IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lamarche v. British Columbia (Securities Commission),* 2024 BCSC 1137

Date: 20240628
Docket: S236673
Registry: Vancouver

Between:

Jean Andre Lamarche

Plaintiff

And

British Columbia Securities Commission
Attorney General of British Columbia
Attorney General of Canada

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page on July 3, 2024.

Before: The Honourable Justice MacDonald

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J. Narwal, KC F. Karimi
Counsel for the Defendants:	K.A. Blok M.S. Smith
Place and Date of Trial/Hearing:	Vancouver, B.C. March 7, 2024 May 10, 2024
Place and Date of Judgment:	Vancouver, B.C. June 28, 2024

Table of Contents

Overview

[1] This is an application by the British Columbia Securities Commission (the "Commission") arguing that a Notice of Civil Claim ("NOCC") filed by Jean Andre LaMarche, the plaintiff, is premature due to an ongoing administrative process at the Commission. Central to this application is the question of whether this Court should stay and strike aspects of the NOCC in light of the ongoing administrative proceeding. In light of applicable constitutional questions, the Attorney Generals of Canada and British Columbia have been advised of the application but take no position on it.

[2] In December 2022, Mr. LaMarche was issued a notice of hearing ("NOH") from the Commission, in which it was alleged that he had engaged in unregistered trading and advising in violation of the *Securities Act,* R.S.B.C. 1996, c. 418. Pursuant to s. 144 of the *Securities Act*, an investigator for the Commission requested that Shaw Communication Inc. ("Shaw") produce certain records of the plaintiff. Although the plaintiff is represented by counsel, there were no limitations or restrictions applied to the records' request to protect solicitor-client privilege ("SCP").

[3] The plaintiff brought an action in this Court seeking a declaration pursuant to s. 52 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Constitution*] that s. 144 of the *Securities Act* is unconstitutional to the extent that it creates an impermissible risk that communications protected by SCP will be compromised. He claims his rights under the *Charter of Rights and Freedoms* [*Charter*], particularly ss. 7 and 8, have been violated.

[4] The Commission takes the position that the plaintiff is attempting to bypass its internal processes. More specifically, the Commission seeks an order staying the plaintiff's constitutional claims and striking the plaintiff's claims for damages, including punitive damages and damages under the *Charter* and the *Privacy Act*, R.S.B.C. 1996, c. 373*,* insofar as they disclose no reasonable claim, without leave to amend. In the alternative, the Commission seeks that the claims for damages be stayed pending completion of the Commission proceedings. The plaintiff agrees that,

absent exceptional circumstances, a party should not apply to a Superior Court for a remedy until administrative resort has been exhausted. The plaintiff argues, however, that exceptional circumstances exist in this case to the extent that the matter concerns the protection of SCP.

[5] For the Reasons that follow, this case does not raise exceptional circumstances that would permit resort to this Court prior to the exhaustion of administrative remedies. The plaintiff's constitutional claims, including damages under s. 24(1) of the *Charter*, are stayed. His claims for punitive damages and damages under the *Privacy Act* are struck, without leave to amend.

Background

[6] The factual history to this dispute is not contentious. The facts are set out in the Commissioner's notice of application (the "Commission NOA") as follows:

> 1. On December 18, 2022, the executive director of the Commission issued a NOH against the plaintiff.
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> 2. The NOH alleges that the plaintiff violated sections 34(a) and (b) of the *Securities Act* by engaging in unregistered trading and advising over a four-year period in relation to 17 investors.
>
> 3. On June 21, 2023, the plaintiff filed a Notice of Application and Constitutional Question in the Supreme Court Criminal Registry returnable on the "OTR" FXD list for June 29, 2023.
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> 4. On July 25, 2023, the Commission filed the Commission NOA requesting that the Court decline jurisdiction to hear the Notice of Application and that the proceeding be stayed.
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> 5. On September 21, 2023, the Commission NOA was scheduled to be heard. At that time, the Court and counsel for the Attorney General raised concerns about the Court's jurisdiction to hear the application given the manner in which the Plaintiff commenced the proceedings.

As a result, the proceedings were adjourned to a previously scheduled appearance in "OTR" court on September 27, 2023.

6. On September 27, 2023, the plaintiff abandoned his Notice of Application. The Commission's NOA was abandoned as a result.

7. On September 28, 2023, the plaintiff filed this NOCC. The NOCC raises the same allegations raised in the Notice of Application, with the addition of the *Privacy Act* complaint and claims for damages.

8. On December 5, 2023, Associate Judge Harper granted the applicant's application to delay the filing of their response to notice of civil claim until 14 days after the court hears and decides the current application.

Parties' Positions

[7] The Commission argues that it is an impartial, quasi-judicial body with authority to adjudicate legal disputes. It has jurisdiction and the necessary resources to determine the constitutional issues, as well as questions of SCP, when they arise in proceedings before it. The Commission argues it is best placed to determine the issues. It can create a fulsome record imbued with its expertise and knowledge in the highly specialized realm of securities regulation.

[8] The Commission also argues that while the constitutional issues are currently not before the Commission, the plaintiff can raise them there and should not be permitted to take an end run around the Commission proceedings by launching a pre-emptive collateral attack.

[9] The Commission contends that pursuant to s. 8 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, Rules 9-5(1)(b) and (d) of the *Supreme Court Civil Rules*, BC Reg 168/2009 [*Rules*] and the court's inherent jurisdiction, this Court should exercise its jurisdiction to stay the constitutional issues raised in the NOCC and allow the Commission to hear the respondent's application should he choose to proceed in that venue. The Commission argues the court should stay the claim as unnecessary

and an abuse of process. The Commission advises that it can grant the remedy the plaintiff seeks under s. 24 of the *Charter* – a stay of the Commission proceedings – if it finds the plaintiff's ss. 7 and 8 rights were violated.

