2006 BCSECCOM 45

Arthur Murray Smolensky

Section 161(1) of the *Securities Act*, RSBC 1996, c. 418

Application

Panel	Brent W. Aitken	Vice Chair
	John K. Graf	Commissioner
	Robert J. Milbourne	Commissioner
Dates of Application	November 7-10, 2005	
Date of Ruling	January 16, 2006	

Appearing

Howard Shapray, Q.C. Brad Cramer	For Arthur Murray Smolensky
Joseph A. Bernardo Dana Goodfellow	For the Executive Director

Ruling

I. Introduction

¶ 1 On September 11, 2002, the Executive Director issued a notice of hearing under section 161(1) of the *Securities Act*, RSBC 1996, c. 418, alleging that in August 1997 Arthur Murray Smolensky manipulated the market in shares of Trooper Technologies Inc. to facilitate the pricing of a private placement for Trooper (contrary to section 57(b)), and that in doing so, Smolensky made trades using material information that was not publicly disclosed (contrary to section 86).

¶ 2 Trooper was listed on the Vancouver Stock Exchange (which later became CDNX Venture Exchange, and is now the TSX Venture Exchange). Smolensky, the founder and Chairman of Global Securities Ltd., is registered as a director and officer of the firm. Global is registered under the Act as an investment dealer.

¶ 3 In the notice of hearing, the Executive Director asks that the Commission prohibit Smolensky from trading securities, using the exemptions in the Act, acting as a director or officer, and engaging in investor relations activities. The Executive Director asks that the Commission reprimand Smolensky and suspend or restrict

his registration, or place conditions on it. The Executive Director also asks the Commission to order Smolensky to pay the costs of the hearing.

¶ 4 In this application, Smolensky asks us to dismiss or stay the section 161(1) hearing on one or more of the grounds that:

1. it is statute-barred;
2. section 148(1) of the Act is unconstitutional under the *Canadian Charter of Rights and Freedoms*; and
3. to hold a hearing would be an abuse of process.

II. Background

A. The Relevant Transactions

¶ 5 In 1997 Trooper was seeking capital. It had been trying to arrange a private placement through a UK investment dealer. On August 5, 1997 Trooper announced that those negotiations were unsuccessful. The Trooper share price then fell over the next few days from $2.30 prior to the announcement to $1.43 on the morning of August 14.

¶ 6 Trooper had also been having discussions with a European institutional investor. Although the institution was interested in investing, the most it was willing to pay for Trooper shares was $0.80. Under Exchange rules, a private placement at that price would have to be based on a trading price of no more than $1.00.

¶ 7 Late in the day on August 14, 1997 Smolensky traded shares of Trooper from various accounts at Global through the Exchange. During the period that these trades were executed, the Trooper share price fell from $1.43 to $1.05. After the close of trading on the Exchange that day, Trooper announced a private placement of 10 million shares at a price of $0.84.

B. The Exchange Investigation

¶ 8 A few days after August 14, 1997, staff of the Exchange contacted Smolensky to ask about the trades in Trooper he made on that day.

¶ 9 The Exchange ultimately disallowed the pricing of the private placement and required that it be priced at $1.35.

¶ 10 On August 20, 1997 the Exchange began an investigation into the Smolensky trades. The investigation continued for 22 months. In May 1999 the Exchange contacted Smolensky again with questions. Smolensky says he was surprised. He says he had heard nothing for nearly two years and so had assumed that the matter had been settled once the Exchange repriced the private placement.

¶ 11 A couple of months later, in July 1999, the Exchange contacted Smolensky and accused him of improper conduct. In September the Exchange told Smolensky that it would be issuing a notice of hearing "unless the matter is settled". The Exchange's first settlement proposal was discussed at a meeting of the Exchange's Executive Committee in September 1999. The Executive Director attended that meeting as an observer.

¶ 12 Those initial attempts at settlement failed and in March 2000 the Exchange issued a notice of hearing alleging that Smolensky manipulated the market in shares of Trooper in order to drive the share price down to the point where Trooper could complete the private placement with the European institutional investor under Exchange rules. The notice of hearing also alleged that the pending private placement was material information about Trooper that was not publicly disclosed, and that Smolensky knew of the information and traded with that knowledge.

¶ 13 The Exchange's second settlement proposal was discussed at a meeting of its Advisory Committee in March 2001. The Committee decided to put the settlement to an Exchange hearing panel for approval. In April 2001, the panel approved the settlement. In the settlement, Smolensky admitted that "[p]rior to 1:00 pm on August 14, 1997, Global, with [Smolensky's] knowledge, proposed a non-brokered private placement financing for Trooper at a price of $0.80 per unit." He also acknowledged that:

- "he sold Trooper shares in Global accounts on August 14, 1997 when he was aware of the proposed private placement" and that "he ought to have known" that the proposed private placement "was a material fact relating to Trooper that had not been generally disclosed", in violation of Exchange By-Law 5.01(2); and
- "he ought to have known that at the time he sold Trooper shares in the Global accounts that those transactions would create an artificial price for the securities of Trooper", in violation of Exchange By-Law 5.02(4) .

