COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Morabito v. British Columbia (Securities Commission),* 2024 BCCA 377

Date: 20241115
Dockets: CA49296; CA49302

Docket: CA49296

Between:

Mark Morabito

Appellant

And

Executive Director of the British Columbia Securities Commission, British Columbia Securities Commission, and Global Crossing Airlines Group Inc., formerly known as Canada Jetlines Ltd.

Respondents

- and -

Docket: CA49302

Between:

Global Crossing Airlines Group Inc., formerly known as Canada Jetlines Ltd.

Appellants

And

Executive Director of the British Columbia Securities Commission, British Columbia Securities Commission, and Mark Morabito

Respondents

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Voith
The Honourable Justice Winteringham

On appeal from: A decision of the British Columbia Securities Commission, dated August 17, 2023 (*Re Morabito,* 2023 BCSECCOM 405).

Counsel for the Appellant in CA49296 (Respondent in CA49302), Mark Morabito: R.J.C. Deane, P. Burnham

Counsel for the Respondent in CA49302 (Respondent in CA49296), Global Crossing Airlines Group Inc., formerly known as Canada Jetlines Ltd.:	S.K. Boyle J.R. Green
Counsel for the Respondents, Executive Director of the British Columbia Securities Commission and British Columbia Securities Commission:	D. Flood M.S. Smith A. Ghorbani Abdehgah
Place and Date of Hearing:	Vancouver, British Columbia June 7, 2024
Place and Date of Judgment:	Vancouver, British Columbia November 15, 2024

Written Reasons by:
The Honourable Justice Winteringham

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Voith

Summary:

Mr. Morabito transferred Canada Jetlines Ltd.'s shares to his spouse and as an insider, reported the transfer. In August 2018, the British Columbia Securities Commission issued an investigation order to investigate allegations of insider trading. The parties have been engaged in lengthy and protracted proceedings ever since. In March 2023, the appellants filed a notice of application alleging the Commission proceedings were an abuse of process and they sought to stay the proceedings. At a blended hearing, the hearing panel dismissed the abuse of process application. Mr. Morabito and Canada Jetlines Ltd. appealed. They submitted that the hearing panel's abuse of process analysis was flawed, as was the procedure undertaken to determine the application. Although an interlocutory appeal, leave to appeal was granted on procedural fairness issues and whether the hearing panel applied the correct abuse of process legal framework.

Held: *Appeal allowed. The hearing panel erred when it authorized a blended hearing for the abuse of process application. The result was that the appellants were prevented from advancing their abuse of process claims and exploring legitimate avenues of cross-examination relevant to the allegations they raised. The case was remitted to the Commission for a new hearing before a differently constituted hearing panel in accordance with these reasons.*

Reasons for Judgment of the Honourable Justice Winteringham:

Overview

[1] Mark Morabito was the chairperson of Global Crossing Airlines Group Inc., formerly known as Canada Jetlines Ltd. ("Jetlines"), a planned low-cost airline trading on the TSX Venture Exchange. In 2018, he made a trade of Jetlines' shares to his spouse. As an insider, Mr. Morabito made timely disclosure of the trade to the British Columbia Securities Commission ("Commission"). In August 2018, the Commission authorized an investigation into the trade and in 2021 issued a notice of hearing against Mr. Morabito, his spouse, and Jetlines, alleging the trade violated the rules against insider trading.

[2] The appellants have been embroiled in the Commission proceedings ever since Mr. Morabito's self-reported trade. In early 2023, Mr. Morabito and Jetlines filed an application to stay the proceedings, alleging the proceedings constituted an abuse of process. A hearing panel constituted by the Commission (the "Panel") dismissed the abuse of process application: *Re Morabito*, 2023 BCSECCOM 405.

Mr. Morabito and Jetlines appealed and Justice Willcock granted leave to appeal the Panel decision: *Morabito v. British Columbia (Securities Commission)*, 2023 BCCA 395 (Chambers) [*Morabito 2023*].

[3] The appellants contend the proceedings against them are an abuse of process because: (1) the Commission investigators improperly probed into all areas of Mr. Morabito's life, including going to his residence to confront his spouse, investigating his elderly father, and compelling production of the family's email accounts, including personal emails of his young daughter; (2) the executive director violated their disclosure obligations by failing to disclose that a material witness (Stanley Gadek, the CEO responsible for Jetlines' aircraft acquisition process and the public disclosure at issue) had been diagnosed with a terminal illness and would be unavailable to answer a material aspect of the insider trading charge; and (3) the executive director failed or refused to disclose relevant documents in the face of multiple applications compelling compliance with the standard of disclosure found in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 1991 CanLII 45.

[4] The appellants submit the Panel committed multiple errors when it dismissed their abuse of process applications by applying an incorrect legal framework and endorsing an unfair process. With respect to the legal framework it applied, the appellants contend the Panel's analysis was too narrow, focusing on abusive delay and not abuse of process generally. With respect to procedure, the appellants submit that the Panel's approach was flawed because it: (1) prevented them from cross-examining the investigators responsible for many of the investigative decisions; and (2) in effect, prevented the appellants from adducing evidence to prove their claims of abuse of process. Relevant as well, submit the appellants, was the executive director's failure to adduce any evidence to answer at least some of the allegations, contrary to what this Court had instructed in an earlier appeal in the same case: *Morabito v. British Columbia (Securities Commission)*, 2022 BCCA 279 [*Morabito 2022*].

[5] The respondents defend the Panel's decision and the procedure it adopted. The respondents contend the appellants are sophisticated investors who know the rules well and the abuse of process application was nothing more than the appellants' most recent attempt to avoid answering the charges against them. Regarding the abuse of process applications, the respondents submit the appellants are at fault for any flaw in the procedure because they shifted the focus of their complaints only after the testimony concluded.

[6] I agree with the appellants that the process established by the Panel was flawed and violated rules of procedural fairness in at least two material respects. First, the Panel endorsed a blended hearing. The executive director was to tender their evidence to prove the substantive charges against the appellants. At the same hearing, the appellants were to elicit evidence to prove their abuse of process claims. The two tasks were incompatible, in part because of the conflicting burdens of proof. For reasons I will explain, the blended hearing was ill-suited to a fair determination of the abuse of process claim.

[7] The second flaw impacting procedural fairness relates to the conduct of the hearing. Pursuant to the *Securities Act*, R.S.B.C. 1996, c. 418, Commission investigators are granted broad investigative powers. The appellants allege an abuse of those powers. At the hearing, the appellants attempted to cross-examine an investigator about some of the investigative tactics used. The executive director objected to the appellants' attempts to cross-examine the sole witness about matters relevant to the abuse of process claim. The Panel sustained the objections. As I will explain, the appellants were prevented from eliciting testimony on material points relevant to the claim of abuse of process.

[8] For the reasons set out below, the procedural defects warrant a remedy. Bearing in mind the Supreme Court of Canada's guidance in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, I am of the view that the appeals should be allowed and the matter remitted back to a newly constituted

hearing panel to determine the abuse of process applications, in accordance with these reasons.