[10] The plaintiff opposed the relief sought by the Commission and emphasizes that s. 144 of the *Securities Act* provides the investigator for the Commission "breathtaking powers" to seize records. He points out there are no limits in the legislation or the regulations. In his NOCC, the plaintiff seeks a declaration his ss. 7 and 8 *Charter* rights were breached by the Commission's unreasonable search and seizure of his privileged communications. Under s. 24(1) of the *Charter*, the plaintiff seeks a judicial stay of the proceedings before the Commission and damages. He also seeks damages, including punitive damages and damages under the *Privacy Act*.

[11] The plaintiff argues that the Commission has no specialized expertise regarding SCP and it is not vested with the power to adjudicate claims of SCP. It also has no jurisdiction to determine privacy issues. The circumstances are, the plaintiff continues, exceptional and I should exercise my discretion to allow the claim to continue in this Court.

Issues

[12] The two main issues before me are:

a) whether the instant circumstances are exceptional such that the NOCC may be allowed to proceed in this Court; and

b) whether the damages aspects of the claim should be struck under R. 9-5(1).

Statutory Framework

[13] The Commission is an independent provincial government agency and Crown Corporation responsible for regulating capital markets in British Columbia through the administration of the *Securities Act*. The Commission's mandate includes

protecting investors, ensuring public confidence, and facilitating capital and financial market efficiencies. The Commission consists of Commissioners and Commission staff, headed by an Executive Director who is appointed by the Commission. The Commission has an Enforcement Division, which was created to investigate conduct that is potentially contrary to the *Securities Act* and to take steps to ensure legislative and regulatory compliance. To that end, hearings are conducted and the Commission is explicitly provided with authority to hear and decide constitutional questions.

[14] Section 4.1 of the *Securities Act* provides that s. 43 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] applies to the Commission. Section 43 of the *ATA* states, in part: "The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions."

[15] Section 144 of the *Securities Act* provides:

> (1) An investigator appointed under section 142, 143.1 or 147 has the same power
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> > (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.
>
> (1.2) Despite subsection (1.1), if
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> > (a) the person to be served by personal service is evading service, or
> >
> > (b) after a diligent search,
> >
> > > (i) the person to be served by personal service cannot be found, or

> (ii) the last or usual residence of the person cannot be found or is unoccupied,
>
> the commission may make an order that the document may be served by substituted service in accordance with the order.
>
> (1.3) If a document is to be served by substituted service permitted under subsection (1.2), a copy of the substituted service order that granted permission to use that substituted method must be served with the document unless
>
> (a) the commission orders otherwise, or
>
> (b) the substituted service permitted under subsection (1.2) is service by advertisement.
>
> (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.
>
> (3) Section 34 of the Evidence Act does not exempt any financial institution, as defined in that section of that Act, or any officer or employee of the institution from the operation of this section.
>
> (4) A witness giving evidence at an investigation conducted under section 142, 143.1 or 147 may be represented by counsel.

[16] The *Securities Act* provides that, subject to certain exceptions, a person directly affected by a decision of the Commission may, with leave, appeal to the Court of Appeal: s. 167(1). In *Dunn v. British Columbia (Securities Commission)*, 2023 BCCA 451, Justice Willcock summarized the principles articulated in *Smolensky v. British Columbia Securities Commission*, 2006 BCCA 254 and *Party A v. British Columbia (Securities Commission)*, 2020 BCCA 382 (Chambers). He determined that the factors to be considered on an application for leave to appeal from a decision of the Commission include, *inter alia*:

(1) whether the point on appeal is of significance both to the litigation before the court and to practice in general;

(2) whether the appellant has an arguable case of sufficient merit;

(3) the benefit to the parties of an appellate decision in practical terms; and

(4) most importantly, whether the appeal will unduly hinder the progress of the action.

[17] The overarching consideration is the interests of justice: *Party A* at para. 29. There is no right to leave.

[18] Rule 9-5(1) of the *Rules* provides:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Exceptional Circumstances

Legal Principles

[19] Absent exceptional circumstances, litigants should exhaust administrative remedies before applying to court for a remedy. The leading case on the exhaustion of internal remedies is *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61 where the court held:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have

> been exhausted. The importance of this rule in Canadian administrative law is well demonstrated by the large number of decisions of the Supreme Court of Canada on point: [Citations omitted].
>
> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> …
>
> [33] … Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted:…
>
> [Emphasis Added.]

[20] Likewise, in *Vancouver (City) v. British Columbia (Assessment Appeal Board, Assessor of Area No. 09 – Vancouver)*, 1996 CanLII 1076 (BC CA), 135 D.L.R. (4th) 48, the Court of Appeal held that:

> [26] The general rule seems clear in both criminal and civil proceedings: a tribunal should be permitted to complete its process and to render its final decision before judicial review is entertained. This rule is founded in the time-honoured principle that a tribunal, such as the Board in this case, is established to fulfil the statutory functions it is assigned. The Board should be seen as the master of its own process, and that process should not be interfered with by the courts until a final decision is rendered, lest there be one court application after another, which would clearly frustrate the Board's mandate and its legislative purpose.
>
> …
>
> [57] The principle shows deference to the administrative tribunal, prevents the inefficient fracturing of the decision-making process, and avoids

> expending judicial resources before a final administrative decision is made that may well vindicate the petitioners.

[21] There are six factors typically canvassed in assessing exceptionality, recently set out by the Court of Appeal in *Chu v. British Columbia (Police Complaint Commissioner)*, 2021 BCCA 174:

> [66] Factors to consider in determining whether the Court's discretion to intervene early, which have been described under the rubric of "special" or "exceptional circumstances", may include hardship or prejudice to the applicant; waste of resources; delay if judicial review proceeds; fragmentation of proceedings; the strength of the case; and the statutory context: *Thielmann v. Association of Professional Engineers and Geoscientists of the Province of Manitoba,* 2020 MBCA 8 at para. 50; *ICBC v. Yuan,* 2009 BCCA 279 [*Yuan*] at paras. 23–24. The analysis is flexible and does not necessarily turn on a single factor: *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49 [*Hill*] at para. 36; *Thielmann* at para. 49.

