2009 BCSECCOM 9

Kegam Kevin Torudag and Lai Lai Chan

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

Application

Panel	Brent W. Aitken	Vice Chair
	Bradley Doney	Commissioner
	Shelley C. Williams	Commissioner
Date of application	December 17, 2008	
Date of ruling	January 5, 2009	
Date of reasons	January 7, 2009	

Appearing

H. Roderick Anderson	For Kegam Kevin Torudag
Sean K. Boyle	For the Executive Director

Reasons for Ruling

¶ 1 Kegam Kevin Torudag and Lai Lai Chan applied for a ruling that the Commission does not have jurisdiction to hear allegations by the executive director that Torudag and Chan contravened section 86 of the *Securities Act*, RSBC 1996, c. 418.

¶ 2 Neither Chan nor her counsel was present at the application. Chan's counsel says he adopts Torudag's arguments on Chan's behalf.

¶ 3 On January 5, 2009 we dismissed the application (see *Torudag* 2009 BCSECCOM 1). These are our reasons.

Background

¶ 4 On June 24, 2008, the executive director issued a notice of hearing (see *Torudag* 2008 BCSECCOM 378) alleging that Torudag and Chan contravened section 86 of the Act by purchasing shares of Icon Industries Limited while being persons in a special relationship with Icon by virtue of their having undisclosed material information about the company.

¶ 5 The essential facts are not in dispute. The following summary is for the purposes of this application, which deals only with the issue of jurisdiction.

¶ 6 Icon was a British Columbia reporting issuer listed on the TSX Venture Exchange.

¶ 7 Torudag is in the business of assisting issuers, primarily mining and other resource companies, to raise capital. At the relevant time, Torudag was not resident in British Columbia. He currently resides in Montreal.

¶ 8 Chan was a prospector resident in Quebec who had some Quebec mineral claims for sale.

¶ 9 Tasso Baras, a British Columbia resident who had a long-standing working relationship with Torudag, told Torudag about the claims in March 2007.

¶ 10 Torudag met Barry Coughlin, a British Columbia resident and the president of Icon, about acquiring the claims. At the time, Icon was a shell company.

¶ 11 Negotiations ensued and resulted in agreements. In an agreement dated March 12, 2007, Torudag and Baras agreed to purchase the claims from Chan, and in an agreement dated March 13, Torudag and Baras assigned the claims to Icon. The assignment agreement provided that the laws of British Columbia applied and that disputes would be resolved under the *Commercial Arbitration Act* of British Columbia.

¶ 12 On March 13, 2007 Icon issued a news release disclosing the assignment agreement at 1532 Eastern Time. On the same day, before the news release was issued, Torudag bought, through the facilities of the Exchange, 119,000 Icon shares. Chan bought 10,000. The sellers were mostly residents of British Columbia. A seller of 38,000 shares was a non-resident dealer.

¶ 13 Torudag bought his shares through an online trading account with Interactive Brokers held by an offshore corporation he controls. Interactive Brokers is a dealer based in Connecticut; its only Canadian office is in Montreal.

¶ 14 Chan bought her shares through a TD Waterhouse account at its office in St. John's Newfoundland.

¶ 15 The Exchange processes all trades on the Exchange using a server located in Toronto.

¶ 16 Torudag and a corporation he controls have accounts with a registered dealer in Vancouver. The corporation traded securities of Icon through its Vancouver account between March 14 and 21, 2007.

The Application

¶ 17 Torudag and Chan say that the Commission does not have jurisdiction to hear the allegations in the notice of hearing because there is not a real and substantial connection between the allegations and British Columbia. They say the impugned transactions occurred outside British Columbia: the orders were placed in Montreal and executed through accounts in jurisdictions outside British Columbia.

¶ 18 Torudag and Chan say that even if we find there to be a connection sufficient to establish jurisdiction, the Commission should decline to exercise it, because any connection is not sufficiently real and substantial. In any event, they say, we should dismiss the allegations in the notice of hearing to the extent they involve shares sold by sellers not resident in British Columbia.