Background

[9] Mr. Morabito transferred Jetlines' shares to his spouse on February 18, 2018 and he reported the transfer on February 23, 2018. On August 14, 2018, the chair of the Commission issued an investigation order pursuant to s. 142 of the *Securities Act*, naming Jetlines, Mr. Morabito, and his spouse as targets of the investigation ("Investigation Order"). The Investigation Order directed Commission staff to undertake an investigation into:

> 1. [T]rading in the securities of [Jetlines] by Mark Morabito and Susan Morabito;
> 2. [The Morabitos'] knowledge of information contained in [Jetlines'] March 13, 2018 news release which announced that [Jetlines] would not meet its projected June 2018 start-up date;
> 3. [The Morabitos'] use of the proceeds obtained from the trading in the securities of [Jetlines],
>
> from approximately January 1, 2017 forward.

[10] The investigation was slow to advance. On January 7, 2021, the Morabitos applied to the Commission under s. 171 of the *Securities Act* for an order revoking the Investigation Order. On October 6, 2021, the Commission dismissed the application: *Re Application 20210107*, 2021 BCSECCOM 394.

[11] On October 7, 2021, a notice of hearing was issued, alleging:

a) Jetlines contravened provisions of the *Securities Act* by failing to make timely disclosure of material information; that is, the termination of a letter of intent to lease aircraft required to meet an announced intended start-up date for its proposed low-cost flights.

b) Mr. Morabito, the executive chairman and a director of Jetlines, contravened the *Securities Act* by authorizing Jetlines' contravention; and,

c) Mr. Morabito engaged in insider trading while knowing about the undisclosed material information in the period between the termination of the letter of intent in December 2017 and disclosure of the termination in March 2018.

Investigation Order Appeal – *Morabito 2022*

[12] Mr. Morabito sought leave to appeal the decision dismissing the application to revoke the Investigation Order. The only question before the Court was who bore the onus of proof on the revocation application and this Court determined it was the applicant, Mr. Morabito: *Morabito 2022* at para. 97.

[13] The appellants assert that the investigation background set out by this Court in *Morabito 2022* is not controversial and they rely on aspects of it to substantiate their abuse of process claims. I have reproduced some of the background set out in *Morabito 2022*, as follows:

a) On November 5, 2018, Michael Pesunti, the person designated as the Commission's lead investigator, attended at the Morabitos' home after Mr. Morabito had gone to work and confronted Mrs. Morabito. The parties disagree about the nature of Mr. Pesunti's encounter with Ms. Morabito: at paras. 20–21.

b) Over the following months, Mr. Pesunti issued the first of a series of production orders directed to Jetlines under s. 141 of the *Securities Act*. An order dated December 4, 2018 required that the company provide:

> 1. the identities of all individuals associated with the Company who had knowledge or awareness of the Company's inability to secure aircrafts and/or delay of start-up date which was announced in the Company's news release on March 13, 2018 (the News Release), and the date that they first became aware
> 2. all documents and correspondence in relation to the Company's progress in securing aircrafts which gave rise to the News Release
> 3. a chronological listing of all events, including, but not limited to, meetings, telephone conversations, and correspondence, in relation [to] the Company's progress in securing aircrafts leading up to the News Release

Although it would seem the investigation was being extended beyond the trade of Mr. Morabito's shares to his wife in February 2018, the Investigation Order was not amended in any way: at para. 23.

c) In April 2019, Mr. Morabito was required to provide an undertaking to give 48 hours advance notice to the Commission of any transaction he intended to conduct that involved a security of any reporting issuer with which he was in a "special relationship". Mr. Morabito was told by Commission staff that the undertaking could be withdrawn only once the investigation proceedings were concluded: at para. 24.

d) On December 3, 2019, the Commission issued a freeze order under s. 151 of the *Securities Act* (the "Freeze Order"). The Freeze Order required that all cash, securities, or other property in Mr. Morabito's account at his wealth management firm be held for safekeeping: at para. 26. The Freeze Order was varied on January 30, 2020, to allow Mr. Morabito to sell securities as long as the proceeds of sale were held in the account and only purchases of securities recommended by his wealth management firm for long-term investment were acquired: at para. 27.

e) In June 2019, the Commission made a demand for documents to a company called King & Bay West Management Corp. ("King & Bay") which provided management services to Jetlines. Mr. Morabito was its chairman and CEO: at para. 28.

f) On May 7, 2020, Mr. Morabito Sr. (Mr. Morabito's then over 80-year-old father) received a demand for production of documents seeking a broad range of information relating to the Morabito Family Trust. Mr. Morabito Sr. was the sole trustee of the Morabito Family Trust (at paras. 30, 31). In July 2020, Mr. Pesunti demanded additional information from Mr. Morabito Sr.: at para. 32.

[14] Justice Newbury, writing for this Court, summarized the investigation this way:

> [34] In the 33 months between the date of the investigation order and the date of the hearing under review, then, Commission investigators, accompanied by a police officer, had attended the Morabitos' home unannounced on a weekday morning when they would have expected that Mrs. Morabito was at home alone; summonsed and interviewed Mrs. Morabito; issued demands for production to Jetlines, King & Bay, and Mr. Morabito Sr.; conducted an examination of the director of finance of King & Bay; required Mr. Morabito to give an undertaking that would remain in place until the investigation was concluded; and issued a freeze order blocking him from withdrawing funds from a specified account (in which he deposes he had never traded shares of Jetlines). In his pleading, Mr. Morabito describes the investigation as having "spiralled out of control without approaching a timely conclusion" and asserted that Commission staff, in particular Mr. Pesunti, had "intruded into many aspects" of his and his wife's lives which were "wholly unrelated to the trade in question".

[15] Justice Newbury then set out the particulars of the revocation application and the basis for making it, noting:

> [37] The appellants did not contend that the investigation order should not have been issued in the first place; rather they contended that Commission staff — in particular Mr. Pesunti — had abused their powers in a way that brought the Commission's processes into disrepute, *contrary to the public interest*. They asserted that there was a "collateral purpose at work" and that staff had "artificially prolonged and weaponized the investigation". They sought an order revoking the investigation order in its entirety to protect the integrity of its process and the powers reposed in it by the Legislature.
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> [Italics in original.]

[16] The revocation application was not based on an abuse of process argument but rather on "public interest". Nevertheless, Newbury J.A. said this about the potential overlap:

> [40] …Although the [Revocation Notice] does refer at one point to an "abuse of process" on the part of Commission staff, [counsel] on behalf of the appellants confirmed to the panel, and to us, that his clients were not pursuing that cause, which would 'distract' from the public interest principle embedded in s. 171. I will therefore proceed on this basis, but will advert briefly at the end of these reasons to *Law Society of Saskatchewan v. Abrametz* 2022 SCC 29, a recent decision concerning abuse of process in the administrative law context.

[17] Justice Newbury noted that the Commission hearing panel heard the revocation application on May 17, 2021, and three days after the hearing, the appellants received a call from counsel for the executive director, requesting a "without prejudice" conference (at para. 45). Justice Newbury described the conference call:

> [46] In the call, counsel for the director made some mention of "litigation privilege" and told the appellants' counsel, Ms. Burnham, that the director was ready to issue a notice of hearing in connection with the investigation. According to an affidavit of Ms. Burnham, the Morabitos were told that the individuals who would be "named" in the notice of hearing were Mr. Morabito, Global Crossing Airlines (the corporate successor to Canada Jetlines) and Mr. Stanley Gadek, the former CEO of Jetlines. Counsel for the executive director said she wanted to give the appellants an opportunity to "make a proposal" to him, the director, before the notice of hearing was issued.

