

BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Dhala, 2024 BCSECCOM 379

Date: August 29, 2024

Hussain Dhala

Panel	Gordon Johnson Karen Keilty Deborah Armour, KC	Vice Chair Commissioner Commissioner
Hearing date	July 16, 2024	
Submissions completed	July 16, 2024	
Ruling date	August 29, 2024	
Parties		
Karin Blok	For the Executive Director	
Hussain Dhala	For himself	

Ruling and Reasons for Ruling

I. Introduction

- [1] Hussain Dhala (Dhala) applies to cross-examine the Commission investigator (Investigator) who participated in an investigation regarding Dhala and who testified in *Re Dhala*, 2015 BCSECCOM 336 (Original Hearing), related to an amended notice of hearing issued against Dhala (2015 BCSECCOM 35). As is explained in further detail below, the panel which conducted the Original Hearing found that Dhala had breached the Act. That panel imposed various prohibitions against Dhala, ordered him to disgorge \$26,900 to the Commission and imposed an administrative penalty of \$125,000.
- [2] This proceeding was initiated by Dhala's application under section 171 of the Act for an order that this panel revoke or vary the order which followed the Original Hearing. After filing that application and submitting evidence, Dhala seeks to cross-examine the Investigator within the context of this evidence, asserting that it is essential for him to obtain certain evidence from the Investigator before completing his submissions on the merits of this proceeding.

II. Factual Background

- [3] Some of the findings of the panel which conducted the Original Hearing are:

[3] During the hearing the executive director called four witnesses, a Commission investigator and three investors, tendered documentary evidence and provided written and oral submissions. Although he had notice of the hearing, Dhala did not attend the hearing, tender any evidence or provide any written or oral submissions. As a result, the executive director applied to have the liability and sanction portions of the hearing heard together. We granted that application. The following are our findings on liability and our decision on sanctions.

...

[6] Dhala convinced four members of his direct and indirect social circle to give him funds for investment purposes. Three of those individuals (M, DC and RC) testified at the hearing. The fourth individual (J) did not testify but provided documentary evidence to the Commission investigator which was tendered as evidence in the hearing. The evidence from all four of the individuals as to what transpired is very similar.

a) Investor M

[7] M testified that he was approached by Dhala with an investment opportunity. Dhala told M about a TSXV listed company, Prophecy Platinum Corporation, that was conducting a private placement. Dhala told M that it was a private offering and not one that M could participate in other than through Dhala.

[8] M ultimately provided \$10,350 to Dhala. Dhala's banking records show that these funds were deposited into Dhala's bank account and were used for Dhala's personal expenditures. Dhala did not acquire any securities of Prophecy on behalf of M.

[9] After repeated attempts by M to recover his funds, M ultimately brought a successful civil claim against Dhala and recovered the \$10,350 that M gave to Dhala.

b) Investor DC

[10] DC testified that he was approached by Dhala with the same investment opportunity as M (i.e. an opportunity to participate in a Prophecy private placement). Dhala told DC that he had a personal relationship with a senior officer of Prophecy and, as a result, could ensure the participation of DC in the offering.

[11] DC provided \$2,500 to Dhala. Dhala's banking records show that these funds were deposited into Dhala's bank account and were used for Dhala's personal expenditures. Dhala did not acquire any securities of Prophecy on behalf of DC.

[12] DC has not had any of his funds returned to him.

c) Investor RC

[13] RC testified that Dhala approached him with respect to currency trading on behalf of RC. RC provided funds to Dhala for this purpose. At some later point, Dhala approached RC about investing in the purported Prophecy private placement. Dhala indicated to RC that he was properly qualified to be selling these securities and that it would just be simpler for RC if Dhala made the purchase of Prophecy securities on his behalf rather than RC acquiring them directly.

[14] In total, RC provided \$22,700 to Dhala. Dhala's bank records show that all of these funds were deposited to Dhala's bank account and were used for Dhala's personal expenditures. Dhala did not conduct any currency trading on behalf of RC and did not purchase any securities of Prophecy on behalf of RC.

