British Columbia Securities Commission

Citation: 2013 BCSECCOM 250

Colin Robert Hugh McCabe and Erwin Thomas Speckert

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

Panel	Brent W. Aitken	Vice Chair
	George C. Glover, Jr.	Commissioner
	Don Rowlatt	Commissioner
Date of hearing	May 31, 2013	
Date of ruling	May 31, 2013	
Date of reasons for ruling	July 5, 2013	
Appearing		
Derek J. Chapman	For the Executive Director	
Sean K. Boyle and Alexandra C. Luchenko	For Colin Robert Hugh McCabe	
Patricia A.A. Taylor	For Erwin Thomas Speckert	

Reasons for Ruling

INTRODUCTION

¶ 1 On July 31, 2012 the executive director issued a notice of hearing under section 161 of the *Securities Act*, RSBC 1996, c.418 alleging that Colin Robert Hugh McCabe and Erwin Thomas Speckert contravened sections 50(1) and 168.1(1) of the Act.

¶ 2 McCabe applied to the Commission for a stay of the proceedings against him. The application is based on the doctrine of *forum non conveniens* in light of proceedings commenced against McCabe in Utah by the United States Securities and Exchange Commission. Speckert appeared at the hearing through counsel but took no position on the application.

¶ 3 Although McCabe's application casts the relief he seeks as a stay, he in essence is seeking a dismissal of the Commission proceedings. He says that if we grant the stay and the SEC proceedings go ahead, in his view that should be the end of the matter. He says he would contest any attempt by the executive director to pursue the allegations in the notice of hearing after the SEC proceedings were concluded.

¶ 4 At the end of the hearing we reserved our decision. After consideration, we dismissed the application, with reasons to follow. These are our reasons.

ANALYSIS

¶ 5 While the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c.28 (CJPTA) does not apply to proceedings before the Commission, McCabe and the executive director agree that the appropriate factors to considering an application to stay on the basis of *forum non conveniens* are those set out in section 11 of the CJPTA:

> "11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
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> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
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> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
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> (b) the law to be applied to issues in the proceeding,
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> (c) the desirability of avoiding multiplicity of legal proceedings,
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> (d) the desirability of avoiding conflicting decisions in different courts,
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> (e) the enforcement of an eventual judgment, and
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> (f) the fair and efficient working of the Canadian legal system as a whole."

¶ 6 The language of section 11 of the CJPTA makes it clear that it is intended to provide guidance as to the choice of forum for "a proceeding" involving the same parties. The burden is on the applicant to demonstrate that a tribunal in another state is "a more appropriate forum to hear the case." (*Club Resorts Ltd. v. Van Breda* [2012] 1SCR 572).

Attempting to apply the factors set out in section 11 of the CJPTA in the circumstances of this case is awkward and it becomes apparent that these factors are largely inapplicable.

¶ 7 Here, the parties are not the same. In the SEC proceedings, the parties are McCabe and the SEC, a securities regulator with jurisdiction over securities-related matters with a connection to the United States. Under the notice of hearing, the parties include McCabe and the executive director of the Commission, a securities regulator with jurisdiction over securities-related matters with a connection to British Columbia. The notice of hearing also contains allegations against Speckert, and the alleged connection between the conduct of McCabe and Speckert is important to the executive director's case against each of them. Speckert is not a party to the SEC proceedings and granting the stay McCabe seeks would leave the notice of hearing in limbo as against Speckert.

¶ 8 Neither are the proceedings the same. Both the notice of hearing and the compliant that forms the basis of the SEC proceedings make allegations that McCabe published false and misleading statements in connection with recommendations to purchase certain securities and was paid substantial undisclosed compensation to promote the purchase of these securities. The similarities end there.

¶ 9 There are numerous differences in the facts alleged in the notice of hearing compared to those in the SEC complaint. The notice of hearing alleges that McCabe illegally promoted securities of three companies including Guinness Exploration Inc. while the SEC complaint alleges false and misleading representations regarding the securities only of Guinness. Facts relating to the furnishing of false and misleading information to a Commission staff investigator and facts relating to the role of Speckert in facilitating the breaches of the Act are alleged only in the notice of hearing. Similarly, there are extensive facts alleged in the SEC complaint that are not contained in the notice of hearing.

¶ 10 McCabe says that Commission staff and the SEC had cooperated in their respective investigations and so the factual underpinnings are similar. He also says that many of the circumstances associated with the impugned conduct occurred or had consequences in the United States. None of this is relevant. We also note that the allegations in the notice of hearing include many factual circumstances which occurred or had impact in British Columbia. Both the executive director and the SEC are free to pursue allegations of wrongdoing that occurred or had impact in their respective jurisdictions, and their election to do so has resulted in different sets of allegations involving different parties under different legislative schemes.

¶ 11 Neither is the applicable law the same. The *Securities Act* and the US *Securities Exchange Act* are materially different. One of the most significant of these differences is that the British Columbia Securities Commission is an enforcing authority under the Act.

The Commission's authority to make orders under sections 161 and 162 require it to consider the public interest. We are advised by counsel that the SEC has no power to seek enforcement orders in the public interest. In the SEC proceedings, the matter will be heard by a court under legislation that does not expressly invoke the public interest.

¶ 12 In our opinion, a *forum non conveniens* argument in general, and the application of section 11 of the CJPTA in particular, is not appropriate in the circumstances of this case, and so the factors in section 11 need not be considered. However, we make these observations about them.

¶ 13 We need not deal with the issue of comparative convenience and expense as McCabe acknowledged that he was not making any submissions regarding the comparative convenience and expense to the parties. Neither did he enter any evidence as to whether he intended to enter evidence at either proceeding.

¶ 14 As we have discussed above, the proceedings are different and distinct, the parties are different, and the law is different. For that reason, there is no issue of multiplicity of legal proceedings. Multiplicity of proceedings is a concern only when there is a risk of the same issues being litigated by the same parties under the same law in two different forums. That is not the case here.

¶ 15 The differences in allegations and applicable law also eliminate the risk of conflicting decisions. The decisions ultimately reached by this Commission and by the court in the SEC proceedings cannot conflict because they will be based on differing allegations involving different parties determined under different laws.

¶ 16 There is also no issue of enforceability. If orders are made in either proceeding, both the Commission and the SEC will have available to them the usual tools they have to enforce orders.

¶ 17 As to "the fair and efficient working of the Canadian legal system as a whole," that is best addressed by a Commission hearing on the merits of the notice of hearing against McCabe and Speckert. There is no other jurisdiction which is more convenient and appropriate to hear the allegations in the notice of hearing.

¶ 18 McCabe suggested in argument that if we were to refuse the stay we would be risking bringing the Canadian securities regulatory system into disrepute. In our opinion, the reverse is true. If we were to grant a stay in these circumstances, allegations of serious misconduct having an apparent substantial connection to British Columbia related to

trading in securities would go unheard, an outcome both contrary to the public interest and inconsistent with a responsible enforcement regime.

¶ 19 July 5, 2013

¶ 20 **For the Commission**

Brent W. Aitken
Vice Chair

George C. Glover, Jr.
Commissioner

Don Rowlatt
Commissioner