2009 BCSECCOM 10

Basil Roy Botha

***Securities Act,* RSBC 1996, c. 418**

Application

Panel	Brent W. Aitken	Vice Chair
	Bradley Doney	Commissioner
	David J. Smith	Commissioner
Date of application	December 15, 2008	
Date of ruling	January 8, 2009	
Appearing		
Carey D. Veinotte Patrick J. Sullivan	For Basil Roy Botha	
Alan E. Keats Shawn R. McColm	For the Executive Director	

Ruling

¶ 1 Basil Roy Botha has applied for an order compelling the executive director to disclose information gathered in an investigation into Botha's activities relating to trading in securities. Botha says that his rights, under section 8 of the *Canadian Charter of Rights and Freedoms* to be secure against unreasonable search or seizure, have been infringed by Commission staff's investigative activities. He wants the disclosure so he can make an application to the Commission for relief under section 24 of the *Charter*.

¶ 2 The investigation is ongoing and its outcome is unknown. The executive director has made no allegations against Botha and has not issued a notice of hearing.

Background

¶ 3 The background facts are in affidavits filed by Botha, John Hamilton, and Chris Redman. Hamilton and Redman say they and others, including Botha, are members of an investment club.

¶ 4 Some time in 2007 Commission staff received a complaint about Botha's activities in relation to trading in securities. They began to make inquiries. In August 2007 a staff investigator left a voice mail for Botha. He identified himself

and said he had questions about whether Botha was acting as a portfolio manager without being registered to do so.

¶ 5 On September 5, 2007 Botha spoke on the phone with that investigator and another. Asked if he was trading securities in the accounts of others and charging a 20% fee, Botha at first refused to answer and then answered "no" to all of the questions the investigators asked. The call ended.

¶ 6 Some time in the fall of 2007 a staff investigator phoned Hamilton to ask him questions about Botha's activities. The investigator told Hamilton that someone using a different internet protocol address than Hamilton's was trading in an online account Hamilton held at E*Trade Canada, a securities dealer. Hamilton refused to answer any questions and the call ended. Another staff investigator called Hamilton in January 2008. Hamilton again refused to answer any questions.

¶ 7 In January 2008 an investigator left a voice mail message for Redman. Redman says the number the investigator called is unlisted. When Redman returned the call, the investigator told him he had reviewed activity in Redman's E*Trade Canada online account and asked him questions about Botha. Redman refused to answer and hung up.

¶ 8 Aware that staff investigators were asking questions of his friends about his activities, Botha sent emails to friends and family members on January 31 and February 2, 2008 and copied the investigator who left him the voice mail the previous August. In the emails, Botha described the investigation and characterized it, essentially, as improper and a violation of his rights.

¶ 9 On February 4, 2008 the investigator replied to Botha. He identified himself and told him that staff was concerned that Botha was acting as a portfolio manager without being properly registered.

¶ 10 On February 6, 2008 the investigator sent another email to the recipients of Botha's January 31 and February 2 emails, copying Botha. In this email, the investigator said:

> Mr. Botha has sent you an email commenting on our review of a certain matter. I feel I must respond. I can assure you that our review is not a violation of any human rights or privacy laws. I can also assure you that any information that we have gathered has been done properly and the proper safeguards for its protection will be maintained. You may not be aware of this fact, but the Securities Act (section 141) allows us to issue an order to

> directly obtain information from a person's brokerage accounts. There are other provisions of the Securities Act that allow us to gather information and evidence, such as section 144 where we can issue a Summons to a person to compel them to give testimony under oath.

¶ 11 On February 12, 2008 the Commission issued an investigation order under section 142 of the Act. The order appoints investigators and authorizes them to:

> . . . investigate, enquire into, inspect and examine any person, company or other entity on any matter, during the period from January 1, 2006, forward, that may reasonably relate to:
>
> (a) the securities trading and advising activities of Botha in British Columbia and elsewhere;
>
> (b) the affairs of Botha; and
>
> (c) the proceeds derived from Botha's trading and advising activities, the whereabouts of those proceeds, and the use that has been made of those proceeds.

¶ 12 On February 13, 2008 staff issued Botha a summons under section 144 of the Act to attend a compelled interview on March 4, 2008. Botha has not complied with the summons.

The Application

¶ 13 Botha says his ultimate goal is to obtain relief under section 24 of the *Charter* for an infringement of his section 8 *Charter* rights, and intends to make an application to the Commission for that relief. However, he says, without the disclosure he seeks, he is not in a position to specify the nature of the relief he will seek.

¶ 14 Botha seeks an order compelling Commission staff to produce the affidavit sworn to obtain the investigation order and, for the period between January 1, 2007 and February 12, 2008, to produce the following items obtained, or related to the investigation that took place, during that period:

- notes, correspondence, memoranda, financial statements, monthly account statements, trading slips, and other documents
- emails
- telephone records (including unlisted numbers)
- electronic media

- bank statements
- internet protocol addresses.