¶ 14 Under the terms of the settlement, Smolensky was suspended from trading for 30 days, paid a fine of $115,000, and paid costs of $10,000. He was also required to pass the Canadian Securities Institute Partners, Directors and Officers examination and the Trader Training Course. His trades were to be supervised for six months after his trading ban was lifted.

¶ 15 The settlement also stated that Smolensky's admissions of fact were only "for the purposes of the settlement of" the Exchange proceedings.

B. The Executive Director's Investigation

¶ 16 On August 20, 2001, the Executive Director obtained an investigation order under section 142 of the Act.

¶ 17 The investigation order authorized the investigators named in the order to:

> 3. . . . investigate, enquire into, inspect and examine any person, company or other entity on any matter that may reasonably relate to
>
> 3.1 the affairs of the Parties and their inter-relationships; and
>
> 3.2 the participation of the Parties in the trading of securities in British Columbia
>
> during the period from June 1, 1996 forward.

¶ 18 The Parties referred to in the investigation included Smolensky and other parties.

¶ 19 In September 2001 the Executive Director issued summonses under section 142 to employees of Global and other individuals and commission staff interviewed those individuals.

¶ 20 Summonses issued by the Executive Director contain excerpts from the Act, including the text of section 148(1), discussed below.

¶ 21 In October 2001 the Executive Director issued a summons to Smolensky. Smolensky says this was the first time he became aware that the matter, which he thought was settled as a result of his settlement with the Exchange, was ongoing. Commission staff interviewed Smolensky pursuant to the summons in December 2001 and June 2002.

¶ 22 In September 2002, the Executive Director issued the notice of hearing in these proceedings.

¶ 23 The allegations in the notice of hearing in this proceeding are essentially identical to those in the March 2000 Exchange notice of hearing, and are based on the same facts and conduct. The notice of hearing contains no allegations against other parties.

D. Court Proceedings

¶ 24 In November 2002 Smolensky applied by petition to the Supreme Court of British Columbia to have the section 161(1) hearing stayed. In April 2003 Smolensky amended the petition. In June Lowery J. of the Supreme Court heard the petition and in July released his decision dismissing Smolensky's application. (See *Smolensky v. British Columbia (Securities Commission)* 2003 BCSC 1189.)

¶ 25 The matter then went to the Court of Appeal. A number of months passed while Smolensky sought directions as to whether it was necessary for him to seek leave (the court ruled it was not), applied for a stay (granted, on certain terms) and appealed the conditions attached to the stay (dismissed).

¶ 26 In November 2003 the Court of Appeal heard Smolensky's appeal of Lowery J.'s dismissal of his petition. In February 2004 the Court of Appeal released its decision dismissing the appeal (with one of the justices dissenting). (See *Smolensky v. British Columbia (Securities Commission)* 2004 BCSC 81.)

¶ 27 In April 2004 Smolensky applied for leave to the Supreme Court of Canada to appeal the Court of Appeal's decision, which the Supreme Court denied in October 2004.

¶ 28 In April 2005, the Commission set the dates for this application.

III. Analysis

A. The Grounds for the Application

¶ 29 Smolensky asks us to dismiss or stay the section 161(1) hearing on one or more of the following grounds:

1. the hearing is statute-barred because of the limitation period in section 165(3);
2. section 148(1) of the Act is unconstitutional under the *Canadian Charter of Rights and Freedoms*; and
3. to hold the hearing would be an abuse of process, because
    - Smolensky has already been penalized for the same conduct by the Exchange
    - the Executive Director has not made full disclosure to Smolensky as required
    - the Executive Director has misused Smolensky's admissions in the Exchange settlement
    - even if constitutional, section 148(1) prevents Smolensky from making full answer and defence

- Smolensky has been prejudiced by the Executive Director's delay in making and prosecuting the allegations

1. Limitation period

Limitation period for section 161(1) proceedings

¶ 30 The notice of hearing was issued under section 161(1). Section 161(1) authorizes the commission to make orders sanctioning persons who contravene the Act or act contrary to the public interest. Section 159 imposes a six-year limitation period for proceedings under section 161(1). It says:

> 159 Proceedings under this Act . . . must not be commenced more than 6 years after the date of the events that give rise to the proceedings.

¶ 31 The events in question occurred in August 1997. The notice of hearing was issued in September 2002. The notice of hearing was issued nearly a year before the limitation period expired and so on the face of it, this is not a ground for dismissing the proceedings.

Effect of section 28(1); double jeopardy

¶ 32 Smolensky says that the only purpose of the section 161(1) hearing is to seek a harsher penalty than meted out by the Exchange, and therefore the hearing amounts to no more than a hearing and review of the Exchange decision, which the Executive Director ought to have brought under section 28(1).