[15] RC was able to convince Dhala to return \$1,000 of his funds. RC asked for further funds from Dhala and Dhala told him that he could not do this as his accounts were frozen by the Commission. This was not true. The remainder of \$21,700 has not been returned to RC.

d) Investor J

[16] J did not testify at the hearing. However, J provided documentary evidence which sets out that he provided \$2,700 to Dhala on the understanding that Dhala was to invest this money by acquiring shares of Prophecy. Although these documents were not corroborated by testimony from J under oath we have given these documents weight given the similarity of this evidence with that of the other three investors. There was no evidence before us that disputed any of the evidence tendered by the executive director with respect to J.

[17] J provided the funds to Dhala by writing a cheque in the name of Dhala's proprietorship, HMD Capital.

[18] There is no evidence of where this money was deposited. There is no evidence that Dhala ever acquired any securities of Prophecy on behalf of J. We find that Dhala did not acquire any shares of Prophecy on behalf of J.

e) Interview with Commission Staff

[19] On February 26, 2013, following all the events described above, Dhala attended an interview with Commission staff. Dhala attended the interview with legal counsel and the interview was conducted under oath.

[20] During the interview, Dhala stated that he only traded on his own behalf, on behalf of his parents and one other individual. He also stated that he only dealt with investor, M, with respect to buying shares of Prophecy.

- [4] Based on its findings the panel found that Dhala had promised that he would invest the funds received from the investors "in securities of Prophecy and currency trading but instead used the funds on personal expenditures" (paragraph 29). The panel found that the legal elements of fraud had been proven against Dhala. The panel also found that Dhala had told the Investigator during an interview and while under oath that he had received funds for the relevant purpose from only one investor, while in truth he had received funds from four of them. As a result the panel found that Dhala had breached section 168.1(1)(a) of the Act.
- [5] Dhala did not participate in the Original Hearing. Dhala asserts that at the time of the hearing he was facing some health concerns arising from the then recent death of his father.
- [6] The original disgorgement order against Dhala was for \$26,900, an amount which recognized that by that point Dhala had repaid a portion of the \$38,250 which the panel found Dhala had raised from the four investors. After the disgorgement order was issued Dhala made further payments and he asks that these be recognized in the course of collection steps which are being taken against him.
- [7] Dhala alleges that after his good health returned he looked carefully into the existing findings. He submits that the findings from the Original Hearing should be revoked or varied because there were flaws in the investigation, because he did not receive certain evidentiary disclosures which he was entitled to and because he did invest the investors funds into foreign exchange (FX) trading activity which was a use of funds to which the investors consented. He submits that some critical facts which must be true can only be obtained from or explored through cross-examination of the Investigator.

III. Test to be applied in an application to order a cross-examination

- [8] In *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995 (*Cowichan Valley*), the Supreme Court of British Columbia set out matters to be considered on an application for cross-examination on an affidavit:

[27] Factors to be considered in the exercise of the court's discretion include whether there are material facts in issue; whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue ... [Citations omitted].

[9] More recently in *Jury v. Rogodzinski*, 2021 BCCA 395, the Court of Appeal referred to *Cowichan Valley* in setting out this test to be applied in an application to cross-examine on an affidavit:

- a) whether there are material facts at issue;
- b) whether the desired cross-examination is relevant to an issue that may affect the outcome of the application in respect of which the cross-examination order is sought;
- c) whether the cross-examination will serve a useful purpose by yielding evidence that would help determine an issue on the application;
- d) whether the information sought is available through other means; and
- e) whether cross-examination will produce unreasonable delay or generate unreasonable expense, both of which are to be avoided.

[10] In *Cowichan Valley*, the Court said this about the legal framework relevant to cross-examination on affidavits:

[29] Minor discrepancies in the evidence, or conflicts that may be resolved by reference to documentary evidence will not warrant the exercise of the court's discretion. However, where there is conflicting evidence on a material fact in issue which would result in the inability of the judge hearing the petition to decide the case, cross-examination will be ordered [citations omitted].