[22] These principles apply to constitutional issues. Where another body has jurisdiction over constitutional questions, and expertise and experience in the subject matter, superior courts should decline jurisdiction if the alternate venue has a "reasonably effective procedure" for adjudication of the issues: *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, 1993 CanLII 137 (SCC). While superior courts always have jurisdiction to hear *Charter* claims, they should decline to do so where the legislature has provided a specific and effective means to have the constitutional issue determined: *R. v. Conway*, 2010 SCC 22 at para. 22.

[23] Specialized tribunals with expertise over the subject matter and authority to decide questions of law are viewed as being in the best position to hear and determine the constitutionality of the statute they are empowered to administer: *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),* [1991] 2 S.C.R. 5 at para. 16, 1991 CanLII 57 (SCC). Where tribunals have explicit authority to decide *Charter* issues, they are considered courts of competent jurisdiction able to provide s. 24 remedies. They cannot, however, grant a general declaration of invalidity: *Cuddy Chicks* at para. 17.

[24] In the context of an alleged *Charter* breach, the Supreme Court of Canada has emphasized that the "factual findings and record compiled by an administrative

tribunal, as well as its informed and expert view of the various issues raised by the constitutional challenge, will often be invaluable to the reviewing court": *Nova Scotia (Worker's Compensation Board)* v. *Martin,* 2003 SCC 54 at para. 30. It is important that *Charter* issues be decided in the context in which they arise as "a particular right or freedom may have a different value depending on the context": *Edmonton Journal v. Alberta (AG),* [1989] 2 S.C.R. 1326 at 1355-6, 1989 CanLII 20 (SCC). For this reason, even where tribunals do not have explicit authority to apply the *Charter* they are required to consider *Charter* values when interpreting statutes: *Doré v. Barreau du Quebec,* 2012 SCC 12 at paras. 29 and 35.

[25] Ultimately, the *Charter* should not and must not serve as a loophole to the proposition that administrative remedies should be exhausted before resort to a court, however formulated. To do so would result in every administrative proceeding being set aside in favour of courts deciding constitutional issues: *DioGuardi Tax Law v. Law Society of Upper Canada*, 2015 ONSC 3430 at para. 12, aff'd 2016 ONCA 531 [*DioGuardi ONSC*].

[26] Beyond the exhaustion of internal administrative remedies, where an effective remedy is available in a forum which has jurisdiction over the subject matter of the claim, the cause of action is unnecessary and may be stayed pursuant to Rule 9-5(1)(b) [formerly, Rule 19(24)(b)]: *Moore v. British Columbia*, 1988 CanLII 184 (BC CA), 50 D.L.R. (4th) 29, leave to appeal to SCC ref'd, [1988] S.C.C.A. No. 157.

[27] Rule 9-5(1)(d) also permits a stay of proceedings where the proceeding is unnecessary, scandalous, frivolous, vexatious or otherwise constitutes an abuse of process. Allowing the procession of a multiplicity of proceedings may create unnecessary expenses, waste judicial resources, risk inconsistent outcomes, and enable pre-emptive collateral attack: *Watch Tower Bible and Tract Society of Canada v. British Columbia (Attorney General)*, 2021 BCSC 1829 at paras. 62-65, 123. As Justice Fisher (as she then was) set out in *Willow v. Chong*, 2013 BCSC 1083:

> [21] Abuse of process under Rule 9-5(1)(d) or the court's inherent discretion is a flexible doctrine. It allows the court to prevent a claim from

> proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice. A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review: [Citations omitted.]

Analysis

General

[28] In view of the legal framework above, resort to this Court by the plaintiff should only be allowed if exceptional circumstances militating such resort are present. Otherwise, resort should be disallowed.

[29] The legislature has granted the Commission explicit authority to determine constitutional questions: s. 4.1 of the *Securities Act* and s. 43 of the *ATA*. Section 43 of the *ATA* provides that the tribunal "has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions." Because the Commission has been given explicit authority to consider questions of law, including constitutional issues, it is a "court of competent jurisdiction" for the purpose of s. 24 of the *Charter.* As a court of competent jurisdiction, the Commission can grant an individual remedy to the plaintiff under s. 24 of the *Charter* if it finds that his ss. 7 or 8 *Charter* rights were violated: *Conway* at para. 22. I will consider the question of a declaration of invalidity later in these Reasons.

[30] A section 96 court always has jurisdiction to decide constitutional issues. To the extent that there is concurrent jurisdiction as between this Court and the Commission, which forum should be preferred at this stage of the proceedings? The primary question before me, therefore, is not whether the within action *could* be pursued in substance at the Commission. Instead it *should* be pursued there or, alternatively, at this Court.

[31] I am alive to the rationales underlying the proposition from *C.B. Powell* and other cases that consider the exhaustion of administrative remedies. Centrally, to the extent that the legislature has expressed an intention, established a process to fulfill that intention, and imbued that process with the necessary attributes and jurisdiction,

the intention of the legislature should, in all but exceptional cases, be respected. Moreover, the factual findings and record a tribunal compiles will be invaluable to a reviewing court: *Martin* at para. 30. This point was emphasized in *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 (cited with approval in *Denton v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 403 at para. 51):

> [45] If administrative decision-makers could be bypassed on issues such as this, those appreciations, insights and understandings would never be placed before the reviewing court. In constitutional matters, this is most serious. Constitutional issues should only be decided on the basis of a full, rich factual record: *Mackay v. Manitoba*, [1989] 2 S.C.R. 357 at pages 361-363. Within an important regulatory sector such as this, a record is neither full nor rich if the insights of the regulator are missing.

