COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McCabe v. British Columbia (Securities Commission),* 2015 BCCA 176

Date: 20150427
Docket: CA042515

Between:

Colin Robert Hugh McCabe

Appellant
(Claimant)

And

British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission

Respondents
(Other)

Before: The Honourable Mr. Justice Willcock
(In Chambers)

On appeal from: Decisions of the British Columbia Securities Commission, dated July 8, 2014 (2014 BCSECCOM 269), and December 18, 2014 (2014 BCSECCOM 512).

Counsel for the Appellant:	S.K. Boyle and M.P. Good
Counsel for the Respondents:	W.L. Roberts
Place and Date of Hearing:	Vancouver, British Columbia March 26, 2015
Place and Date of Judgment:	Vancouver, British Columbia April 27, 2015

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Summary:

Application for leave to appeal decisions of the British Columbia Securities Commission. The Commission found the applicant made misrepresentations through a monthly publication service to subscribers located in the U.S. and ordered him to pay an administrative penalty and disgorge the payments he received for the misrepresentations. The applicant argues the Commission did not have jurisdiction to sanction him for the conduct, the Notice of Hearing was deficient to prosecute him in his individual capacity, the misrepresentations were not sufficiently connected to order disgorgement, and the Commission imposed an administrative penalty in excess of the statutory maximum penalty for one contravention without expressly determining how many contraventions had occurred. Held: leave to appeal is granted on the sole issue of whether the Commission had jurisdiction to sanction the applicant for the misrepresentations. The other proposed grounds of appeal do not raise distinct questions of law warranting the granting of leave; they relate to findings of fact and there is no arguable basis for interfering with the Commission's decision.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] Colin McCabe seeks leave to appeal two decisions of the British Columbia Securities Commission:

a) a July 8, 2014 decision finding that he contravened s. 50(1)(d) of the *Securities Act*, R.S.B.C. 1996, c. 418 [the *Act*], by making gross misrepresentations in the February, March and May 2010 editions of *Elite Stock Report* (the "liability decision", indexed at 2014 BCSECCOM 269); and

b) a December 18, 2014 decision imposing a sanction pursuant to s. 161(1)(g) of the *Act*, requiring him to pay the Commission $2,776,993 and a sanction pursuant to s. 162 requiring him to pay an administrative penalty of $1.5 million (the "sanctions decision", indexed at 2014 BCSECCOM 512).

[2] Section 50(1)(d) of the *Act* provides:

> 50 (1) A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not do any of the following:

> (d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation.

[3] Section 161(1)(g) provides for the imposition of a sanction intended to require disgorgement of ill-gotten gains:

> 161 (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:
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> > (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission, any amount obtained, or payment or loss avoided, directly or indirectly, as result of the failure to comply or the contravention.

[4] Section 162 of the *Act* provides for the imposition of an administrative sanction intended to promote compliance with the legislation governing the securities industry:

> 162 If the commission, after a hearing,
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> (a) determines that a person has contravened
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> (i) a provision of this Act or the regulations, or
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> (ii) a decision, whether or not the decision has been filed under s. 163, and
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> (b) considers it to be in the public interest to make the order,
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> the commission may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention.

[5] Section 167 of the *Act* provides for appeals:

> 167 (1) A person directly affected by a decision of the commission … may appeal to the Court of Appeal with leave of a justice of that court.

[6] Our jurisprudence establishes that leave to appeal should be granted where the applicant raises a serious point of law that warrants the granting of leave or where there is a risk of a miscarriage of justice if leave is refused: *Doman v. British Columbia (Superintendent of Brokers)*, [1996] B.C.J. No. 2631; 85 B.C.A.C. 210 (Chambers) [*Doman*], var'd on other grounds (1997), 12 C.C.L.S. 282 (C.A.).