¶ 15 Botha says that the executive director has no power to investigate other than pursuant to an investigation order issued under section 142 of the Act. It follows, he says, that any investigation conducted without an investigation order is illegal (with the exception of what is described in one of the relevant cases as an "informal internal review" to determine whether the issuance of an investigation order is warranted).

¶ 16 Botha says that the staff's activities between September 2007 and February 12, 2008, the date of the investigation order, went well beyond an informal internal review, and constituted an illegal investigation.

Analysis

Investigations in the absence of a section 142 order

¶ 17 Botha contends that the executive director may not conduct an investigation in the absence of an investigation order, with the exception of an informal internal review.

¶ 18 Botha's contention is incorrect. Section 142 authorizes the Commission to issue investigation orders. The effect of an investigation order is to empower the investigators named in the order with the investigative and compulsion powers in sections 143 and 144. However, there is no express language in the Act that precludes the executive director from investigating without a section 142 order, and without the section 143 and section 144 powers.

¶ 19 To the contrary, section 141 authorizes the executive director to make a production order against any person of a type listed in subsection 141(2):

> 141 (1) The executive director may make an order under subsection (2)
>
> (a) for the administration of this Act,
> . . .
> (c) in respect of matters relating to trading in securities or exchange contracts in British Columbia . . . .
>
> (2) By an order applicable generally or to one or more persons or entities named or otherwise described in the order, the executive director may require any of the following persons to provide information or to produce records or classes of records specified

> or otherwise described in the order within the time or at the intervals specified in the order:
>
> (a) a clearing agency;
>
> (b) a registrant;
>
> (c) a person exempted from the requirement to be registered under section 34 by an order under section 48;
>
> (d) a reporting issuer;
>
> (e) an investment fund manager or a custodian of assets, shares or units of an investment fund;
>
> (f) a general partner of a person referred to in paragraph (b), (c), (d), (g), (j) or (k);
>
> (g) a person purporting to distribute securities in reliance on an exemption
> (i) from section 61, or
> (ii) in an order issued under section 76;
>
> (h) a transfer agent or registrar for securities of a reporting issuer;
>
> (i) a director or officer of a reporting issuer;
>
> (j) a promoter or control person of a reporting issuer;
>
> (k) a person engaged in investor relations activities on behalf of a reporting issuer or security holder of a reporting issuer;
>
> (l) the Canadian Investor Protection Fund; and
>
> (m) a person providing record keeping services to a registrant.
>
> . . . .

¶ 20 Although a section 141 order is a broad investigative tool available to the executive director, the powers it confers are much narrower than those available under sections 143 and 144 once an investigation order is issued. Section 141

would be utterly redundant if the legislature intended that no investigations take place other than under an investigation order under section 142. Clearly, the legislature contemplated investigations by the executive director without the authority of an investigation order – investigations with broad enough scope to make use of the powers granted by section 141.

¶ 21 Court decisions have also established that the executive director has the authority to undertake investigative activities other than under a section 142 investigation order.

¶ 22 In *Brosseau v Alberta Securities Commission* [1989] 1 SCR 301, a person subject to an investigation by the Alberta Securities Commission argued that the investigation was illegal because it was undertaken without the authority of an investigation order under section 28 of the Alberta *Securities Act*, the provision that corresponded to section 142 of the Act. The Supreme Court of Canada noted there was no evidence that an investigation order had been issued, and went on to say (at p. 312), "In fact, the record and submissions suggest that this was not the route chosen by the Commission."

¶ 23 The court found that course of action permissible under the Alberta *Securities Act* (at page 312:

> I am inclined to agree that the Commission must have the implied authority to conduct a more informal internal review. It would be unreasonable to say that a securities commission requires express statutory authority to review the documents it has on file, or to keep itself informed of the course of an R.C.M.P. investigation. To do so would be to make mandatory a resort to a s. 28 investigation for what are often simple administrative purposes. Such an approach might have the effect of paralysing the operations of the Commission. It would seem logical that before ordering a s. 28 investigation, the Commission would have first investigated the facts. If no wrongdoing is found, that would end the matter. If irregularities are uncovered, then the Commission could proceed either to a more thorough s. 28 investigation or to order a hearing, as in this case, to probe more deeply into the matter.

¶ 24 Botha points to the phrase "informal internal review" and the examples given by the court to support his view that any investigative activity undertaken in the absence of an investigation order must be limited to reviewing internal files, and the like. However, this is inconsistent with the legislature's inclusion of section

141 in the Act (a provision not found in the Alberta legislation considered by the court in *Brosseau*), and with decisions in subsequent cases.