[32] If resort to the court would serve no useful purpose or is an attempt to simply bypass the Commission proceeding, the NOCC may be stayed under the doctrine of the abuse of process: R. 9-5(1)(b) and (d). This Court has the discretion to decline jurisdiction if the tribunal can grant just and appropriate relief to the parties: *Moore* at para. 23.

Chu Factors

[33] In what follows, I analyze the case for exceptionality in accordance with the factors set out in *Chu.* The *Chu* analysis is flexible and does not turn on a single factor. Indeed, there is overlap in my analysis as between the categories and my inclusion of discussion under one such category should not be taken as having no application to other factors. They are not airtight or exclusive categories.

Statutory Context

[34] The Commission has specialized expertise with respect to the interpretation and application of its home statute. The Supreme Court of Canada has recognized that "securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets": *Pezim v. Superintendent of Brokers,* [1994] 2 S.C.R. 557 at 589, 1994 CanLII 103 (SCC).

[35] In *Re Cartaway Resources Corp.,* 2004 SCC 26, Justice LeBel said the following about the expertise of the Commission:

> [45] Section 167(1) of the Act provides that an appeal of a decision of the Commission under s. 162 lies to the Court of Appeal, with leave of a justice of that court. Decisions of the Commission are thus not protected by a privative clause. This militates against deference. Nevertheless, this Court has held that deference is due to matters falling squarely within the expertise of the Commission even where there is a right of appeal: *Pezim*, *supra*, at p. 591. This Court recognized in *Pezim*, at pp. 593-94, that the Commission has special expertise regarding securities matters. The core of this expertise lies in interpreting and applying the provisions of the Act, and in determining what orders are in the public interest with respect to capital markets. In this case, the question of whether general deterrence is an appropriate consideration in formulating a penalty in the public interest falls squarely within the expertise of the Commission.

[36] Justice LeBel emphasized the Commission's expertise within its core functions:

> [46] Although courts are regularly called on to interpret and apply general questions of law and engage in statutory interpretation, courts have less expertise relative to securities commissions in determining what is in the public interest in the regulation of financial markets. The courts also have less expertise than securities commissions in interpreting their constituent statutes given the broad policy context within which securities commissions operate: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336.

[37] Being a highly specialized tribunal weighs in favour of the Commission deciding the issues at first instance when they fall within its core expertise. As the authorities bear out, the same can be true for matters involving confidential information and SCP. In *A.B. v. B.C. Securities Commission*, 2004 BCCA 249, a party sought to enjoin the continuance of a Commission investigation pending the determination of SCP over documents seized in the course of that investigation. In a chambers decision on a motion for leave to appeal, Justice Hall opined "that the relief sought here by the applicant in the trial court was premature" and "that here it would be appropriate to seek a remedy from the Commission in the first instance": at para. 12.

[38] A preference for first-instance decision making at the Commission, in a case relating to certain confidential information and a *Charter* challenge to the applicable section, was also expressed in *Smolensky v. British Columbia Securities Commission*, 2004 BCCA 81 [*Smolensky*]:

> [6] In my opinion, the issue of the compatibility of s. 148(1) with the *Charter* is premature. The Commission has a power under that section to consent to limits to confidentiality and that power must be exercised in the public interest to avoid infringement of *Charter* rights. Before this Court states a definitive opinion on *Charter* issues, the Commission should have the opportunity to address those issues on the facts of this case, including any specific restrictions of access to information and disclosure asserted by the appellant. I have concluded that the other grounds of relief raised by the appellant are issues that also should be dismissed as not timely. They are not appropriate for judicial review in the absence of a complete record of facts and deliberation before the Commission, apart from a limitation issue addressed below.

[39] Finally, in *Dioguardi Tax Law v. Law Society of Upper Canada*, 2016 ONCA 531, leave to appeal to SCC ref'd, 2017 CanLII 8583 (SCC), the Court of Appeal for Ontario upheld the order of the application judge who refused to determine an application on the basis of prematurity even though the applicant raised issues of SCP and breach of *Charter* rights. Relying, in part, on *Cheng v. Ontario Securities Commission*, 2018 ONSC 2502 (Div. Ct.), the Divisional Court quashed a petition for judicial review rooted in an interlocutory order at the Ontario Securities Commission adjudicating SCP.

[40] I am satisfied that even if the instant issues related to SCP are not directly within the expertise of the Commission—on which I make no finding—these issues should be adjudicated by the Commission at first instance.

[41] The plaintiff also argues that the Commission does not have jurisdiction to grant a primary remedy he seeks: a declaration of invalidity under s. 52 of the *Constitution* in respect of s. 144 of the *Securities Act*. He suggests that, in result, this Court, which may grant such a remedy, is the most appropriate forum for the within dispute. A parochial remedy from the Commission, he continues—individualized and non-precedential—would be inappropriate. The Commission, in contrast, argues that

it has a reasonably effective procedure for the adjudication of the constitutional issues raised. It contends it is the appropriate forum for this dispute.

[42] It is true that a legislative delegation of remedial power does not completely oust the jurisdiction of the courts especially where recourse to the courts is "necessary to obtain an appropriate and just remedy": *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16 at para. 54. While the Commission must refuse to give effect to legislation it considers unconstitutional, as a creature of statute, the Commission does not have authority to make a formal declaration of constitutional invalidity. The Commission can, however, provide the plaintiff with an individual remedy flowing form the constitutional issues he has raised. As the plaintiff emphasizes, such a decision would have no precedential value and could not be enforced outside of the plaintiff's case.