[18] The appellants sought to re-open the revocation hearing before the hearing panel to introduce evidence about the call and invitation to resolve the dispute. Justice Newbury summarized the hearing panel's refusal to re-open:

> [48] The appellants did seek to introduce as fresh evidence in the revocation hearing an affidavit of Ms. Burnham concerning the call — referred to as a "re-opening" application. The panel denied the application for reasons set forth at paras. 70–81 of its later reasons. In response to the allegation that the call was another indicator that the executive director was attempting to "extract a settlement" from the Morabitos, the panel observed that it had "very little, if any" evidence about the director's motivations. The panel was "unable to infer, based on timing alone, any improper motive" on his part and found there was "simply insufficient evidence" to draw the inference sought by the appellants. Indeed, there were "potential legitimate explanations for the conduct in question besides bad faith and intentional misconduct".

[19] Justice Newbury expressed the view that the Morabitos' complaints were not without some justification:

> [92] I reiterate that the appellants argued their case before the panel, and in this court, on the basis that it was in the public interest for the Commission to grant an order revoking the investigation order outright. As mentioned earlier, they did not contend that the order had not been properly made in the first place. Instead, they complained (in my opinion, not without some justification) about how the investigation was being carried out — that it was proceeding at a "glacial pace"; that the director's tactics, if not abusive, were heavy-handed and unprofessional; and that if the director had in fact wished to "get to the truth", he should have spoken to the Morabitos' investment advisor.

> [Emphasis added.]

[20] Other investigative failures were identified, including the fact that the Commission staff did not interview any of Jetlines' directors or employees. There were nine members of the Jetlines' board at the relevant time, each of whom had expansive experience in the airline industry and related capital markets relevant to the matters under investigation. The appellants contend these were potentially material witnesses who could have addressed the flow of information to insiders and to the public. In fact, it seemed the investigators did not undertake any further interviews after October 2019. Further, Mr. Morabito deposed that the Freeze Order has significantly inhibited his ability to withdraw funds from an account that had no history of trading in Jetlines' shares.

[21] Justice Newbury concluded that the onus lies on the applicant for an order revoking an investigation order under s. 171. However, she went on to discuss circumstances (which the appellants highlight now) that would shift the evidentiary burden to the executive director:

> [97] I have concluded that the proper balancing of these factors requires that the onus lies on the applicant for an order revoking an investigation order under s. 171. This does not mean, however, that an executive director or any other investigator should sit back in every instance and simply rely on the fact the burden of proof lies on the applicant. In cases where the applicant alleges unprofessional conduct or an abuse of some kind and adduces evidence supporting his or her case, the *evidentiary* burden may well shift to the director to respond in a meaningful way — to explain why a particular tactic was followed, for example, or why an investigation has been inordinately delayed. Respectfully, the public interest would not be served by a regulatory system that the investing public perceives to be biased, unfair or chronically inefficient.
>
> [Emphasis added.]

I have reproduced these paragraphs from *Morabito 2022* to set out the background of the insider trading investigation and to contextualize this Court's remarks about the shifting evidentiary burdens.

Appellants' Disclosure Applications

[22] Alongside the application to revoke the Investigation Order, the appellants brought multiple disclosure applications. The appellants rely on aspects of the disclosure process to support their abuse applications, including the following:

a) On March 24, 2022, in response to an application for further and better disclosure, Mr. Morabito first learned of the June 2021 discussions between the executive director's staff and Mr. Gadek.

b) On April 19, 2022, Jetlines applied for further and better disclosure from the executive director to address perceived gaps in previous disclosure.

c) On July 13, 2022, the appellants filed applications to cross-examine the deponents of affidavits filed in response to the disclosure applications.

d) On August 8, 2022, the Panel issued a ruling, with reasons to follow, dismissing the applications to cross-examine the deponent about disclosure.

e) On October 18, 2022, the Panel issued a disclosure ruling, with reasons to follow, ordering the executive director to deliver: (1) a list and description of each document over which the executive director claimed settlement privilege; (2) a list of the categories of documents over which the executive director claimed litigation privilege, with descriptions; and (3) a list of the categories of documents which the executive director says are irrelevant, with descriptions.

f) On February 17, 2023, the Panel issued a supplemental disclosure ruling, with reasons to follow, ordering the executive director to deliver additional information about documents that were withheld.

g) On April 3, 2023, the Panel issued a second supplemental ruling finding the executive director had proven their claim for settlement privilege over redacted portions of certain documents relating to the executive director's decision to withhold information about Mr. Gadek.

[23] The appellants noted that the Panel did not deliver their "reasons to follow" on the various disclosure applications until after they had filed their applications for leave to appeal the abuse of process ruling.

Abuse of Process Applications

[24] Well into the protracted disclosure process, the appellants learned that the executive director had failed or refused to disclose that a material witness was terminally ill and about to die. The appellants submit that Mr. Gadek was critical to proving an essential element of the insider trading charge and the executive director's non-disclosure was the "final straw". Mr. Morabito deposed that he did not know Mr. Gadek was terminally ill. He deposed further that he first learned counsel for the executive director was informed of Mr. Gadek's illness in June 2021, two months before he died. However, the executive director only disclosed in March 2022 that they knew about Mr. Gadek's condition, in response to persistent disclosure applications. Olen Aasen, corporate counsel for Jetlines, deposed that he learned about Mr. Gadek's death after he received the notice of hearing, around October 18, 2021. At the hearing before us, the respondents maintained their position that Mr. Gadek's terminal illness was not relevant, that his evidence was available from other sources, and in any event, was subject to settlement privilege.

Notice of application

[25] On February 15, 2023, Mr. Morabito filed an application seeking an order that the Commission proceedings be permanently stayed as an abuse of process. Jetlines filed a similar application, dated March 2, 2023, seeking the same relief.

[26] Mr. Morabito particularized the allegations of abuse of process, raising the following grounds:

a) The proceeding had become abusive of the Commission's process, abusive of the Commission's jurisdiction, and abusive of the rights of the appellants based on the "… unexplained, inordinate delays in the investigation, to the persistent failures to timely make full and complete disclosure, to the … targeting of Mr. Morabito individually …".

b) The executive director withheld documents and failed to disclose to the appellants that a material witness was terminally ill and about to die. Documents which were later disclosed revealed that the executive director knew in June 2021 about Mr. Gadek's terminal illness. The notice of hearing was issued in October 2021, two months after Mr. Gadek had died. Thereafter and despite the appellants' repeated requests, the executive director refused to disclose any details about Mr. Gadek's communications with the executive director after Mr. Gadek had been informed about the allegations against him.

c) After the notice of hearing was issued, the executive director provided minimal disclosure to the appellants. The initial disclosure did not include the steps taken to investigate information held by Jetlines personnel, including Mr. Gadek. The appellants brought multiple applications for disclosure, seeking information relating to Mr. Gadek, particulars of his evidence, and efforts taken by the executive director to preserve their evidence.

Panel's procedure for determining the abuse of process applications

[27] On March 3, 2023, the parties convened a case management conference with the chair of the Panel to address the substantive allegations and the abuse of process applications. The appellants took the position that they be permitted to proceed with the abuse of process applications before the liability hearing. The executive director disagreed. They took the position that it was necessary to

tender the liability evidence first in order for the Panel to assess prejudice, a critical component of the remedy sought by the appellants. The Panel acceded to the executive director's proposal that they be permitted to commence the liability hearing. In correspondence dated March 3, 2023, the chair of the Panel confirmed the procedure:

> I confirmed that the [appellants] have made applications to stay the proceedings against their clients for abuse of process and that the [P]anel has determined it will best be in a position to decide the applications after hearing the evidence introduced by the executive director in the liability hearing. I also confirmed that the respondents will not be required to call their respective cases until the panel has issued a ruling on the stay applications.
>
> The respondents have already filed their written submissions regarding the stay applications. The executive director will file his written submissions in that matter after the close of his case and the respondents will have the opportunity to file written reply submissions.