¶ 33 Section 28(1) authorizes the Executive Director (and others) to appeal decisions of the Exchange:

> 28. (1) The executive director or a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of . . . an exchange . . . may apply by notice to the commission for a hearing and review of the matter . . . and section 165(3) to (8) applies.

¶ 34 Section 165(3) gives persons directly affected by a decision of the Executive Director the right to appeal that decision to the commission, and imposes a 30-day limitation period that runs from the time the Executive Director gives notice of the decision to the person directly affected. The closing words of section 28(1) apply this limitation period to hearings and reviews initiated by the Executive Director under section 28(1). For the purposes of this application, therefore, section 165(3) should be interpreted as though it read as follows:

> 165 (3) Except if otherwise expressly provided, [the executive director] may, by a notice in writing sent to the commission within 30 days after the date on which the [Exchange] sent the notice of the decision to the [executive director], request and be entitled to a hearing and review of the decision of the [Exchange].

¶ 35 The Exchange decision was made in April of 2001. The notice of hearing was issued in September 2002, 17 months later. If Smolensky is right, the proceedings were commenced long past the limitation period contained in section 165(3) and should be dismissed.

¶ 36 The essence of this ground of Smolensky's application is that to hold a hearing under section 161(1) would allow double jeopardy to attach to Smolensky for his conduct because he has already been sanctioned for that conduct by the Exchange. Smolensky also says that it would be an unfair reading of the legislation to conclude that the Executive Director could hold a hearing under section 161(1) when that hearing, as in this case, would be to consider the same allegations, and the same facts, as the proceedings before the Exchange.

¶ 37 We do not agree. The law is clear that the same facts and conduct can generate parallel proceedings before different courts and tribunals.

¶ 38 If a person's conduct contravenes the rules and by-laws of the Exchange, the Exchange has the authority to sanction that person under the Exchange's enforcement process. If the person's conduct is also a contravention of the Act, or is conduct that is contrary to the public interest, the Commission has the authority to sanction that person under the enforcement provisions in the Act, including section 161(1).

¶ 39 When a matter that falls within the Commission's jurisdiction comes to the attention of the Executive Director, the Executive Director is entitled to seek an investigation order, investigate and, if appropriate, issue a notice of hearing. This is so regardless of whether the same conduct is the subject of proceedings before the Exchange, a self-regulatory organization, a securities regulator in another jurisdiction, or a court.

¶ 40 This is because the Exchange and the Commission fulfill different roles in the regime of securities regulation. The Exchange is responsible for, and has jurisdiction over, trading by its members. The scope of its sanctions is limited. It can suspend its members from trading through the facilities of the Exchange, can ban them permanently from doing so (by expelling them as members) and can impose fines (although their orders imposing fines do not carry the force of law).

¶ 41 The Commission's mandate, however, is much broader. It has overall responsibility for the regulation of trading securities in British Columbia, including the responsibility to oversee the Exchange and self-regulatory organizations.

¶ 42 The Commission also has broader investigation and enforcement powers than the Exchange. For example, section 161(1) authorizes the Commission (and the Executive Director) to sanction persons for contravening the Act or acting contrary to the public interest. The section authorizes the Commission to sanction persons in the public interest in ways the Exchange cannot, such as ordering that a person:

- cease contravening the legislation or a decision of the Commission
- cease trading in securities or exchange contracts (generally, not just through the facilities of the Exchange)
- not use the exemptions in the Act
- not act as a director or officer of any issuer
- not engage in investor relations activities

¶ 43 In addition, under section 162 (not relevant in this case because the Executive Director has not sought orders under that section), the Commission can also impose administrative penalties.

¶ 44 All of the orders that the Commission can make under sections 161(1) and 162 have the force of law.

¶ 45 In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557), the Supreme Court of Canada recognized the differing roles of the various agencies involved in securities regulation:

> 59 It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, Canadian Securities Regulation (1977), at p. 1.
>
> 60 Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The Commission is one such agency. Also within this large framework are

> self-regulatory organizations which possess the power to admit and discipline members and issuers. The VSE falls under this head. . . .

¶ 46 After the Exchange deals with a matter, the Executive Director has essentially three courses of action open. First, the Executive Director may consider that the matter has been dealt with adequately by the Exchange and take no further action.

¶ 47 Second, the Executive Director may consider that the sanctions imposed by the Exchange are inadequate, but that the matter can still be appropriately handled within the enforcement regime administered by the Exchange. In that case, the Executive Director can apply for a hearing and review of the Exchange decision under section 28(1) and seek different sanctions within the ambit of what the Exchange is authorized to impose.

¶ 48 It is not open to the Commission to make, under section 28(1), any of the orders described under sections 161(1) or 162. So the third course open to the Executive Director is to initiate proceedings under section 161(1) and, in an appropriate case, section 162. This will be the outcome when the Executive Director considers that the conduct that was the subject of the Exchange proceedings is sufficiently serious that some or all of the sanctions authorized by section 161(1) or 162 should be imposed. The Executive Director may proceed in this fashion even if the Exchange's disposition of the matter was appropriate in the context of its own regime.