[43] The preference that administrative remedies be exhausted before resort to a superior court is strong: *C.B. Powell*. In *Okwuobi*, the Supreme Court considered the remedial authority of the Administrative Tribunal of Québec (the "ATQ"), which, like the Commission, could not issue a formal declaration of invalidity. In that case, the appellants argued that even if the ATQ had "jurisdiction over the subject matter at hand, namely the rights of claimants under s. 23, it still [did] not have the ability to provide the remedies being sought by the appellants": at para. 44. The Supreme Court held that this was not "a reason to bypass the exclusive jurisdiction of the Tribunal": at para. 44. Justice Belobaba highlighted the consequence of this proposition in *DioGuardi ONSC*:

> [11] … The expert administrative tribunal should hear the constitutional challenge and make its ruling. If the applicant loses, it can appeal or seek judicial review. And it is "at this stage of the proceedings" i.e. when the matter makes its way to the court, that a formal declaration of invalidity can be sought.
>
> [Footnotes omitted.]

[44] The plaintiff suggests that *Okwuobi* is distinguishable because "[u]nlike the individuals in *Okwuobi*, the Plaintiff is not seeking to circumvent the Commission's

process" insofar as he "cannot obtain damages through the Commission's hearing, nor can he obtain a declaration of constitutional invalidity." In *Okwuobi*, however, the Supreme Court held that "[t]he appellants, or any other claimants before the ATQ, should attempt to exhaust the remedies available from the ATQ rather than arguing that the absence of a particular remedy requires them to circumvent the administrative process entirely": at para. 46. In respect of the declaration of constitutional invalidity, the plaintiff's contention closely reflects what the *Okwuobi* Court referred to as circumvention. I will consider the question of damages under the *Privacy Act* in a subsequent section.

[45] I am satisfied that the fact that the Commission cannot issue a formal declaration of invalidity should not weigh against this matter proceeding before it. The absence of that power under s. 52 of the *Constitution* does not, in these circumstances, militate towards exceptionality. Remedies are available to the plaintiff at the Commission and it may be open to him to pursue a declaration of constitutional invalidity at a more appropriate time.

[46] If the plaintiff is not satisfied with the decision of the Commission he may, with leave, appeal directly to the Court of Appeal: *Securities Act*, s. 167. It is important to recognize that appeal "with leave" is *not* an appeal by right. That said, in *Smolensky*, the Court of Appeal did not disturb by the chambers judge acceptance that the s. 167 statutory appeal in the *Securities Act* was sufficient despite a *Charter* challenge:

> [34] The chambers judge accepted that he had a residual discretion to consider judicial review but he declined to exercise the discretion, having regard to the privative clause in the *Act*, the authority of *Pezim*, and observations in *Delmas v. Vancouver Stock Exchange* (1994), 1994 CanLII 3350 (BC SC), 98 B.C.L.R. (2d) 212, 119 D.L.R. (4th) 136, [1995] 1 W.W.R. 738 (S.C.); aff'd (1995), 1995 CanLII 1305 (BC CA), 15 B.C.L.R. (3d) 136, 130 D.L.R. (4th) 461, [1996] 4 W.W.R. 293 (C.A.), favouring statutory appeals over judicial review.
>
> [35] In my respectful view, the learned chambers judge was correct in his analysis of the law and there are no grounds to disturb the exercise of his discretion. The abuse of process issues are ones that should be considered by the Commission in the first instance and any further proceedings would come to this Court by way of statutory appeal on the record before the Commission.

[47] That the appeal mechanism available to the plaintiff requires leave does not substantially detract from that fact that an appeal mechanism exists and that the nature of the appellate mechanism reflects the legislature's design. This factor does not weigh towards exceptionality.

Strength of the Case

[48] Central to the plaintiff's allegations is the matter of SCP, which is of supreme importance to the Canadian justice system: *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20 at para. 5. The prospect of one or more breaches of the *Charter* is similarly important. Without deciding the issue, I am satisfied that there may be merit to the plaintiff's claims. The record before me in this respect, however, is limited. I acknowledge that, at this stage in the proceedings and in light of the December 5, 2023 decision of Associate Judge Harper, certain steps may not had occurred at the time this application was argued.

[49] In view of s. 144, the plaintiff has established a *prima facie* case that the *Securities Act* provides no protective measures similar to those set out in the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.), a body with quasi-criminal powers akin to the Commission: *Solicitor-Client Privilege of Things Seized (Re)*, 2019 BCSC 91 at para. 58. Nor, in the record before me, has the Commission established a protocol for assessing claims of privilege aimed at protecting the rights holder. There is merit to the claims given that SCP cannot be abrogated by inference: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 11. Privilege must "remain as close to absolute as possible": *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 43.

[50] I am also cognizant that the records allegedly protected by SCP have already been seized by the Commission. This is not a factual circumstance, as in *Smolensky,* where the nature and extent of a *Charter* breach was prospective; I note, however, that *Smolensky* remains assistive in respect of certain principles. This Court has affirmed that the adjudication of SCP itself constitutes an abrogation of the privilege, even absent the decision-maker's power to compel production in

order to verify the claim. For example, in *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 at para. 39, Justice Butler (as he was then) observed: "There is no question that the adjudication of a claim of solicitor-client privilege by the Commissioner amounts to an incursion of the privilege. The incursion is even greater if the Commissioner can also compel disclosure of records over which claims of solicitor-client privilege are made."

[51] It remains true, however, that cases where a constitutional infringement had already allegedly occurred that were not considered exceptional. In *A.B.*, for example, in the court below the plaintiff alleged that the defendant reviewed and used information contained within documents which were protected by SCP in its conduct of the investigation. I note there was some controversy as to whether such use had been established. The plaintiff sought an interlocutory injunction to prevent the defendant from continuing the relevant investigation. The injunction was refused. On appeal Justice Hall, in Chambers, stated "… I consider that the relief sought here by the applicant in the trial court was premature. It seems to me that here it would be appropriate to seek a remedy from the Commission in the first instance …": at para. 12.