[30] Normally, before the court exercises its discretion to order cross-examination, the applicant will have filed affidavit materials that put in issue a material fact by contradicting the opposing party's affidavit evidence [citations omitted].

[11] BC Policy 15-601 – *Hearings* describes the Commission's procedures for hearings held under the Act. As set out in more detail in sections 1.2 and 2.1 of that policy, the Commission's goal is to conduct its proceedings fairly, flexibly and efficiently and, as master of its own procedures, the Commission can do what is required to attain that goal.

[12] Section 4.1 of BC Policy 15-601 addresses evidence at hearings and states, in part:

If a party applies to cross-examine another party on their affidavit, the Commission may allow it where there are contested facts at issue in the affidavit. If cross-examination is allowed, it will generally be restricted to the facts in issue in the tendered affidavits.

[13] The test developed by the courts and the language of section 4.1 of BC Policy 15-601 address the situation where a witness has provided an affidavit that prompts an application for cross-examination regarding conflicts between that affidavit and other evidence. That test, however, can be adapted to address other circumstances, including those now before this panel.

[14] In *Re Morabito*, 2023 BCSECCOM 457, the Commission agreed with applicants seeking to cross-examine a Commission investigator that contested facts need not arise from conflicting affidavits of opposing parties. However, the panel also noted that the applicants in that case sought to establish material contested facts on the basis of information that was not included in the affidavits in issue, which the applicants described as "gaps". At paragraph 33, the panel said:

The applicants appeared to be speculating that cross-examination relating to these “gaps” might elicit some additional facts that could assist them in making their case in the Disclosure Applications. Speculation is not a basis on which we can find the existence of contested material facts.

- [15] We agree with the panel in *Morabito* that the existence of “gaps” will not on its own justify an order for cross-examination. Accordingly, to succeed in this application, Dhala must meet the test articulated above to demonstrate material facts at issue and must do so on the basis of evidence before the panel, not on the basis of speculation.

IV. Dhala’s position

- [16] In his submissions to the panel, Dhala advanced several factors, the most relevant of which are described below, that he said justified an order permitting him to cross-examine the Investigator.

a) Flaws in investigation

- [17] In large measure, Dhala’s submissions focused on what he asserted were inappropriate steps taken in the investigation preceding the Original Hearing as well as a failure to take steps that should have been taken in that investigation.
- [18] Dhala relied on the fact that one of the original complainants against him was himself the subject of serious allegations and claims contained in two proceedings in the Supreme Court of British Columbia to assert that the complainant against him was being sued for large sums and therefore had “motive to twist the facts” when giving information to the Commission.
- [19] In addition, Dhala asserted that information provided by this complainant to the Investigator was based in part on text messages that could not be “authenticated”.
- [20] Dhala argued that a Commission investigator should perform a gatekeeping function by obtaining knowledge of a complainant’s background to stop a flood of what could be vexatious complaints. Dhala asserted that instead of performing a proper gatekeeping function the Investigator “put forward a case to the commission that was low hanging fruit and only used evidence that would support an easy narrative rather than doing his job as an investigator and really getting down to the root of where this money was used and doing a thorough job as an investigator.”

b) Disclosure Issues

- [21] Dhala complained that the Investigator should have contacted him directly to provide him with notes from an unrecorded interview that took place during the investigation but failed to do so, instead providing the notes to former counsel for Dhala. This was particularly inappropriate, in Dhala’s view, because he said that counsel for the executive director was communicating with him directly at the time the Investigator was dealing with his former counsel.
- [22] In addition to the fact he was not provided with the notes of an unrecorded interview, Dhala pointed to the fact that a recording of another interview was not disclosed by the executive director until recently, a decade later.
- [23] Dhala also asserted that documents before the panel on this application had not been fully disclosed to him in advance of the oral hearing, an assertion directly contradicted by the executive director.