¶ 49 The Executive Director's decision to proceed under the third course, as in this case, does not constitute double jeopardy. It merely reflects the differing roles of the Exchange and the Commission within the framework of securities regulation.

¶ 50 In *Bennett v. British Columbia (Securities Commission)* (1992) 94 DLR (4^{th}) 339 (BCCA), the British Columbia Court of Appeal dealt with the question of whether the Commission could hold a hearing under section 161(1) into allegations of illegal insider trading after the respondents had been acquitted of quasi-criminal charges of insider trading arising from the same conduct.

¶ 51 In *Bennett*, the two proceedings at issue were a quasi-criminal proceeding before a court and an administrative proceeding before the Commission. In this case, the proceedings at issue are a disciplinary proceeding before the Exchange and an administrative proceeding before the Commission. Smolensky argued that because both the Exchange and the Commission are concerned with essentially the same dimension of the public interest, a section 161(1) hearing based on the same facts and conduct that formed the basis of the Exchange settlement would be unfair as tantamount to double jeopardy.

¶ 52 However, *Bennett* does not support that argument. The court noted that the court and the Commission had differing roles in enforcing the provisions of the Act. As explained above, so do the roles of the Exchange and the Commission differ. The Exchange enforces the regime it administers, and the Commission applies the enforcement provisions under the Act, a more comprehensive regime, with more significant sanctions, than that administered by the Exchange. Neither regime is intended to substitute for the other – the same conduct can give rise to proceedings under both regimes. (Indeed, if in a case the Commission made orders against an Exchange member that had not been disciplined by the Exchange, there would be no reason that the Exchange could not then initiate disciplinary proceedings against the member based on the conduct that gave rise to the Commission orders.)

¶ 53 *Hauchecorne* [2000] BCSC Weekly Summary 30, although not cited by the parties, is of particular interest. That case was a section 161(1) hearing that followed not just Exchange proceedings on the same facts and conduct, but also a hearing and review under section 28(1) by the Commission of the Exchange's decision. The history is noted in the Commission's decision (at page 3):

> The Exchange held a hearing . . . in 1998 . . . [and] found against Hauchecorne on all but four of the alleged infractions. . . .
>
> In June 1999 . . . the Exchange fined Hauchecorne $200,000, ordered him to disgorge commissions in the amount of $95,000 and permanently withdrew its approval of Hauchecorne as a registrant. Hauchecorne was also ordered to pay the costs of the Exchange hearing.
>
> Both Hauchecorne and the Executive Director applied for a hearing and review of the Exchange decisions. Hauchecorne applied to have the liability decision set aside or alternatively to have the penalty reduced. The Executive Director applied to have the Exchange's dismissal of the four allegations reversed.
>
> In December 1999 the Commission dismissed Hauchecorne's application and confirmed the Exchange decisions, other than its decision to dismiss the four allegations. As to those allegations, the Commission granted the Executive Director's application by finding Hauchecorne liable . . . .
>
> The evidence in support of the allegations contained in the notice of hearing [for the section 161(1) hearing] consisted of the Exchange decisions and the decision of the Commission on the hearing and review.

¶ 54 The Commission went on to impose sanctions on Hauchecorne under section 161(1).

¶ 55 Smolensky advanced a number of arguments based on principles of statutory interpretation to support the idea that the 30-day limitation period in section 165(3) and the 6-year limitation period in section 159 conflict with each other and cannot co-exist for a matter arising out of the same facts and conduct. However, in our view, there is no conflict between these sections.

¶ 56 Section 28(1), the section to which the 30-day limit applies, allows the Executive Director to appeal decisions of the Exchange (and other subordinate regulatory agencies) to the Commission. This is a tool provided by the legislature to assist the Executive Director in fulfilling the responsibility of overseeing the regulatory activities of agencies like the Exchange.

¶ 57 Section 161(1), the section to which the six-year limit applies, is the section that the legislature has provided for the Commission to take enforcement action for contraventions of the Act and conduct contrary to the public interest. In our opinion, there is no conflict between the two sections that needs to be resolved.

The Executive Director's role in the Exchange settlement

¶ 58 Smolensky also argues that the Commission has, in essence, settled with Smolensky. This is because, he says, the Executive Director was present at the March 2001 meeting of the Exchange Advisory Committee when it decided to put the settlement to an Exchange heading panel for approval. This, Smolensky says, shows that the Commission itself had already implicitly dealt with the Smolensky case through the Executive Director's tacit approval of the proposed settlement.

¶ 59 As evidence, he relies on a portion of an affidavit of Douglas Garrod. Garrod, who as a lawyer practiced securities law and for a time was a vice president of the Exchange, is currently the president of Global.