[52] It is noteworthy that in the Reasons below it was said "[t]his is not a case where use has been made of privileged materials or where privilege has purportedly been lost. The defendant was aware of the potential for privileged documents and took steps to protect privilege": *A.B. v. British Columbia Securities Commission*, 2004 BCSC 165 at para. 79, leave to appeal ref'd, 2004 BCCA 249. Conversely, in the instant matter the plaintiff pleaded that the Commission failed to implement an effective protocol to ensure the protection of SCP communications. Even assuming the plaintiff's allegation is true, I am not satisfied that this makes the plaintiff's case so strong as to be exceptional.

[53] More broadly, many strong and important constitutional cases have not, permitted resort to a superior court absent the exhaustion of administrative

remedies. Despite being in reference to judicial economy, Justice Belobaba's words from *DioGuardi ONSC* are apt:

> [12] The fact that the tribunal-court process may take more time than a direct application to the court is beside the point. The additional time involved by starting in the appropriate forum does not amount to "exceptional circumstances" that would justify skipping the tribunal step altogether. **Otherwise, the expert administrative tribunal could be skipped in every case by simply alleging a *Charter* breach and the well-established proposition affirmed in *C.B. Powell* and *Volochay* would be eviscerated.**
>
> [Emphasis added; footnotes omitted.]

[54] While the plaintiff may well have a case, I am not satisfied that the case is so strong as to render it exceptional. Rather, like other *Charter* challenges to the *Securities Act* and other legislation throughout the country, a first instance decision should come from the relevant administrative actor.

Fragmentation of Proceedings

[55] The Commission suggests that, insofar as it constitutes an effective and appropriate forum for the litigation of the issues in the NOCC, resort to this Court would constitute a pre-emptive collateral attack and would lead to a multiplicity of proceedings. The plaintiff counters that the NOCC does not constitute an attempt to circumvent the administrative process at the Commission.

[56] The plaintiff roots the assertion that he is not attempting to circumvent the Commission in the concept of a 'remedial vacuum' or, in essence, the fact that Commission cannot grant a declaration of constitutional invalidity. He relies on the following excerpts from *Okwuobi*:

> 54 Superior courts may also retain residual jurisdiction to hear direct constitutional challenges to a legislative scheme, should the proper circumstances arise. Such a challenge would have to be distinguishable from the facts of the cases at bar in which the appellants have, in effect, attempted to obtain relief (the right to minority language education) by circumventing the administrative process and bringing their claims directly to the Superior Court. That said, the residual jurisdiction of superior courts cannot be entirely ousted by the legislature, in particular where recourse to such courts is necessary to obtain an appropriate and just remedy.
>
> …

> As H. Brun and G. Tremblay note in *Droit constitutionnel* (4th ed. 2002), at p. 187, superior courts [TRANSLATION] "theoretically have the power to review the constitutionality of legislation". This inherent power to ensure that the Constitution is adhered to necessarily requires that superior courts retain jurisdiction, where the circumstances are appropriate, to "fill the remedial vacuum" mentioned by Lamer J. in *Mills*.

[57] Earlier comments in *Okwuobi* are instructive:

> 46 It should also be noted on the topic of remedies that, while it is true that only the Superior Court or a judge thereof may issue an injunction (this will be discussed further below), the ATQ has nevertheless been granted a broad remedial power under ss. 74 and 107 of the Act respecting administrative justice. The broad wording of s. 74 indicates an intention on the part of the Quebec legislature to grant the ATQ the remedial authority needed to safeguard the rights of the parties. **The appellants, or any other claimants before the ATQ, should attempt to exhaust the remedies available from the ATQ rather than arguing that the absence of a particular remedy requires them to circumvent the administrative process entirely.**
>
> [Emphasis added.]

[58] While this paragraph from *Okwuobi* begins with specific reference to the grant of an injunction, the balance is more broadly applicable. Indeed, the two preceding paragraphs concern constitutional validity. I find that the instant circumstances are analogous the sort described in *Okwuobi*: namely, where a party has "in effect, attempted to obtain relief … by circumventing the administrative process and bringing their claims directly to the Superior Court": at para. 54.

[59] That fragmentation may result by allowing this claim to proceed finds support in the plaintiff's NOCC. The requested relief flowing from the constitutional issues includes "[a]n order pursuant to s. 24(1) of the *Charter* judicially staying the proceedings before the *Commission* and awarding damages." It is clear, not surprisingly, that the plaintiff has a direct and personal interest in the outcome of this claim. In *Dioguardi ONSC*, a direct and personal interest actually bolstered the reasoning for allowing the administrative process to run its course:

> [15] It should also be pointed out that this is not a purely altruistic application that is only concerned with the welfare of the client-complaints. Counsel for the Law Society agreed that if the application is successful and the impugned provisions are not enforced by the Law Society Tribunal or (later on appeal or judicial review) struck down by the court, the charges

> against the applicants could not proceed and would have to be dismissed. In other words, the applicants have a direct and personal interest in the outcome of this application. All the more reason, in my view, why it makes sense to allow Law Society's administrative process to run its course.

[60] I am satisfied that allowing this matter to proceed in this Court could reasonably lead to the fragmentation of the proceedings, and, in effect, circumvention of the Commission's process.

Waste of Resources and Delay

[61] To the extent that this claim may be viewed as an attempt to circumvent the process at the Commission, its continuance would lead to wasted resources. The legislature has established a system for adjudicating the issues raised by the plaintiff, which includes both opportunities permitted for in statute to refer matters to this Court and a statutory appeal to the Court of Appeal. If the documents allegedly protected by SCP needed to be reviewed, the Commission relies on s. 43(2) of the *ATA*:

> If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.