[28] The respondents say the appellants were well-served by this procedure, resisting the suggestion that the hearings were "merged" or that they had been "rolled into one". Rather, the respondents submit the two hearings were distinct, stating it was very clear the executive director was calling Nicole Henwood, a Commission investigator, to prove liability and that the appellants were free to do what they wished to prove abuse of process. The respondents submitted that if the appellants wanted to call Mr. Pesunti or Karen Lau (one of the other Commission investigators), they could have done so. There was a procedure in place that allowed them to call a hostile witness for cross-examination, and in fact, they had earlier used this mechanism during the disclosure applications.

[29] In their reply, the appellants rejected this "metaphysical distinction", submitting that the Panel's reasons made clear that they did not see any distinction between the substantive liability hearing and the abuse of process hearing. I agree. The opening remarks of the chair of the Panel reveal that the Panel and parties contemplated a blended hearing:

> THE CHAIR: Thank you. Just to set the framework once again for this hearing. As we're all aware, the respondents have filed applications to stay these proceedings against their clients on the basis of abuse of process. And the [P]anel determined that it would best be in a position to decide these applications after hearing the executive director's evidence.
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> As has been outlined in correspondence between the hearing office and the parties, the respondents will not be required to call their respective cases until the [P]anel has issued a ruling on the stay applications, and if the applications are successful, these proceedings are at an end for the respondents. If they are dismissed, the respondents will have an opportunity to enter their cases at the hearing dates on the hearing dates that already been established in September.
>
> Before we begin, I want again to run through how we're going to proceed with the application. Today and on Tuesday, June the 27th, the executive director will present his evidence. The parties will then make written submissions, and deadlines have been set for those, and I'll run through them again at the conclusion of the hearing. And the [P]anel will then consider the submissions and issue a ruling and reasons.

[30] With those opening remarks, the testimony commenced on June 23 and continued on June 27, 2023. Over the objection of the appellants, Ms. Henwood was the sole witness called by the executive director. Ms. Henwood was assigned to the investigation in November 2021, one month after the notice of hearing was issued. She did not have first-hand knowledge of any of the investigative steps taken before her involvement.

[31] The appellants assert that the flawed and unfair procedure denied them the opportunity to cross-examine the investigator responsible for investigative decision-making. When they attempted to inquire into issues relevant to their abuse of process applications, the executive director objected, citing relevance. An example of the objection taken and the Panel’s ruling demonstrates how cross-examination was curtailed:

CROSS-EXAMINATION BY CNSL R. DEANE:

Q Ms. Henwood, where is Michael Pesunti today?

A He is in his office.

Q Is there any reason why he could not have testified on Friday and attend today for cross-examination?

CNSL J. TORRANCE: Objection. Relevance.

CNSL R. DEANE: I'm entitled to cross-examine the witness on the course of their investigation. Mr. Pesunti was the lead investigator. I'm asking questions about the investigation.

CNSL J. TORRANCE: Well, he's actually asking questions about who's testifying here in the hearing, so -- and who's testifying is Ms. Henwood. That's who we've called. So that's what the question relates to in my submission.

THE CHAIR: I believe that we will continue with Ms. Henwood. She's testifying as to documents that were obtained by the executive director. To the extent that there are issues, I don't believe you have an entitlement to cross-examine a particular witness. I think any issues you raised in terms of Ms. Henwood would perhaps go to the strength of the [executive director's] case in their submissions, but Ms. Henwood is the witness that [executive director] has produced.

CNSL R. DEANE: So I'm not being permitted to ask that question, Madam Chair?

THE CHAIR: You have asked the question. So which question are you asking now? You asked --

CNSL R. DEANE: The question on the table that led to my friend's objection was is there any reason why he, being Mr. Pesunti, could not testify on Friday and attend today for cross-examination.

THE CHAIR: I don't know whether that is something that is relevant to these proceedings and that you do not have entitlement to any particular witness. But if Ms. Henwood chooses to answer, I think this is the witness that the [executive director] has chosen to produce to introduce his evidence, and I don't actually see how the question you are asking is relevant.

CNSL R. DEANE: I'm not going to argue with the chair. Is the question then -- is my friend's objection sustained?

THE CHAIR: It is sustained, yes.

CNSL R. DEANE:

Q Mr. Pesunti was the lead investigator on this matter, correct, Ms. Henwood?

A Yes.

[Emphasis added.]

[32] Counsel for Jetlines made a similar attempt to cross-examine Ms. Henwood about Mr. Pesunti's conduct during the investigation:

> Q Now, Ms. Henwood, you understand that -- and certainly from the questioning today there are a number of complaints about Mr. Pesunti's conduct in connection with the investigation?
>
> A I'm aware of one complaint.
>
> Q What is that?
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> A That he went to Susan Morabito's house and yelled.
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> Q And given your experience at the commission here, you're aware, you have experience that that is a common complaint against Mr. Pesunti, isn't it?
>
> A No.
>
> CNSL J. TORRANCE: Objection. Relevance.
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> CNSL S. BOYLE: It goes directly to the issue of abuse of process and the conduct of the investigation that Mr. Pesunti was leading the investigation, had blinders on and was out to get both my client and Mr. Morabito. And Ms. Henwood has direct knowledge about that.
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> THE CHAIR: Mr. Torrance.
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> CNSL J. TORRANCE: The abuse -- as I read the abuse of process applications, part of it is related to the death of Mr. Gadek, and the other part of it relates to disclosure. This issue is one that has been somewhat covered in the appeal, I think.
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> THE CHAIR: I'm sorry, the appeal of the investigation order?
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> CNSL J. TORRANCE: In the appeal, the appeal of the investigation.
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> CNSL S. BOYLE: Our position, the application is broader and that this is a topic that's fair to canvass with the witness as part of cross-examination in the defence of the allegations against us.
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> THE CHAIR: I think the [P]anel is going to adjourn for a moment to consider this.
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> (PROCEEDINGS ADJOURNED AT 2:42 P.M.)
>
> (PROCEEDINGS RECONVENED AT 3:01 P.M.)
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> NICOLE HENWOOD, a witness for the executive director, recalled.
>
> THE CHAIR: Well, Mr. Boyle, the [P]anel has determined that that question is not relevant to the matter before us, and we ask that you move on.
>
> [Emphasis added.]

[33] In the absence of the witness, Mr. Boyle then attempted to further explain to the Panel the basis for his questions and why they were relevant to the abuse of process application, particularly focusing on Mr. Pesunti's conduct. The Panel sustained the relevance objection and did not permit counsel to cross-examine on this topic. The appellants maintain their position that these questions were highly relevant to the abuse of process claim.

[34] Following Ms. Henwood's testimony, the executive director closed their case on liability and the abuse of process hearing was similarly ended. Further to the case management directive, the executive director delivered their written submission on the abuse of process applications on July 3, 2023. The appellants delivered their written reply on July 17, 2023.