¶ 60 In his affidavit, Garrod says that in October 2002 he had a discussion with "a person I have known personally for in excess of 20 years", who he identifies as the "Confidant". Paragraphs 15 through 20 of his affidavit relate to the statements of the Confidant. He says that the Confidant told him that he or she was present at the March 2001 meeting and that the Executive Director was there, too. He says the Confidant says that the Executive Director reviewed the terms of the settlement and asked questions about it, received answers to the questions and then indicated that he was "satisfied by the settlement terms". Garrod says that this information was provided to him in confidence by the Confidant and so he would not reveal his or her identity.

¶ 61 In light of the conclusions that we have reached, this evidence is not relevant. The Exchange's decision was a decision of the Exchange hearing panel that approved the settlement, not of the Executive Director. Even if the Executive Director were present at the March 2001 meeting, it would not render a section 161(1) hearing on the same conduct an abuse of process. As we explained above, the Executive Director is entitled to initiate enforcement proceedings based on the same facts and conduct.

¶ 62 That disposes of the matter, but we also note that the evidence is not reliable. Although the Commission frequently admits hearsay evidence on the basis of relevance, we do not think it would be fair to admit into evidence these hearsay statements from an unidentified person (who is therefore not available for cross-examination) especially with no evidence that the person is not available to testify directly.

¶ 63 We therefore do not admit paragraphs 15 through 20 of the Garrod affidavit into evidence. The balance of his affidavit is not impugned and we enter those portions as Exhibit 8.

Conclusion

¶ 64 We have concluded that the Executive Director brought the section 161(1) proceedings in this case within the six-year limitation period in section 159. We also concluded that to hold a section 161(1) hearing in this case would not amount to double jeopardy. We therefore dismiss these grounds of Smolensky's application.

2. Section 148(1) and the *Charter*

¶ 65 Smolensky argues that section 148(1) offends sections 2(b), 7 and 8 of the *Charter* and in so doing impairs Smolensky's ability to make full answer and defence to the allegations in the notice of hearing.

¶ 66 Sections 1, 2(b), 7 and 8 of the *Charter* say:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justifiable in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
> . . .
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;
> . . .

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles and fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.

¶ 67 Section 148(1) of the Act says:

> 148 (1) Without the consent of the commission, a person must not disclose, except to the person's counsel, any information or evidence obtained or sought to be obtained or the name of any witness examined or sought to be examined under section 143, 144 or 145.

¶ 68 Section 143, 144 and 145 grant powers to investigators appointed under section 142.

¶ 69 Smolensky says that the effect of section 148(1) was to deny him the opportunity to prepare his defence because it prevented him from interviewing witnesses and potential witnesses on a timely basis.

¶ 70 In the prior proceedings in the Supreme Court and the Court of Appeal, Smolensky challenged the validity of section 148(1). The courts refused to decide on that issue on the basis that it was premature to do so. These are the relevant portions of the majority decision of the Court of Appeal on this issue:

> 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 deliberations before the Commission, apart from a limitation issue addressed below.
>
> 7 The appellant submits that a hearing before the Commission will put him to substantial expense that may prove to be unnecessary if he ultimately succeeds on any of his claims for judicial relief. The cost of the proceedings is a factor to be considered but, at the same time, the appellant

> raises important issues of general application that require careful consideration in the context of established facts and not simply in the abstract. In my view, these considerations outweigh the cost factor in the circumstances of this case. There is no suggestion that the cost of proceedings will deprive the appellant of a vigorous defence.
> . . .
> 20 In my view, the Commission is obliged to ensure that s. 148(1) does not restrict access to relevant witnesses and information by persons subject to enforcement proceedings. The statutory mechanism provided to the Commission to discharge that duty is the power of the Commission to consent to limitations on the statutory confidentiality imposed by s. 148(1). I think that the duty to exercise the consent power in the public interest, which includes the right to a fair hearing, is necessarily implied from the regulatory scheme of the *Act*. It is reinforced by s. 11(1) of the *Act* which explicitly references disclosure required by "public duty" as an exception to the obligation of confidentiality imposed on "[e]very person acting under the authority of this Act". While not explicitly stated in s. 148(1), the public interest in infused throughout the regulatory regime of the statute and is referenced at various places generally in the *Act*.
> . . .
> 24 The effect of s. 148(1) on the appellant, if any, is largely unknown at this stage of the proceedings. It is unclear whether s. 148(1) will impede the appellant's access to potential witnesses and other information in the enforcement proceedings against him. . . .
>
> 25 The executive director has made extensive disclosure to the appellant's counsel of witness statements and other information obtained in the course of the Trooper investigation. The Commission has not had an opportunity to address any issues as to the adequacy of that disclosure. Nor have any issues of access been raised before the Commission. These judicial review proceedings launched by the appellant have pre-empted the Commission's involvement and deprived the court of any factual record which would provide a context to the issues as well as the Commission's position. The Supreme Court of Canada has emphasized that *Charter* decisions should not be made in a factual vacuum, particularly where, as here, the effects of the legislation are alleged to infringe the *Charter*: *MacKay v. Manitoba*, [1989] 2 SCR 357, at 361-62 . . . .

