission] to establish the materiality of a witness's evidence." (At para. 24.) Edwards J. agreed, and went on to observe:

> To give effect to the investigatory provisions of the *Act*, consistent with the observations of the Supreme Court of Canada in *Branch* about the public interest they serve, those provisions must be interpreted to permit the investigators to compel anyone who may have material evidence to testify. If investigators encounter a janitor in an abandoned "bucket shop" they must be entitled to enquire whether the former occupants are known to that person or have left a forwarding address, without having to establish that the janitor in fact knows something about the former occupants. [At para. 25; emphasis added.]

In the case at bar, of course, the proposed witnesses are not even subjects of the Commission's investigation. That investigation 'has to start somewhere'. As the respondents argue, the petitioners can surely have no greater right to require the Commission to justify a summons than do the actual targets of the IO.

[53] In the end, *proceeding on the assumption* for purposes of this appeal that the breach of the duty of fairness by an investigator in summonsing a potential witness may properly be the subject of judicial review, I conclude that any such duty is "minimal" and that it has been met in this case. The witnesses have been given prior notice of the hearing at which they were to be questioned; they have been informed of the identity of the subjects of the investigation; and they have the right to counsel before and at the hearing. I further consider that if the Commission were required to disclose further information or to provide a "record" at this early stage, the practical consequences might well be to 'bog down' or compromise the investigation — as well as to raise possible privacy consequences for the subjects of the investigation.

[54] I am persuaded that no breach of procedural fairness occurred in this instance and that neither Ms. Smith nor the Commission was required to disclose the "basis for the issuance" of the summonses or their relevance to the "subject and scope" of the investigation.

Disposition

[55] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Abrioux"

I agree:

"The Honourable Justice Marchand"