[62] A stay of the plaintiff's constitutional claims would delay adjudication in respect of the requested declaration of constitutional invalidity should the proceedings evolve such that that question is posed to a court. For the reasons set out above, I am satisfied that a delay of this sort is permissible in view of the statutory context and the applicable common law.

[63] The Commission has the competence and jurisdiction to deal with the instant issues. This includes, in appropriate circumstances, referring matters to this Court. The continuance of a separate process focused on the same or similar issues in this Court would constitute a waste of judicial resources. This factor weighs towards a stay.

Hardship or Prejudice

[64] While submissions were not directly focused on the question of hardship or prejudice, some contentions can be considered within this category. That the applicable statutory appeal is by leave not by right could be said to invite some prejudice on the plaintiff, but as I have discussed elsewhere, this is not sufficient to militate towards exceptionality. The plaintiff has also pleaded prejudice to the extent that the Commission is already in possession of the seized records.

[65] As I have discussed elsewhere, the fact that the Commission is not able to grant a declaration of constitutional invalidity is of note, but, as the authority on this question makes clear, this is not a bar to the matter proceeding at the Commission. It is true that the scope and extent remedies available to the plaintiff at a superior court will not entirely be available to the plaintiff at the Commission. This does not mean, however, that the plaintiff mustn't first exhaust his administrative remedies prior to resort to a court.

[66] Any hardship or prejudice that the plaintiff may suffer in consequence of a stay does not, in my view, rise to the required level of exceptionality.

Conclusion

[67] Having considered and applied the factors from *Chu* to the instant circumstances, I do not find that the plaintiff's circumstances are exceptional. Rather, the circumstances before me are analogous to others where courts have found or otherwise indicated that administrative remedies should be exhausted before resort to a superior court. While there are factors that distinguish the instant circumstances from others outlined, I do not find that any such differences, jointly or severally, lead to a finding of exceptionality. In accordance with the authorities and R. 9-5(1), set out above, the plaintiff's constitutional claims are stayed. The administrative process should be allowed to run its course and the record created will assist any future court that this matter properly comes before.

Should the plaintiff's damages claims be struck?

Legal Principles

[68] Pursuant to R. 9-5(1), this Court may strike out, or stay, the whole or a part of any pleading on various grounds. In *Moses v. Lower Nicola Indian Band,* 2015 BCCA 61, the Court of Appeal set out the test under Rule 9-5(1). It requires that the claim have "no reasonable prospect of success" or that it is "plain and obvious" that the claim will fail: *Moses* at para. 41.

[69] While material facts in a NOCC must be assumed to be true in the context of a R. 9-5(1) application to strike, that "does not mean that allegations based on assumptions and speculations must be taken as true. Rather, such allegations must be subjected to a skeptical analysis in order to determine their true character": *Brar v. British Columbia (Securities Commission),* 2022 BCSC 1726 at para. 8. "[W]here a plaintiff makes broad allegations that a government official ... took actions in bad faith, the court can, and should, subject them to a skeptical analysis": *Forum National Investments Ltd. v. British Columbia Securities Commission,* 2021 BCSC 1050 at para. 66. This point was emphasized in *Deep v. College of Physicians and Surgeons,* 2010 ONSC 5248:

> [55] Although Dr. Deep has made bald allegations of bad faith against the defendants, he does not plead any particular facts to support these allegations. Simply pleading bad faith without setting out a factual foundation for it, is a conclusion of law, and not a fact in itself. I must find Dr. Deep has failed to plead bad faith properly. As a result, statutory immunity would apply. The claim therefore has no chance of success against the defendants.

[70] The *Securities Act* explicitly prohibits the Commission from being sued for damages for any acts done with authorization and in good faith. Section 170(1) of the *Securities Act,* entitled "Immunity of commission and others", provides:

> (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.

[71] In addition to the application of s. 170 of the *Securities Act*, the *Privacy Act* claim may be barred by s. 2(2)(d)(ii) of the *Privacy Act*. That provision expressly states that certain acts or conduct do not give rise to a claim under s. 1:

> (2) An act or conduct is not a violation of privacy If any of the following applies:
>
> (d) the act or conduct was that of
>
> (ii) a public officer engaged in an investigation in the course of his or her duty under a law in force in British Columbia,
>
> and was neither disproportionate to the gravity of the crime or matter subject to investigation nor committed in the course of a trespass.

[72] Even if the plaintiff's *Privacy Act* claim is not barred by statute, the essential elements of the applicable tort must nonetheless be sufficiently pleaded. There are three essential elements to the tort set out in s. 1 of the *Privacy Act*: that the defendant: (i) wilfully, and (ii) without a claim of right, (iii) violated the privacy of the plaintiff. Justice Wilkinson considered the first two elements in *G.D. v South Coast British Columbia Transportation Authority*, 2023 BCSC 958:

> [39] The Court of Appeal for British Columbia held in *Hollinsworth v. BCTV*, 59 B.C.L.R. (3d) 121, 1998 CanLII 6527 at para. 29 (C.A.) that "… the word 'wilfully' does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention to do an act which the

> person doing the act knew or should have known would violate the privacy of another person". …
>
> [40] As well, "without a claim of right" has been defined as "an honest belief in a state of facts which, if it existed, would be a legal justification or excuse": *Ari (2013 SC)* at para 55.
>
> […]
>
> [42] The legislation does not reach conduct that is accidental. Some deliberate, intentional, or purposeful conduct must be at play. The Court of Appeal in *Duncan v. Lessing,* 2018 BCCA 9 at paras. 83–87 emphasized this in commenting on the jurisprudence and observing that the Privacy Act is directed at conduct that is deliberate in nature:
>
> > [86] The term "wilfully" appears in many statutes and is usually defined as meaning deliberately, intentionally or purposefully. It is not necessary for the purposes of this appeal to define with precision the definition of the term, but it can be said with some confidence that "wilfully" does not mean accidentally. In the case at bar, Mr. Lessing cannot be said to have deliberately or purposefully violated Mr. Duncan's privacy.