¶ 71 In *MacKay*, the Supreme Court of Canada stated the importance of a factual basis for *Charter* decisions:

> 9 *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably

> result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* issues cannot be based on the unsupported hypotheses of enthusiastic counsel.
> . . .
> 20 A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the *Charter* but its effects. If the deleterious effects are not established there can be no *Charter* violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the applicant's position.

¶ 72 We find ourselves in the same position as the Court of Appeal. At this point, we have none of the factual context that the Courts require us to have before us to consider the *Charter* issues Smolensky raises.

¶ 73 Until a hearing is held on the merits, the Commission will have no factual background upon which to assess the *Charter* issues. For example, at this point we do not know:

- the disclosure that the Executive Director has made to Smolensky
- the evidence, including witnesses, that the Executive Director intends to use to try to prove the allegations in the notice of hearing
- the evidence, including witnesses, that Smolensky might reasonably require to try to refute the evidence of the Executive Director
- Smolensky's actual access to witnesses

¶ 74 Only with this information, and doubtless other information as well, will the hearing panel be in a position to determine whether, on the facts of this case (as required by *MacKay*) Smolensky's *Charter* rights have been violated.

¶ 75 In our opinion it is premature to make a ruling on the *Charter*-based grounds of Smolensky's application, and we therefore dismiss them.

¶ 76 Smolensky sought to introduce into evidence an affidavit of Donald J. Sorochan, QC, who the parties acknowledge has much experience in defending persons in Commission enforcement proceedings. Sorochan was presented as an expert and his affidavit consists of opinion evidence on the subject of the extent to which section 148(1) could impair the defence of persons subject to enforcement proceedings under the Act. The facts on which Sorochan expresses his opinions

are contained in a purportedly hypothetical scenario in a schedule to his affidavit. The scenario closely matches the background to the Smolensky case.

¶ 77 The Executive Director objects to the admission of this evidence on the basis that it essentially duplicates the opinion we are required to form in deciding the *Charter* questions that Smolensky has raised.

¶ 78 We agree. The Sorochan affidavit is of no assistance to us as evidence. In eventually determining whether section 148(1) has had the effect of violating Smolensky's rights under the *Charter*, the Commission hearing panel will have to conclude the extent to which his ability to defend himself was impaired, if at all. The Sorochan affidavit speaks to this very issue. That being for the panel to decide, we do not admit the affidavit into evidence.

¶ 79 Smolensky said in argument that if we refused to admit the Sorochan affidavit into evidence, he would adopt its contents as part of his argument. This he is entitled to do if he wishes, and so we are treating the affidavit as part of the record for that purpose.

3. Abuse of process

¶ 80 Smolensky says the proceedings are an abuse of process on five grounds:

- Smolensky has already been penalized for the same conduct by the Exchange
- section 148(1) prevents Smolensky from making full answer and defence
- the Executive Director has not made full disclosure to Smolensky as required
- the Executive Director has misused Smolensky's admissions in the Exchange settlement
- Smolensky has been prejudiced by the Executive Director's delay in making and prosecuting the allegations

¶ 81 Smolensky also says that there is no public interest in proceeding against him because the Exchange has already dealt with the matter.

Exchange proceedings

¶ 82 This is Smolensky's "double jeopardy" argument. We rejected it in our analysis of the limitation period issue.

Section 148(1)

¶ 83 We have already analyzed section 148(1) in the context of Smolensky's submission that it violates the *Charter*. Smolensky also argues that even if section 148(1) is valid under the *Charter*, its application in this case amounts to an abuse of process because it has prevented him from making full answer and defence.

We decided it would be premature to rule on the *Charter* issues because we do not have the factual context before us to determine whether in fact the application of section 148(1) in this case has operated to deny Smolensky the ability to make full answer and defence. For the same reason, it is premature to consider the same argument against section 148(1) outside the *Charter* context.

Disclosure

¶ 84 In September 2002 Smolensky sought disclosure from the Executive Director of evidence as follows:

> 1. Any and all communication between any staff member of the Commission and the VSE or CDNX (including their legal counsel) on or after the Material Date [August 14, 1997] that concerns the subject matter of the Notice of Hearing, including any requests for related information.
>
> 2. Any documents, including any correspondence, emails, internal notes, memoranda or records made by any Staff Member of the Commission concerning the trading in Trooper shares on the Material Date of the private placements which were announced after the close of trading on Material Date.
>
> 3. Any documents, including any correspondence, email, internal notes or memoranda pertaining to the decision of the Executive Director to proceed against Mr. Smolensky by way of a new hearing rather than by way of hearing and review as provided in Section 28 of the *Securities Act*.
>
> 4. All communication with the CDNX, Vancouver Stock Exchange or its legal or other representatives concerning the public interest as it applies to Mr. Smolensky.
>
> 5. All documents of any kind that pertain to the timing and manner in which the Decision of the CDNX to settle the dispute with Mr. Smolensky came to the attention of any member of the staff of the Commission.