The Panel's abuse of process decision

[35] On August 17, 2023, the Panel released its decision, dismissing the abuse of process applications. The Panel commenced its reasons by setting out the remedy sought by the appellants; that is, an order that the proceedings be permanently stayed as an abuse of process. The Panel set out its procedure and wrote that it had determined "… it would be better placed to decide the stay applications after hearing the executive director's case regarding the liability of the [appellants] for the conduct alleged in the Notice of Hearing …": at para. 4. The Panel confirmed that the appellants would not be required to present their case "… unless and until the [P]anel had dismissed the stay applications": at para. 4. The Panel summarized its process:

> [5] Accordingly, on June 23 and June 27, 2023, the executive director presented his case and the [appellants] had an opportunity to cross-examine the executive director's witness. The [appellants] had made fulsome written submissions in the Stay Applications. After the oral hearing of the executive director's liability case, the executive director filed his written submissions on the Stay Applications and each of [the appellants] filed a written reply. This is the decision of the [P]anel on the Stay Applications.

[36] The Panel then set out the background, including the allegations of insider trading, the procedural history, and the disclosure applications. The Panel concluded this portion of its reasons by addressing its decision about procedure, stating:

> [33] The executive director proposed that since a central aspect of the Stay Applications relates to the [appellants'] position that the death of [Mr. Gadek] deprived them of key evidence essential to their defence, the [P]anel would be in the best position to consider the Stay Applications after hearing all the evidence at the liability hearing.
>
> [34] The [P]anel agreed that it would be better placed to decide the Stay Applications after hearing the executive director's evidence, on the basis that the question whether the ability of the [appellants] to defend themselves against the allegations in the Notice of Hearing has been irremediably prejudiced must be rooted in the evidence relating to the allegations.
>
> [35] [Mr.] Morabito took the position that the stay applications must be heard and determined before further proceedings unfold.
>
> [36] After considering the positions of the parties and the general principle in BC Policy 15-601 – *Hearings* that the Commission's goal is to conduct its proceedings fairly, flexibly and efficiently, this [P]anel determined that it would hear the executive director's evidence before it decided the Stay Applications but that the [appellants] would not be required to present their cases unless and until the [P]anel dismissed the Stay Applications.

[37] The Panel next turned to the applicable law, stating that it must consider the allegations in the notice of hearing, the relevant securities law underlying the allegations, and the law of abuse of process to determine whether a stay of proceedings "… is indeed the only option that is fair to the [appellants] …": at para. 37.

[38] The Panel set out the governing provisions of the *Securities Act*. The Panel then turned to Part 2.1 of BC-Policy 15-601 which governs the conduct of hearings and provides that "… the Commission is the master of its own procedures …". The hearing policy states: "[t]he Commission holds administrative hearings, which are less formal than the courts. The Commission's goal is to conduct its proceedings fairly, flexibly and efficiently".

[39] Regarding abuse of process jurisprudence, the Panel cited three authorities: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, *R. v. Power,* [1994] 1 S.C.R. 601, 1994 CanLII 126, and *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 [*Abrametz*].

[40] Next, the Panel set out the parties' submissions. The Panel noted that although delay and the disclosure issues surrounding the death of Mr. Gadek were important to their applications for a stay, those were not the only bases warranting a stay. In this section of its reasons, the Panel summarized some of the additional concerns, including:

a) interactions between the investigative team and the Morabito family and the "… sweeping scope of the investigation, which evidently sought and gathered extensive information from Morabito's spouse, teenage daughter and parent and from several financial institutions and other advisors to Morabito …" and included "… a visit to the Morabito family home by a Commission investigator, accompanied by a 'burly RCMP officer'": at para. 62;

b) decisions made by investigators selecting who was to be interviewed in the investigation, choosing not to investigate any of the directors or employees of Jetlines, and choosing not to interview "… any of the individuals responsible for or directly involved with [Jetlines'] disclosure obligations and regular communications with IIROC …": at para. 63;

c) the executive director's decision to present his evidentiary case in chief through Ms. Henwood, an investigator assigned to the investigation after it was complete and the notice of hearing had been issued, and who did not have first-hand knowledge of the investigative steps taken and the reasons for them: at para. 68;

d) the executive director's decision to shield the investigator (Mr. Pesunti) from cross-examination and denying the appellants the opportunity to confront the investigator: at para. 69; and

e) that the concealment of Mr. Gadek's death was particularly egregious; however, the appellants' allegations of abuse "… engage the proceeding as a whole": at para. 71.

[41] The Panel summarized the executive director's submission as follows:

> [75] The executive director's submissions address two principal potential bases for a stay of proceedings: (1) the executive director's failure to inform the [appellants] of the impending death of [Mr. Gadek]; and (2) the executive director's disclosure process.

[42] The executive director submitted that Mr. Gadek was one of many witnesses to the events in question and that none of his evidence was crucial to the appellants' theory of the case. With respect to disclosure, the executive director relied on previous decisions of the Panel that indicated the executive director had met their disclosure obligations. In any event, the executive director pointed the Panel to *Blencoe* and *Abrametz* in support of the proposition that a stay would only be issued in the clearest of cases, and that this case did not qualify as such.

[43] In its analysis, the Panel essentially adopted the submission of the executive director, concluding that Mr. Gadek's testimony was not critical to the appellants' case: at para. 103. The Panel similarly dismissed the appellants' arguments related to delay, disclosure, and bias: at paras. 113–131. The Panel invoked *Blencoe* and *Abrametz*, relying on the latter for the proposition that there were two ways in which delay could constitute an abuse of process. The Panel wrote:

> [132] … First, delay can impact hearing fairness, and can compromise a party's ability to respond to a complaint. This can arise when memories have faded, essential witnesses are unavailable or evidence has been lost. Second, inordinate delay can cause prejudice to a party irrespective of hearing fairness.

[44] The Panel concluded that since the testimony of Mr. Gadek was not critical to the appellants' defence on the merits, it did not impact hearing fairness: at para. 133. Further, while the conduct of the Commission staff had been imperfect, the executive director's actions did not individually or collectively compromise hearing fairness: at para. 135. In any event, the Panel held it would not have granted a stay even if it had found an abuse of process, owing to the considerable public interest in having the merits of the case tested in a hearing: at para. 140.

Leave to appeal the Panel's decision

[45] On October 16, 2023, Justice Willcock granted leave to appeal the Panel's decision, finding that the appellants "… have identified questions of law with implications of general importance to persons subject to prosecution by administrative bodies": *Morabito 2023* at para. 33. Justice Willcock concluded "… there is significant apparent merit in the proposed appeal", stating:

a) the Panel "… itself concluded there was 'a strong foundation for a claim for abuse of process', but dismissed the stay application because the [appellants] had not discharged the burden upon them to prove they had suffered some prejudice". On this point, "… there is an arguable case the Panel erred in giving inappropriate weight to the presence or absence of prejudice, and thereby failed to give effect to the fact the doctrine of abuse of process 'transcends the interests of the litigants' …": at para. 38, internal references omitted;

b) "… [T]here is some merit in the argument that the Panel failed to require the [executive director] to bear the evidentiary burden described in *Morabito 2022* …" and "… some prospect that a division of this Court would find the Panel failed to give effect to the evidentiary onus, and erred by not requiring the [executive director] to respond in a 'meaningful way' to the [appellants'] allegations and by speculating with respect to the [executive director's] motives": at paras. 39–40; and,

c) "… [T]here is some prospect a division of this Court will conclude the Panel erred in failing to weigh in the balance the fact the [executive director] effectively shielded the investigators from cross-examination on their conduct: at paras. 41–42.