¶ 19 Torudag and Chan say that the participation of British Columbia sellers is not relevant because neither of them sought to acquire shares in British Columbia, nor knew that any of the sellers were residents of British Columbia. In any event, they say, the involvement of British Columbia resident sellers is not a sufficient connecting factor to establish jurisdiction.

¶ 20 The executive director says that the Commission has jurisdiction because there is a real and substantial connection between the allegations and British Columbia. Its shares trade on the Exchange, which is regulated by the Commission in cooperation with the Alberta Securities Commission. British Columbia residents sold the shares that Torudag and Chan purchased. Icon is located in British Columbia and is a reporting issuer here.

¶ 21 The executive director also cites the applicable law and arbitration provisions of the assignment agreement, the British Columbia residency of Tasso and Couglin, and Icon, Torudag's connections with British Columbia, and his trading in Icon shares through his company's British Columbia account the day following the alleged misconduct.

Discussion and Analysis

¶ 22 Section 86(1) of the Act says:

> A person that
>
> (a) that is in a special relationship with a reporting issuer, and

> (b) knows of a material fact or material change with respect to the issuer, which material fact or material change has not been generally disclosed,
>
> must not enter into a transaction involving a security of the reporting issuer . . . .

¶ 23 The Act defines special relationships in section 3. The executive director alleges that Torudag and Chan were persons in a special relationship with Icon when they bought shares of Icon on March 13, 2007.

¶ 24 Under section 161(1) the Commission may make the orders described in that section if it considers it to be in the public interest. The Act does not impose a territorial limit on the Commission's public interest jurisdiction. Nor is there any implicit precondition of a territorial connection required for the Commission to exercise that jurisdiction: *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)* [2001] 2 SCR 132.

¶ 25 So, for example, in *Gregory & Co. v Quebec Securities Commission* [1961] SCR 584, the Supreme Court of Canada held that the Quebec Securities Commission had jurisdiction to prohibit a dealer from operating in Quebec, even though all of its clients resided outside the province. Similarly, in *R v McKenzie Securities Ltd.* (1966) 56 DLR (2d) 56, the Manitoba Court of Appeal upheld the quasi-criminal convictions under the Manitoba *Securities Act* of two Ontario-registered brokers who never entered Manitoba but traded securities on behalf of Manitoba residents.

¶ 26 In *Bennett v British Columbia (Securities Commission)* [1991] BCJ No 1021, the British Columbia Supreme Court said (at page 26) that cases such as *Gregory* and *McKenzie* (referring to them specifically) "illustrate that so long as some substantial aspect of the impugned transaction occurred within the territorial jurisdiction of the legislating Province, the Provincial law will apply."

¶ 27 The parties agree that the test for determining whether the Commission has jurisdiction is whether the subject matter of the notice of hearing has a real and substantial connection with British Columbia: *Morguard Investments Ltd. v De Savoye* [1990] 3 SCR 1077; *Muscutt v Coucelles* [2002] OJ No 2128 (QL) (Ontario CA); *Beals v Saldanha* [2003] 3 SCR 416.

¶ 28 Even where there is a connection to the province, the Commission can choose not to take jurisdiction, if in its opinion the connection is not sufficiently close (*Asbestos*).

¶ 29 The test is “not meant to be a rigid test” and "the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections”: *Hunt v. T&N plc*. [1993] 4 SCR 289 at 43 (cited in *Muscutt*). The test requires “only a real and substantial connection, not the most real and substantial connection” (*Muscutt*, para. 44).

¶ 30 Although we accept that the real and substantial connection test is appropriate, the exercise of a securities commission’s public interest jurisdiction was not at issue in any of the cases cited in support of the test. Some caution is therefore appropriate in applying those cases in the context of public interest jurisdiction.

¶ 31 Considering the test in the circumstances in this case, we start with the purpose and effect of section 86.