¶ 25 In *British Columbia Securities Commission v DiCimbriani* [1996] BCJ No 394 (BCCA), DiCimbriani argued that the Commission had acted in bad faith because, among other things, he had been under investigation for 20 months, and for the first six months of that period Commission staff was investigating without an investigation order.

¶ 26 In response, the Commission argued that no investigation order is necessary to authorize an investigation by a Commission staff member, citing *Brosseau.* The court agreed, saying DiCimbriani's allegations were "answered fully" by the Commission.

¶ 27 In *Cusak v Ontario Securities Commission* (1993) 104 DLR (4th) 54 (Ont. Ct. of Justice, Gen. Div.) the court considered an application from persons charged with contravening the Ontario *Securities Act* to quash the information on which the charges were based. The grounds included, among other things, the carrying on by OSC staff of an investigation without the authority of an investigation order issued under section 11 of the Ontario legislation, the provision that corresponded to section 142 of the Act.

¶ 28 The OSC admitted that no investigation order had been issued and that the investigation was carried out informally by OSC staff. The OSC argued that the power to issue investigation orders was permissive and does not preclude informal investigations in circumstances where it is not necessary to make use of broad powers like those found in sections 143 and 144 of the Act. The Ontario legislation did not contain a provision similar to section 141 of the Act.

¶ 29 After considering *Brosseau,* the court said:

> . . . having considered the Act in its entirety . . . I have concluded that the [OSC] is correct in its position. The sections of the Act are permissive in nature and one must conclude from the very wording of section 11 that some investigation would be required before the Commission could conclude on the basis of a sworn information that it was probable that a contravention of the Act or of the Criminal Code had occurred. . . . As found in Brosseau . . . I think one can only conclude that the Commission has implied authority to conduct informal investigations and gather information on a voluntary basis without having recourse to the intrusive powers contained in the Act

> which were enacted for the purpose of enabling it to do its task in cases where some coercion is required.

¶ 30 Botha relies on *British Columbia Securities Commission v Stallwood* [1995] BCJ No 1321 (BC Supreme Ct.), which cites *British Columbia Securities Commission v Branch* [1995] 2 SCR 3, to support his argument.

¶ 31 *Stallwood* and *Branch* are not relevant to this application. Those cases considered the validity of the Commission's investigatory powers – the powers in sections 143 and 144 that are available to an investigator only after the Commission issues an investigation order. They do not deal with the subject of this application – informal investigations undertaken by the executive director without an investigation order, and which therefore make no use of the investigatory powers under sections 143 and 144.

¶ 32 *Brosseau*, *DiCimbriani* and *Cusak* make it clear that the executive director may conduct informal investigations without an investigation order, and need obtain an investigation order only to invoke the investigatory powers that flow from an order issued under section 142. This appears to be what has happened here. As a result of their informal investigation, Commission staff apparently concluded that the investigation ought to continue and, in order to complete it, they would need the powers available under an investigation order.

¶ 33 The executive director's power to conduct informal investigations is not limitless nor is it without protections for those who could be affected by the investigation. With no investigation order, the executive director's statutory investigative tools are limited to the powers in section 141. Under section 11(1), the executive director is also required to keep confidential any information obtained in the course of the investigation:

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

¶ 34 Botha suggests there is something sinister about staff's issuance of a summons to Botha the day after the investigation order was issued. He suggests that the only reason the investigation order was issued was so that staff could compel his testimony.

¶ 35 Far from sinister, this pattern of events suggests that the investigation was simply unfolding as one might expect. Having apparently concluded that the investigation should continue but could not be completed without invoking the Commission's investigatory powers, staff obtained an investigation order and then acted on it.

Jurisdiction

¶ 36 Botha says we have jurisdiction under section 24 of the *Charter* to make the order he seeks.

¶ 37 However, this is not an application under section 24 of the *Charter.* It is an application for disclosure to support an anticipated, but currently non-existent, section 24 *Charter* application. Indeed, Botha's counsel agreed with the panel chair's characterization of the application as an application for disclosure within another application Botha has not yet made.

¶ 38 The issue is not merely procedural. With no substantive application before us, we have no legal or factual context to provide us with criteria to decide what, if any, disclosure order we could or ought to make.

¶ 39 More importantly, there is no other apparent basis for our jurisdiction to make the order Botha seeks. He has not identified any section of the Act that gives us that jurisdiction.

¶ 40 The application is also premature. The executive director has neither made allegations against Botha nor issued a notice of hearing.

Ruling

¶ 41 The application is dismissed.

¶ 42 January 8, 2009

¶ 43 **For the Commission**

Brent W. Aitken
Vice Chair

Bradley Doney
Commissioner

David J. Smith
Commissioner