[46] It was not contested that if leave to appeal was granted, proceedings before the Commission would be stayed pending the disposition of the appeal.

On Appeal

Grounds of appeal

[47] On appeal, the appellants allege the following errors:

a) the Commission erred in using *Blencoe* and *Abrametz* to inform its analytical framework when those cases dealt with abuse of process founded on delay alone;

b) the Commission erred in giving inappropriate weight to prejudice to the appellants when the consideration of abuse of process is intended to transcend the interests of the parties; and,

c) the Commission erred by failing to require the executive director to discharge an evidentiary burden to answer allegations of abusive conduct substantiated with some evidence (as was set out in *Morabito 2022*), including by failing to consider that the executive director shielded investigators from cross examination.

[48] The appellants say that these failures resulted in the Commission erring in not permanently staying the proceedings. They maintain that when the analysis is properly undertaken, a permanent stay of proceedings is the only appropriate remedy. The appellants encourage this Court to adhere to the evidentiary record available, make the findings of abuse of process they say are clearly available on the evidence, and grant a stay of proceedings.

[49] The respondents submit that the Panel made no error. They say the Panel used the correct analytical framework for assessing an abuse of process claim; correctly declined to draw the inferences proposed as lacking an evidentiary foundation and accordingly, the evidentiary burden had not shifted; and, the Panel did not err by declining to find an abuse of process. The respondents say the abuse of process applications were yet another attempt by the appellants to avoid a liability hearing. However, if there was an error, then the matter should be remitted back to the Panel in accordance with s. 167 of the *Securities Act* along with any direction required.

Standard of review

[50] This is a statutory appeal pursuant to s. 167 of the *Securities Act* arising out of an allegation of insider trading to which the appellate standards of review apply: *Vavilov* at para. 33; *Abrametz* at paras. 26–30. Where questions of procedural fairness are dealt with through a statutory appeal mechanism, they are subject to appellate standards of review: *Abrametz* at para. 28. Questions of law are reviewed for correctness and questions of fact and mixed fact and law are reviewed for palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

[51] Whether there has been an abuse of process is a question of law, reviewable for correctness: *Abrametz* at para. 30.

General principles

[52] The Supreme Court of Canada in *British Columbia Securities Commission v. Branch,* [1995] 2 S.C.R. 3, 1995 CanLII 142 considered the significance of securities legislation and its operation. The Court made clear that the primary goal of the *Securities Act* is to protect the investing public and to promote public confidence in the system. The Court referred to the Commission's mandate as a "goal of paramount importance": at para. 34. Recognizing the "… [pre-eminence] of securities regulation in our economic system …", Justices Sopinka and Iacobucci (writing for the majority), cited *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 1994 CanLII 103:

> 72 This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

[53] The appellants do not disagree with the importance of the general principles governing the Commission and its operation. With this grant of power, however, the appellants submit that the Commission must nonetheless abide by rules of procedural fairness and that in a case such as this, the doctrine of abuse of process has a role to play.

[54] In *Abrametz*, the Supreme Court of Canada considered the doctrine of abuse of process in the context of disciplinary proceedings involving a lawyer. Justice Rowe, writing for the majority, noted that the appeal gave the Court the opportunity to address the doctrine of abuse of process as it relates to inordinate delay in the administrative context. The Court also clarified the standard of review applicable to questions of procedural fairness and to abuse of process in statutory appeals.

[55] Describing abuse of process as a broad concept that applies in various contexts (at para. 36), Justice Rowe wrote:

> [35] It is also characterized by its flexibility. It is not encumbered by specific requirements, unlike the concepts of *res judicata* and issue estoppel: *Behn*, at para. 40; *C.U.P.E.*, at paras. 37-38. In *Behn*, at para. 40, LeBel J. referred with approval to Goudge J.A., dissenting, in *Canam Enterprises Inc.* (C.A.), where Goudge J.A. explained that the doctrine of abuse of process
>
> > engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.
>
> Such flexibility is important in the administrative law context, given the wide variety of circumstances in which delegated authority is exercised.
>
> [Emphasis omitted.]

[56] Justice Rowe set out that the abuse of process doctrine focused primarily on the "… integrity of courts' adjudicative functions, and less on the interests of parties … The proper administration of justice and ensuring fairness are central to the doctrine … It aims to prevent unfairness by precluding 'abuse of the decision-

making process' …". In administrative proceedings, "… abuse of process is a question of procedural fairness …": at paras. 36, 38, internal references omitted.

[57] The appellants stress the importance of the flexibility of the abuse of process doctrine in administrative proceedings, particularly given "… the wide variety of circumstances in which delegated authority is exercised": *Abrametz* at para. 35. The appellants assert that the Panel erred when it analyzed abuse of process through the lens of "delay" and "prejudice" alone. They submit the Panel failed to engage in the broader abuse of process principles as enunciated in *R. v. Babos*, 2014 SCC 16, where Justice Moldaver stated:

> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid*., at para. 57).

Where, as here, the residual category is invoked, the first stage of the test is met when it is established that "… the state has engaged in conduct that is offensive to societal notions of fair play and decency and [that] proceeding with a [hearing] in the face of that conduct would be harmful to the integrity of the justice system". As Justice Moldaver stated, "… there are limits on the type of conduct society will tolerate in the prosecution of offences": *Babos* at para. 35.

[58] It was on this point of fair play and decency where the appellants assert the Panel's analysis fell short. The appellants submit the broader abuse of process principles are particularly important in circumstances where the Commission (and by extension, its executive director) has been delegated vast powers to regulate capital markets in British Columbia. The Panel's narrow analytical framework (with its focus

on prejudice) shielded the investigation from a critical review. The appellants submit the Panel never answered the question about whether the impugned conduct was "… offensive to societal notions of fair play and decency …": *Babos* at para. 35.

Analysis

[59] In an appeal such as this one, this Court must bear in mind the powers granted by the legislature to the Commission. However, deference will give way when procedural decisions result in a manifestly unfair hearing. In my view, that is what occurred here. To answer the procedural problems, the appeal can be determined on the third ground raised in the factum, restated as follows: Did the Panel err by instituting a procedure that violated the rules of procedural fairness by (1) not requiring the executive director to respond in a meaningful way to the appellant's abuse of process allegations; and (2) by shielding the Commission investigators from cross-examination?

Did the Panel err in adopting a procedure that materially restricted the determination of the abuse of process application?

[60] In my view, the critical aspect of this appeal arises out of the procedure that the executive director requested and which the Panel endorsed. At the case management conference, the executive director took the position that prejudice was a key factor for the Panel to assess and that the Panel could only perform this task with the benefit of the liability evidence. As such, the executive director, over the objection of the appellants, advocated for a procedure that permitted the executive director to call their case in conjunction with the abuse of process application. The appellants were left with a procedure that in my view, and for reasons set out below, was fundamentally flawed and not in accordance with the rules of procedural fairness.

[61] As Justice Rowe stated in *Abrametz*, "[i]n administrative proceedings, abuse of process is a question of procedural fairness ...": at para. 38, internal references omitted. All administrative decision-makers have a duty to use a "… fair and open procedure, appropriate to the decision being made and its statutory, institutional,

and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker": *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817 at para. 22, 1999 CanLII 699. In assessing whether the duty of procedural fairness was satisfied in the circumstances, a reviewing court must have regard to several factors, including the nature of the decision being made and the process followed in making it, the statutory scheme, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the administrative body: *Baker* at paras. 22–23.