Analysis

[73] The Commission argues the plaintiff's myriad claims for damages should be struck pursuant to Rule 9-5(1)(a) as disclosing no reasonable claim because they are statutorily barred by s. 170 of the *Securities Act* and s. 2(2)(d)(ii) of the *Privacy Act.* I note that the plaintiff has only pleaded damages claims under the *Charter*, the *Privacy Act*, and punitive damages. There is no cause of action flowing from the *Securities Act*, despite the instant circumstances having occurred under its auspices.

[74] At the outset, having stayed the *Charter* claims, the plaintiff's claim for damages under s. 24(1) of the *Charter* is similarly stayed.

[75] Where the essential character of a civil action does not merely mask a claim for judicial review, however, it may be open to a party to pursue that claim: *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214 at para. 2. Justice Binnie, for the Supreme Court, said the following in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62:

> [75] The Crown contends that TeleZone's argument would risk putting judicial review of federal decision makers back in the provincial superior courts dressed up as damages claims. On this view the "artful pleader" will

> forum-shop by the way the case is framed. Of course, "artful pleaders" exist and they will formulate a claim in a way that best suits their clients' interests. However, no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement. Such relief is not available in the provincial superior court. The claimant must, as here, be content to take its money (if successful) and walk away leaving the order standing.
>
> [76] Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.
>
> […]
>
> [78] To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

[76] The plaintiff pleaded that "the Commission wilfully and without claim of right, accessed, retained, and made use of the communications subject to solicitor-client privilege." Any success on this pleading will hinge on the commission having acted in bad faith (s. 170 of the *Securities Act*) or in a manner disproportionate to the gravity of the crime (s. 2(2)(d)(ii) of the *Privacy Act*). To this extent, I think it reasonable to proceed on the basis that the bad faith and disproportionality pleadings could sever the essential character of the plaintiff's claim from the public law issues discussed above. Nonetheless, I find that the plaintiff's claim should be struck for three reasons.

[77] First, an allegation of bad faith unsupported by a factual foundation to establish bad faith is a conclusion of law. Where a legal conclusion is pleaded, sufficient material facts must also be pleaded to support the legal conclusion. The question of disproportionality must be similarly supported in the pleadings. The bar is not all that high, but bald assertions are not sufficient: *Durkin v. Facebook, Inc.,* 2022 BCSC 1305 para. 26.

[78] The NOCC alleges that the Commission's failure to "implement an effective protocol to ensure the protection of the plaintiff's solicitor-client communications," coupled with the seizure of the communications, constitutes an act and/or omission that was not done in good faith. In its application response, the plaintiff proposed further particulars including deliberate efforts by the Commission in—*inter alia*—deliberately refusing to implement minimum standards, processes, and training to protect SCP and redress breaches thereof. The plaintiff argues that, when believed to be true, these pleadings establish the requisite bad faith requirement. Alternatively, the plaintiff argues he should be given a chance to amend his pleadings by adding the words "and in bad faith" (insofar as, in the NOCC, the plaintiff phrased this "not done in good faith").

[79] The plaintiff is represented by counsel and I am of the view that, had there been a factual foundation for the assertion of bad faith, apart from seizing the documents, it would have been included in the NOCC. The additional particulars that the plaintiff sought to introduce in the application response are groundless and fanciful to the extent that the plaintiff asserts deliberateness: *Olenga v. British Columbia*, 2015 BCSC 1050 at para. 17. Based on the lack of factual foundation, there is no claim that could be reasonably pursued in light of s. 170 of the *Securities Act*.

[80] Second, in respect of s. 2(2)(d)(ii) of the *Privacy Act*, the applicable tortious act would be violating the privacy of the plaintiff; it is *not* the violation or infringement of SCP even if such an infringement could—in theory—simultaneously occur. To this extent, the recourse the plaintiff seeks relates precisely to the alleged access, retaining, and use of materials from Shaw, but the purpose of s. 1 of the *Privacy Act* is not to facilitate damages for breaches of the *Charter*. It is not disputed that this seizure of the materials from Shaw was authorized under s. 144 of the *Securities Act* even if, ultimately, that provision is found to be unconstitutional. To this extent, it would be a violation of privacy—the alleged seizure and review of the materials form Shaw—and not a violation of SCP that would weigh in the proportionality analysis.

That allegedly tortious act is the exact sort of conduct contemplated by s. 2(2)(d)(ii) of the *Privacy Act* as not being a violation of privacy.

[81] Third, even if the plaintiff surpasses the statutory bars in light of the discussion of the first and second elements of the *Privacy Act* tort from *G.D.*—wilful and without claim of right—there is a lack of material facts pleaded and I find that there is no reasonable claim.

[82] In my view this is not a situation where an amendment to the pleadings should be allowed. The amendments proposed by the plaintiff would not disturb my analysis in any material way. Consequently, the aspects of the NOCC relating to damages under the *Privacy Act* are struck without leave to amend and those relating to *Charter* damages are stayed. Likewise, the pleadings disclose no reasonable claim in respect of punitive damages, which aspects of the pleadings are similarly struck.

Conclusion

[83] Resort to a superior court prior to the exhaustion of administrative remedies requires the presence of exceptional circumstances. Exceptional circumstances are not present here. Rather, while the plaintiff's allegations—concerning SCP and *Charter* issues—are serious, administrative remedies remain available to him at the Commission. A similar preference in analogous circumstances, including those that involved similarly serious SCP and *Charter* issues, is borne out in the case law.

[84] The plaintiff's constitutional claims, including damages under s. 24(1) of the *Charter,* are stayed.

[85] The plaintiff's claims for punitive damages and damages under the *Privacy Act* are struck as disclosing no reasonable claim, without leave to amend.

"D. MacDonald J."