c) Evidence regarding use of funds

- [24] The panel in the Original Hearing found that Dhala had raised \$38,250 from four investors and was enriched to the extent of \$26,900 which was “the total amount obtained from his fraudulent misconduct net of certain amounts returned to the investors.” In oral submissions on this application, Dhala took issue both with the total amount the Commission determined him to have obtained and with its findings on how that money was spent.
- [25] Dhala complained that although the Investigator gave detailed evidence to the panel in the Original Hearing about how Dhala had spent investor funds, the Investigator failed to give evidence, or sufficient evidence, about how Dhala had in fact funded accounts for FX trading.
- [26] Dhala asserted that he funded FX trading accounts in two ways: via credit card and via PayPal. Dhala also stated that he provided credit card statements to the Investigator. In Dhala’s view, the Investigator “turned a blind eye” to the fact that some credit card entries said “FX Pro” which in Dhala’s submission demonstrated that he had transferred funds to an account for FX trading. Dhala made the same assertion with respect to items in a spreadsheet on which the Investigator gave evidence at the Original Hearing that had entries marked “PAYPAL FX”.
- [27] Dhala submitted that there was evidence before the panel in the Original Hearing to establish that he had funded FX trading accounts in the two ways that he said he had: via credit card and via PayPal. Dhala asserted that the Investigator was dismissive of this evidence during his testimony at the Original Hearing. Dhala submitted that the Investigator “failed to highlight” what Dhala said showed proof of transfers to FX trading accounts. In submissions before this panel, Dhala stated:

And then he [the Investigator] stands up and says oh, yeah, as though to brush it off, those are just deposits to Mr. Dhala’s FX accounts. And that’s it. So I believe that’s very, you know, that’s not right, for lack of a better word, as an investigator to ignore it and to brush it off and casually sweep it under the rug, especially when I just provided you evidence in his own testimony there that he knows that the funds were used for stocks as well as FX trading, but he seemed to ignore that. And that’s one of the big issues that I have with [Investigator] and why I believe he needs to answer some questions of mine.

d) Other complaints made by Dhala

- [28] Dhala made various complaints about investigators and other staff of the Commission, including individuals who had no connection to him or any proceeding against him. It was difficult to understand the relevance of most of the complaints and we conclude that none of the complaints have any bearing on this application.

V. Executive director’s position

- [29] The executive director stressed that Dhala’s application to cross-examine the Investigator must be situated in the context of his substantive section 171 application to vary the decision in the Original Hearing.
- [30] The purpose of such an application, according to the executive director, is not to rehear a matter nor is it an opportunity to appeal a Commission’s decision. Rather, the onus is on an applicant to provide new and compelling evidence or a significant change in circumstances such that, had an original panel known them at the time, they would have made a different decision.
- [31] On the matter of the civil proceedings referenced by Dhala, the executive director pointed out that those proceedings were discontinued against the party who gave information about Dhala to the Investigator. The executive director also submitted that there could be no basis on which

to cross-examine the Investigator in the absence of any evidence that the Investigator had or should have had knowledge of those civil proceedings.

- [32] The executive director submitted that the fact that Dhala sent money to accounts for FX trading was irrelevant because a careful examination of the dates that money went into Dhala's account from investors and out from that account for personal items, demonstrated that Dhala had in fact used investor funds for personal expenses.
- [33] As to the late disclosure of an audio recording of a Commission interview, the executive director pointed out that in his testimony at the Original Hearing, the Investigator referred to that interview and, accordingly, there was no attempt to hide the fact that the interview had taken place. In any event, the executive director submitted that nothing in that newly-disclosed interview was inconsistent with other evidence and that the investor interviewed gave consistent evidence that he had provided funds to Dhala to invest in a stock, not in FX.
- [34] In sum, the executive director submitted that there is no evidence that the Investigator could give that would assist the panel in deciding the section 171 application and therefore, Dhala had not met the onus upon him to satisfy the requirements for an order permitting cross-examination.