[62] It is not disputed that the Panel controlled its own process and was empowered to create a procedure to best determine the abuse of process applications. However, it had a duty to use a fair and open procedure "… with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker": *Baker* at para. 22. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker*.

[63] The procedure adopted by the Panel frustrated the appellants' ability to advance their claims of abuse of process—to the extent that the appellants were denied a fair hearing. I set out but three examples demonstrating procedural unfairness.

[64] First, the executive director called one witness to prove their case, Ms. Henwood. She was assigned to the investigation after most of the investigative steps had completed and after the notice of hearing had been issued. She did not have first-hand knowledge of the investigation nor the steps that were taken. The appellants submit that it was unfair for the executive director to call Ms. Henwood as the sole witness because she did not have any involvement with the impugned

investigative events. In response, the appellants were told they could call Mr. Pesunti and Ms. Lau as part of their own case.

[65] The suggestion that the appellants call Mr. Pesunti and Ms. Lau as part of their own case demonstrates well the confusion caused by the blended hearing. The Panel assured the appellants that they would not be put to their defence until the Panel decided the abuse of process applications. The executive director opened their case and proceeded with the prosecution of the substantive allegations. They left it to the appellants to prove the abuse of process claims. In my view, in the circumstances presented, it was unfair to insist that the appellants call an adverse (or hostile) witness in their own case.

[66] In the usual course, a party prosecuting a claim is given significant latitude about witnesses they wish to call. For the liability hearing, the Panel was not necessarily incorrect when it stated that the appellants were not entitled to any particular witness. However, in this case, the appellants sought to advance allegations of abuse of process. Mr. Pesunti was the obvious person with first-hand knowledge of many of the incidents particularized in the notices of application. As stated by the Supreme Court of Canada in *R. v. Lyttle*, 2004 SCC 5, cross-examination is "… a faithful friend in the pursuit of justice and an indispensable ally in the search for truth" that should be "… jealously protected and broadly construed": at paras. 1, 44.

[67] In my view, fairness dictated that the executive director call Mr. Pesunti to answer at least some of the allegations. This is particularly true in light of the remarks in *Morabito 2022* (at para. 97) about when the evidentiary burden may shift to the director. Instead, the executive director proceeded in a manner that shielded Mr. Pesunti (and other investigators) from answering the allegations, including those related to the investigative steps taken by Mr. Pesunti and the executive director's failure to disclose Mr. Gadek's terminal illness, to cite just two examples. I agree with the appellants' submission that there was a body of evidence presented, at least with respect to these two examples, such that the evidentiary burden shifted to the

executive director to respond in a meaningful way "… to explain why a particular tactic was followed, for example …": *Morabito 2022* at para. 97.

[68] The second example of procedural unfairness relates to the stymied cross-examination of the one witness called. The nature of the objections launched by counsel for the executive director similarly shows the confusion caused by the blended hearing. When counsel tried to cross-examine Ms. Henwood about Mr. Pesunti's conduct (a significant feature of the abuse of process applications) the executive director objected on the basis of relevance.

[69] Earlier in these reasons, I referred to transcript excerpts showing the appellants' attempts to cross-examine Ms. Henwood about things Mr. Pesunti had done. When the executive director objected, the Panel sustained the objections, and in effect, prohibited these legitimate avenues of cross-examination, with the chair ruling, "… I don't…see how the question you are asking is relevant".

[70] It seems that the Panel was considering relevance in the context of the substantive case but not in relation to the claim of abuse of process. This is despite the appellants' attempt to explain relevance in the context of their abuse of process applications. In effect, the appellants were prevented from eliciting evidence to substantiate their abuse of process claims.

[71] The appellants submit that the problem with the blended hearing was exacerbated by the Panel because they "… fill[ed] in the evidentiary gaps …". The executive director did not tender any evidence to counter the abuse allegations. By filling in the gaps, the Panel allowed the executive director "… to sit back in the face of credible allegations of abuse, contrary to what this Court has already instructed …".

[72] As an example of "filling in the gap", the appellants point to the evidentiary void left by the executive director with respect to their decision to stay silent about Mr. Gadek's terminal illness. In their written submissions to the Panel, the executive director responded to this allegation by stating, "[t]o provide [Mr.] Gadek's personal

medical information to third parties while he was alive would have been a serious breach of [Mr.] Gadek's privacy". In the decision, the Panel answered this allegation in the following way:

> [127] It is clear from the record that the executive director knew in June 2021 but did not tell [Mr.] Morabito or [Jetlines], that [Mr. Gadek] was terminally ill. It is also clear that the initial disclosure of documents by the executive director to the [appellants] did not include any reference to discussions the executive director had with [Mr. Gadek] before [his] death in August 2021. The [appellants] invite us to conclude that the failure to make such disclosure while [Mr. Gadek] was alive was an improper tactical decision on the executive director's part. We find that we have no basis to make that conclusion, since it is also possible that the executive director regarded any information that could have been provided by [Mr. Gadek] as irrelevant to the allegations made against the [appellants] in the Notice of Hearing.
>
> [Emphasis added.]

[73] The Panel justified the non-disclosure for reasons not advanced by the executive director. The executive director submitted that they did not disclose this information because of privacy concerns. The Panel found that it was "… possible that the executive director regarded any information that could have been provided by [Mr. Gadek] as irrelevant …". This was not the position the executive director took, at least before the Panel (counsel for the executive director did take that position before this Court).

[74] The appellants, correctly in my view, assert that the Panel impermissibly speculated about the reason for the executive director's non-disclosure. This was a finding that was not available to the Panel on the evidence presented.

[75] Another example of "filling in the gap" relates to the executive director's failure to interview Mr. Gadek. The appellants contend some of the prejudice may have been ameliorated if Mr. Gadek had been interviewed. There was no explanation from the executive director about the failure to interview Mr. Gadek. The Panel dismissed this complaint by stating:

> [126] We take it that [Mr.] Morabito's assertion that staff "never bothered to interview" [Mr. Gadek] is meant to suggest bias on staff's part. There can be any number of reasons for deciding to interview a witness, or not. We have not seen anything to convince us that the executive director's decision not to interview [Mr. Gadek] had an improper motivation.

[76] Without considering whether the investigator's conduct was, in fact, an abuse of process, the Panel excused this complaint by noting there are "… any number of reasons for deciding to interview a witness, or not …". The Panel provided an excuse for this investigative failure that was not one advanced by the executive director.

[77] The third example demonstrating procedural unfairness was the way counsel for the executive director reframed and narrowed the abuse of process applications. Counsel for the executive director told the Panel that the abuse of process application was restricted to disclosure delays and the failure to disclose Mr. Gadek's terminal illness. During the cross-examination about Mr. Pesunti, the executive director objected, stating: "… as I read the abuse of process applications, part of it is related to the death of Mr. Gadek, and the other part of it relates to disclosure. This issue is one that has been somewhat covered in the appeal [of the investigation order], I think". He was wrong. The Panel stood down for 20 minutes to consider the objection. When they returned, they ruled: "… the [P]anel has determined that that question is not relevant to the matter before us, and we ask that you move on".