¶ 85 The Executive Director refused disclosure on the basis that any information that the Executive Director had that was covered by the request is not relevant to the allegations in the Notice of Hearing and therefore not subject to disclosure.

¶ 86 In our opinion, this does not constitute abuse of process. The standards for disclosure that the Executive Director must meet are clear (see *Timothy Fernback*

2004 BCSECCOM 378 and 2004 BCSSECCOM 622). If Smolensky believes that the disclosure that the Executive Director has made fails to meet that standard, his remedy is to apply to the Commission for an order directing the Executive Director to remedy the disclosure. Any deficiencies in the disclosure can be handled through that process.

Smolensky admissions

¶ 87 Smolensky says that it is an abuse of process for the Executive Director to "essentially assert" in the notice of hearing that admissions made by Smolensky "for the purposes of settlement only" are admissions of guilt that preclude Smolensky from opposing critical allegations at the section 161(1) hearing. Smolensky says this is "dirty pool".

¶ 88 Smolensky also says that the notice of hearing misstates the content of his admissions in his settlement. The notice of hearing says that Smolensky admitted prior knowledge of the private placement. Smolensky says that all he admitted to was that he was aware of Global's conditional offer to participate in a Trooper private placement. Smolensky says that this, in addition to the publication of the notice of hearing by the Executive Director "carries the appearance of malice and abuse of power".

¶ 89 In our opinion, these grounds are unfounded. We do not agree that the notice of hearing implies that Smolensky has admitted the misconduct alleged in the notice of hearing. The notice of hearing summarizes Smolensky's admissions as part of its description of the Exchange settlement. Moreover, we do not know whether the Executive Director intends to attempt to enter Smolensky's admissions into evidence in the section 161(1) hearing as proof of the facts they address. If so, Smolensky can object, and the panel can deal with that issue in the course of the hearing.

¶ 90 As for Smolensky's admissions in the Exchange settlement, they are already a matter of public record. In our opinion, the notice of hearing describes them accurately. In the settlement, Smolensky admitted that "Global, with [Smolensky's] knowledge, proposed a non-brokered private placement financing for Trooper at a price of $0.80 per unit" and acknowledged "he sold Trooper shares in Global accounts on August 14, 1997 when he was aware of the proposed private placement". The notice of hearing says he acknowledged "that he had been aware of the proposed timing and price of the private placement during the trading".

¶ 91 In the settlement, Smolensky acknowledged that "he ought to have known" that the proposed private placement "was a material fact relating to Trooper that had not been generally disclosed". The notice of hearing says he acknowledged that

"he ought to have known that the proposed arrangement was an undisclosed material fact relating to Trooper."

¶ 92 Therefore, in our opinion, there is nothing about the notice of hearing that constitutes an abuse of process.

Delay

¶ 93 This leaves the issue of delay. Smolensky says that the delay between the time of the events in question (August 1997) and the present is too long, and to proceed in the face of that delay would constitute an abuse of process.

¶ 94 Smolensky says that the delay in this case has been unreasonable and that he has been prejudiced as a result. He says that he is unable to make full answer and defence because the recollections of some witnesses have faded and other witnesses who may have relevant information cannot be found.

¶ 95 Before considering the law, it is worthwhile to review the chronology of this case. Smolensky first became aware of the allegations against him by the Exchange in July 1999. Almost two years later, in April 2001, Smolensky settled with the Exchange. About four months after that, in August 2001, the Executive Director began the investigation and in October 2001 Smolensky was summoned to an interview with Commission staff. He then became aware of the Executive Director's investigation.

¶ 96 Smolensky admits that until he was summoned in October 2001, section 148(1) did not prevent him from contacting anyone who he believed could assist with his defence against the Exchange's allegations which, as Smolensky points out, are exactly those that form the basis of the Executive Director's notice of hearing.

¶ 97 About 10 months later, in August 2002, the Executive Director provided Smolensky with a draft notice of hearing for his comment. Smolensky responded by objecting to the hearing proceeding at all. In September 2002 the Executive Director issued the notice of hearing.

¶ 98 After about another three months, in November 2002, Smolensky applied to the British Columbia Supreme Court for judicial review. Those proceedings, the appeal of them to the Court of Appeal, and the application to the Supreme Court of Canada resulting in a denial of leave to appeal lasted for nearly another two years, to October of 2004.

¶ 99 In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 Bastarache J. commented (at para. 102) on the impact of delay in the administrative context:

> 101 In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount imposing a judicially created limitation period . . . . In the administrative law context, there must be proof of significant prejudice which results from unacceptable delay.
>
> 102 There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative hearing. When delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy . . . . It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied.
>
> 103 The respondent argued before the B.C. Supreme Court that the delay in the administrative process caused him prejudice that amounted to a denial of natural justice in that he could no longer receive a fair hearing. He alleged that two witnesses had died and that the memories of many witnesses might be impaired by the passage of time. Lowry J. referred to these claims as "vague assertions that fall short of establishing an inability to prove facts necessary to respond to the complaints" [and] concluded that the respondent's opportunity to make full answer and defence had not been compromised and thereby refused to terminate the proceedings.