VI. Analysis and conclusion

- [35] The panel agrees with the executive director that Dhala must identify how his cross-examination of the Investigator could assist in resolving any facts in issue on his section 171 application.
- [36] The primary difficulty with Dhala's application to cross-examine the Investigator is that on virtually every issue which Dhala raises he has not demonstrated that the Investigator could provide such evidence. The most important example of this is the issue of how Dhala used the funds which he collected from investors.
- [37] At the Original Hearing the panel received evidence in the form of a spreadsheet built primarily from Dhala's banking records. The spreadsheet showed that on certain dates funds from investors were deposited to Dhala's account, and that immediately before the deposits were made the account balance was negligible or even negative. In each relevant case there were a series of cash withdrawals, transfers to the account of Dhala's proprietorship, or expenditures on what appear to be purely personal uses. According to the spreadsheet, there was no material use of funds from investors for either investment in Prophecy or for FX.
- [38] In his submissions to us, Dhala noted many transfers which Dhala said were for FX trading purposes. Dhala submitted he needs to ask the Investigator why the Investigator did not emphasize during the Original Hearing that indications of transfers for FX trading purposes were in the spreadsheet. This misses the point of the evidence, which is that according to the spreadsheet even if Dhala was authorized to spend investor funds on FX trades, the funds received from investors were used for other purposes until they were exhausted and the account had returned to a negative or negligible balance. If there is some other explanation which is compelling, that explanation is not apparent from the documents. If such an explanation exists it will have to come from Dhala. Dhala seemed to suggest during the course of his submissions that the authorization he had from investors extended to using their funds for personal uses, such as cash withdrawals or personal expenses, as long as Dhala would later spend a like amount on FX trading. There was no such evidence from investors which was brought to our attention. Given that lack of evidence, there is no apparent reason why the Investigator should be cross examined about such issues.

- [39] This issue of exactly who is in a position to provide potentially new information about the use of funds is at the core of much of Dhala's criticism of what the Investigator did and did not do in the course of the investigation. If the primary issue is whether funds from investors were spent by Dhala on personal uses to the exclusion of both shares of Prophecy or FX trading, then the criticism that the Investigator should have focused more on the FX trading issue is merely a distraction. According to our reading of the findings of the original panel, they were fully aware that Dhala was conducting FX trading and that some authority from some investors existed for Dhala to use funds for FX trades. As we have noted above, the specific finding of liability against Dhala at paragraph 29 is that he used funds for personal uses and not "securities of Prophecy and currency trading". It is possible that further evidence about Dhala's use of funds exists, but this does not provide a basis to cross-examine the Investigator about Dhala's criticism of the investigation.
- [40] With respect to the disclosure issues which Dhala raised, we agree with Dhala that there were some materials which were sent to Dhala's former counsel before the original hearing when they should have been sent directly to Dhala. There are some other materials which were not provided to Dhala until recently. We have not been shown anything compelling in those materials but, if there is compelling information in the materials, Dhala can identify that in this proceeding. The delayed disclosure does not provide a basis to cross-examine the Investigator.
- [41] The balance of Dhala's submissions amount to speculation about motives of complainants, speculation about the authenticity of evidence which otherwise appears generally consistent with undisputed evidence and various allegations of incompetence and malice against almost everyone Dhala has dealt with. None of those submissions provide a basis to cross-examine the Investigator.
- [42] We see no basis to order the cross-examination of the Investigator.
- [43] We dismiss the application to cross-examine the Investigator. We direct that within 45 days of the issuance of this ruling, Dhala provide any further evidence and submissions he wishes to rely on to the Hearing Office, with copies delivered concurrently to counsel for the executive director. We also direct that any further evidence or submissions from the executive director be delivered within 45 days of the deadline for delivery of Dhala's submissions. Dhala may reply to new issues raised in the executive director's materials if he does so within 7 days of receiving them. After the deadline for Dhala's reply expires, the hearing panel will make a decision on the merits of Dhala's application to review the decision of the original panel.

August 29, 2024

For the Commission

Gordon Johnson
Vice Chair

Karen Keilty
Commissioner

Deborah Armour, KC
Commissioner