[78] In my view, this is just one example of an objection that prevented the appellants from advancing the abuse of process allegations. The abuse of process application was plainly much broader than characterized by the executive director in their objections.

[79] The failure to disclose Mr. Gadek's terminal illness was certainly the focus of the appellants' attention, but this was not the sole focus, nor were their complaints about disclosure failures. Rather, the notice of application made clear that there were a number of other issues that constituted the basis for the abuse application,

including the investigator's conduct with Mrs. Morabito, the Freeze Order limiting Mr. Morabito's trading activity, production of documents from Mr. Morabito Sr., and the proceedings themselves. On this point, the appellants sought to cross-examine Mr. Pesunti, the investigator charged with the investigation into the insider trading allegations, the investigator who attended the Morabitos' home, and the investigator who sought and obtained various production orders. It was Mr. Pesunti who needed to answer the allegations of investigative impropriety. When the executive director's objection was sustained, the appellants were prevented from examining the investigative complaints critical to their application.

[80] In sum, the Panel adopted a procedure that: (1) compelled the appellants to elicit evidence from a witness hostile to their interests; (2) prevented the appellants from eliciting evidence to prove their allegations of abuse of process from the one witness the executive director chose to present their case; and, (3) impermissibly narrowed the abuse of process application such that the conduct of the investigators was protected from scrutiny. The procedure adopted by the Panel (as proposed and advocated for by the executive director) resulted in a hearing that was procedurally unfair. Blending the abuse hearing with the substantive allegations barred the appellants from a fair determination of their applications.

[81] The Panel is in control of its own procedure and was permitted to do what was required to ensure that the hearing was fair, flexible, and efficient. Considerable deference is granted to decision-makers who need to exercise their discretion and case management powers to ensure justice is done in the circumstances.

[82] However, where there is a credible basis supporting allegations of state misconduct, as here, the Panel must proceed in a manner that allows for an airing of the allegations. This point was made by the Supreme Court of Canada in *R. v. Haevischer*, 2023 SCC 11 when the Court examined the summary dismissal procedure for an abuse of process application brought during the course of a criminal trial. In *Haevischer*, the defendants sought a stay of proceedings alleging police misconduct. The trial judge had summarily dismissed an application for a *voir*

dire. The Supreme Court of Canada concluded this was an error. Justice Martin stated:

> [118] … the judge conducted the balancing exercise when she could not be sure that she had access to all the necessary evidence. In cases like this, which involve state misconduct, there is a distinct possibility that the extent of the misconduct will be unknown at the summary dismissal stage, and it may well be more serious than alleged. Where the trial disclosure is not relevant to the issues on an application, separate disclosure will likely be necessary to ensure that all material relevant to the application is produced. In addition, the misconduct may only come to light through cross-examination. As acknowledged by the Court of Appeal, certain defence allegations — such as the ones made here — "are such that they can likely only be established through cross-examination" (para. 404; see also *R. v. Rice*, 2018 QCCA 198, at para. 64 (CanLII)). This Court has further recognized that cross-examination is a critically important tool and an essential component of the accused's right to full answer and defence (see, e.g., *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 41; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 663; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 76; *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 64).
>
> [Emphasis added.]

[83] Justice Martin's words are apt here. I agree with the appellants' submission that the nature of their allegations required an answer from the investigators themselves. For example, only Mr. Pesunti could respond to the accusation that he went to Mr. Morabito's home when he knew Mr. Morabito was not there to intimidate Mrs. Morabito. These are the sort of "defence allegations" that "… can likely only be established through cross-examination": *Haevischer* at para. 118.

[84] During the hearing, the respondents advanced a submission suggesting that there were two discrete hearings: the liability hearing and the abuse hearing. The respondents submitted that the abuse of process hearing would proceed in writing and the liability hearing would be dealt with by calling Ms. Henwood. The respondents explained that the appellants were told four months before the commencement of the hearing that this was the Commission's only witness to be called.

[85] The appellants say that the first time they heard the suggestions about "two distinct hearings" was during the hearing of this appeal. In my view, the respondents' position is inconsistent with the record and is not borne out by the Panel's reasons.

Indeed, the Panel concluded that it did not matter what evidence the executive director chose to tender because "… the executive director is free to choose how he will present his case, and to take the risks attendant upon his choice. Either he will succeed in proving the allegations in the Notice of Hearing, or he will not": at para. 129. I agree with the appellants that this statement is misplaced and accept their submission that "[h]ow the [e]xecutive [d]irector decides to prove his substantive case should be of no moment to the [Panel] at this stage when only the stay applications were before it".

[86] In this case, the appellants were placed in an impossible position. They had sought a hearing before the liability hearing commenced. The decision-maker denied that request. When the appellants requested that a particular investigator testify at the hearing, that request was also denied. They were told they did not have to open their case until the conclusion of the liability hearing. However, that process was in direct conflict with their ability to elicit evidence on the abuse of process hearing. When the appellants attempted to cross-examine the investigator about issues raised in the applications, counsel for the executive director objected and the Panel sustained that objection. In the end, the appellants never got the hearing to which they were entitled.

[87] In my view, that disentitlement constituted an error. It constituted a violation of the rules of procedural fairness and I would allow the appeal on that basis. Given these conclusions, it is not necessary for me to examine in detail the first ground of appeal raised.

Remedy

[88] It is my view that the Panel erred when it authorized a blended hearing for the abuse of process application and liability, in particular in light of the constraints it imposed. The result was that the appellants were prevented from exploring legitimate avenues of cross-examination relevant to the allegations they raised. The process suggested by the executive director (and instituted by the Panel) prevented

the appellants from putting forward their views and evidence fully and having them considered by the decision-maker.

[89] The appellants strongly urge this Court to find an abuse of process and stay the proceedings permanently. The appellants contend the evidentiary record is indisputable on the issues that matter. They point to three key findings: (1) the fact that Mr. Gadek, a material witness and essential to their right to make full answer and defence, is dead; (2) the executive director failed to disclose Mr. Gadek's terminal illness until after his death and well into the disclosure process; and (3) the executive director has maintained a claim of privilege (wrongly) over the limited information Mr. Gadek provided to counsel for the executive director. The appellants submit that this Court has all it needs to find an abuse of process and to grant the remedy they seek, stating that it would be unfair to remit the matter back to the Commission, particularly in circumstances where the Commission has not heeded the caution already received from this Court in *Morabito 2022*.

[90] Returning to *Vavilov*, we are being invited to engage with a disputed record, and to a certain extent, a disputed legal framework. As has been repeated throughout the abuse of process jurisprudence, a stay of proceedings is reserved for the clearest of cases. If an abuse of process is found, the hearing panel can fashion the appropriate remedy informed by a fulsome evidentiary record.

[91] The parties can start their abuse of process application afresh and in contemplation of the appropriate witnesses to be made available for cross-examination. They will then have the benefit of a fulsome evidentiary record to launch their submissions in the context of a legal framework informed by *Babos*, *Abrametz,* and the abuse of process jurisprudence generally.

Disposition

[92] Being mindful of the Court's comments in *Vavilov* in favour of returning an administrative decision to the decision-maker on an appeal, I would allow Mr. Morabito and Jetlines' appeal, set aside the decision of the Panel, and remit the matter to a newly constituted hearing panel of the British Columbia Securities

Commission to proceed with a hearing to determine the abuse of process applications in accordance with these reasons.

[93] We are indebted to counsel for their able arguments.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Voith"