¶ 100 When there has been delay in a case, the portions of the delay attributable by the respondent are relevant, as shown by the Court's comments on Blencoe's conduct throughout the proceedings:

> 124 With respect to calculating the delay, Lowry J. found that the only time that could be considered for the delay was between the filing of the Complaint to the end of the investigation process, in July. He stated that the Tribunal could not be criticized for not setting the hearing dates earlier as the respondent did not press for earlier dates, did not question the fixed dates and cancelled the pre-hearing conference. . . . Following Lowry J.'s reasoning, the delay would be computed until July 1997, this reducing the delay from 32 months to 24 months.

> 125 During those 24 months, the Commission also had to deal with a challenge by the respondent as to the lateness of the Complaints and his accusation that the Complaints were in bad faith. The respondent refused to respond to the allegations until this determination was made. As a result, the process was delayed for some eight months. The respondent was perfectly entitled to bring forward allegations of bad faith and to question the timeliness of the Complaints. However, the Commission should not be held responsible for contributing to this part of the delay. In this regard, Lowry J. stated (at para. 42):
>
> > It is not suggested that Mr. Blencoe was not entitled to challenge the complaints, as he did at the outset, but having done so, and having been unsuccessful, it is not in my view open to him now to claim that the events of the eight months elapsed contributed to an unacceptable delay. . . .

¶ 101 *Blencoe* also establishes that ongoing contact between the parties is relevant:

> 131 A review of the facts of this case demonstrates that, unlike the aforementioned cases where there was complete inactivity for extremely lengthy periods, the communication between the parties in the case at bar was ongoing. . . .

¶ 102 Applying these principles to this case, we note the following.

¶ 103 First, Smolensky had the opportunity when he first became aware of the allegations against him by the Exchange (July 1999), to compile documents and records and to interview witnesses to the events and to seek to take affidavits from them if he thought that would be useful to his defence. He had the better part of two years to do this before settling with the Exchange (in April 2001). Had he done so, the prejudice of which he now complains (less reliable and perhaps missing witnesses) might have been ameliorated.

¶ 104 Second, the Executive Director's investigation began within a reasonable time, about four months, after the Exchange settlement.

¶ 105 Third, Smolensky became aware of the Executive Director's investigation in October 2001, about four years before the date of this application. If he believed that the investigation was an abuse of process, it was open to him to apply to the Commission to revoke or vary the investigation order. Alternatively, he could have applied to the Commission under section 148(1) for a consent (blanket or otherwise) so that he could have contacted witnesses. He did neither.

¶ 106 Fourth, when the Executive Director sent Smolensky the draft notice of hearing in August of 2002, and issued it in September 2002, Smolensky had another opportunity to apply to the Commission for a hearing and review of the Executive Director's decision to issue the notice of hearing on the grounds that it was an abuse of process. He chose not to do so.

¶ 107 Fifth, Smolensky chose to commence judicial review proceedings that ended up taking another couple of years to run their course.

¶ 108 Sixth, since then, Smolensky has not objected to the timeframes set to hear this application.

¶ 109 Considering all of these factors, it appears to us that there is no delay that Smolensky can attribute to the Executive Director. Smolensky was fully within his rights to seek judicial review, but, as the court said in *Blencoe*, the time that review took does not give him a basis to claim unacceptable delay.

¶ 110 We also note that throughout this period there was a steady stream of correspondence and pleadings exchanged between the parties. So this case, like *Blencoe*, was not one in which the regulator lay completely inactive for a lengthy period.

Conclusion

¶ 111 We therefore do not find that any of the grounds advanced by Smolensky support a finding that to proceed with the section 161(1) hearing would be an abuse of process.

¶ 112 As for Smolensky's contention that there is no public interest in proceeding with the matter as the Exchange has dealt with it, it is premature to reach that conclusion. Certainly the Exchange dealt with Smolensky's admitted contraventions of its By-Laws in the manner it saw fit. Until the Commission deals with the allegations in the notice of hearing, we cannot conclude that it is not in public interest to proceed.

IV. Rulings

¶ 113 We therefore make the following rulings:

1. We do not admit into evidence the affidavit of Donald J. Sorochan, but it remains part of the record as submissions by Smolensky.

2. We do not admit into evidence paragraphs 15 through 20 of the affidavit of Douglas Garrod. We admit the remainder of the affidavit as Exhibit 8.

3. We dismiss Smolensky's application to have the section 161(1) hearing dismissed or stayed.

¶ 114 January 16**,** 2006

For the Commission

Brent W. Aitken
Vice Chair

John K. Graf
Commissioner

Robert J. Milbourne
Commissioner