¶ 32 The Commission’s mission includes the protection and promotion of the public interest by fostering a securities market that is fair and warrants public confidence. A major attribute of a market that is fair and worthy of confidence is the expectation by market participants that all those trading in the market have available to them the same material information about the securities traded.

¶ 33 The Act has several provisions intended to ensure that expectation is met. It requires reporting issuers, in addition to making disclosure in periodic reports, to make timely disclosure of material changes in their affairs. It also regulates the conduct of those in a special relationship with a reporting issuer. Section 86 prohibits those persons from trading in securities of the issuer while knowingly in possession of material information that has not been generally disclosed.

¶ 34 Section 86 is a critical element of the regulatory regime that maintains the integrity of British Columbia capital markets, and helps protect British Columbia and other investors against being victimized by the prohibited conduct.

¶ 35 Here, the allegation is that Torudag’s and Chan’s purchases of Icon securities on March 13, 2007 were transactions prohibited by section 86. Neither Torudag nor Chan are residents of British Columbia, nor were they in British Columbia at the time they made their purchases. Is there a real and substantial connection between the allegations in the notice of hearing and British Columbia?

¶ 36 The Exchange is a major component of British Columbia’s capital markets. Hundreds of reporting issuers located in British Columbia trade on the Exchange, and it is the listing destination for many British Columbia start-up companies that are successful in graduating from the private capital markets to become public companies.

¶ 37 The significance of the Exchange to British Columbia's capital markets is one reason that the Commission, in cooperation with the Alberta Securities Commission, is responsible for its regulatory oversight. The Commission regulates the Exchange through a recognition order made under section 24 of the Act and market participants expect the Commission to regulate, both directly and through the Exchange, trading activity on the Exchange. The other securities regulators in the Canadian Securities Administrators rely on the British Columbia and Alberta securities commissions to perform this regulatory function.

¶ 38 We find that Torudag's and Chan's participation in British Columbia markets by making trades through the Exchange is sufficient to establish a real and substantial connection between the subject matter of the allegations in the notice of hearing and British Columbia. In addition, most of those who sold Icon shares to fill Torudag's and Chan's purchase orders were residents of British Columbia.

¶ 39 Torudag and Chan say they did not seek to acquire shares from British Columbia investors, nor did they know that their orders would be partially filled by British Columbia sellers. That is not relevant. What matters is that their transactions took place through the Exchange, over which the Commission exercises regulatory authority.

¶ 40 That the Exchange chooses to process trades on a server located in Toronto does not diminish the real and substantial connection to British Columbia. The replacement of physical trading marketplaces with electronic trading platforms has not altered the jurisdiction of the regulator over the market; it has merely made the physical location of the trade less useful as a factor in determining jurisdiction.

¶ 41 Torudag and Chan say that the Supreme Court of Canada decision in *Asbestos* argues against our exercising our public interest jurisdiction.

¶ 42 In *Asbestos*, a Quebec crown corporation acquired effective control of Asbestos Corporation Limited by buying the control block. The issue was the offeror's failure to make a follow-up offer to minority shareholders, a group including Ontario residents holding almost 30% of the target's shareholders. The Commission concluded that the take over bid was abusive and unfair to minority shareholders, but decided that there was not a sufficient connection to Ontario for it to exercise its public interest jurisdiction. The court upheld the OSC decision.

¶ 43 *Asbestos* is not helpful in the context of this application. This is not about whether the Commission ought to intervene in a take over bid. The question is, "Does the Commission have jurisdiction to enforce its rules against those trading, wherever

they may be, in a market over which it has or shares primary regulatory oversight?" In our opinion, it does. The Commission's regulatory relationship with the Exchange establishes a real and substantial connection between the allegations in the notice of hearing and British Columbia. Were the answer otherwise, it would diminish the confidence of market participants in the regulatory oversight of trading on the Exchange.

¶ 44 January 7, 2009

¶ 45 **For the Commission**

Brent W. Aitken
Vice Chair

Bradley Doney
Commissioner

Shelley C. Williams
Commissioner