[11] The criteria were set out in some detail by Taggart J.A. in *Queens Plate Development Ltd. v. Vancouver Assessor, Area 09*, [1987] B.C.J. No. 1573, 16 B.C.L.R. (2d) 104 at 109 to 110 (C.A.) [*Queens Plate*], in words recently adopted by Chiasson J.A. in *Botha v. British Columbia (Securities Commission)*, 2009 BCCA 214 (Chambers) [*Botha*]:

> [4] The criteria for granting leave to appeal from a decision on a statutory appeal were stated in *Queens Plate Development Ltd v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 at 109 – 110, Taggart J.A. (in Chambers) as follows:
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> > … it seems a justice may have regard for one or more of the matters listed below:
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> > (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from
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> > (b) whether the appeal is limited to questions of law involving:
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> > (i) the application of statutory provisions...;
> >
> > (ii) a statutory interpretation that was particularly important to the litigant ...; or
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> > (iii) interpretation of standard wording which appears in many statutes
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> > (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...;
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> > (d) whether there is some prospect of the appeal succeeding on its merits...; although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;
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> > (e) whether there is any clear benefit to be derived from the appeal ...; and
> >
> > (f) whether the issue on appeal has been considered by a number of appellate bodies ...

[7] The question before me is whether, in the sense described in *Queens Plate* and *Botha*, there is a serious point of law that can be made out on appeal from the liability decision or the sanctions decision. Leave may be granted either generally or on a specific issue.

Background

Notice

[8] By a Notice of Hearing dated July 31, 2012, Mr. McCabe was advised that the Commission would hold a hearing at which the Executive Director of the British Columbia Securities Commission (the "Executive Director") would tender evidence, make submissions and apply for orders under ss. 161, 162 and 174 of the *Act*. He was advised the Executive Director would seek to establish the facts described in the following paragraphs.

[9] Mr. McCabe, a resident of British Columbia, was the sole officer and director of Jake Landon Publishing Inc. ("Landon"), a British Columbia company, that published a tout sheet distributed by direct mail, the *Elite Stock Report* (the "Report"), in which he made stock purchase recommendations under his own name. He was not a registered advisor and did not, at any time, act in a capacity designated under the *Act*.

[10] Between October 2009 and July 2010, his companies collectively invoiced Emma Marketing Services, Inc., a British Virgin Islands company, a total of $8.2 million US for touting companies quoted on the Over The Counter Bulletin Board (the "OTCBB") in the United States. That sum included the fees for the touting referred to below.

[11] In December 2009, he received a phone call from Erwin Speckert who asked him to feature Guinness Exploration Inc., ("Guinness") a thinly traded company whose shares were quoted on the OTCBB in the Report. Without knowing the caller's true identity, he agreed to do so for $1.5 million US and on January 19, 2010 he e-mailed an issue of the Report to subscribers, in which he recommended that they buy Guinness shares. The trading volume of Guinness increased dramatically.

[12] Between January 21, 2010 and January 25, 2010, at the direction of Mr. Speckert, he billed Emma Marketing $1.5 million US by faxing four Landon invoices to a fax number in Switzerland. A bank account in the name of Landon in

Surrey, British Columbia, received a series of wire transfers totaling $1.5 million US in payment of the invoices.

[13] In February 2010, he distributed by direct mail an issue of the Report that touted Guinness and made misrepresentations.

[14] In March 2010, Mr. Speckert again telephoned Mr. McCabe and asked him to feature Guinness in the Report. He agreed to do so for $650,000 US, without making any inquiries or knowing the caller's full name. On March 12, 2010, he billed Emma Marketing by faxing two Landon invoices totaling $650,000 US to a fax number in Switzerland. The invoices were paid and funds were deposited in Landon's bank account in Surrey, British Columbia.

[15] Mr. McCabe distributed by direct mail another issue of the Report making the same promotional statements in March 2010 that he had made in February. Further, in the March issue of the Report he stated that Emma Marketing had paid Landon $400,000 US for disseminating information. That statement was said to be false or misleading.

[16] In early May 2010, Mr. Speckert again telephoned Mr. McCabe to ask him to feature Guinness in the Report. Mr. McCabe agreed to do so for $500,000 US without making further inquiries or knowing the caller's identity. On May 10, 2010, Mr. McCabe billed Emma Marketing by faxing two Landon invoices totaling $500,000 US to the Swiss fax number. Again, Mr. McCabe was paid by transfers to Landon's bank account in Surrey, British Columbia.

[17] In May 2010, Mr. McCabe distributed by direct mail an issue of the Report promoting Guinness and making the same representations as the February issue. The May issue of the Report stated that Landon had received total compensation of $350,000 US from Emma Marketing. That was also said to amount to misrepresentation.

[18] Mr. McCabe was alleged to have engaged in other touting in December 2010 for Tuffnell Ltd. ("Tuffnell") and Gunpowder Gold Corporation ("Gunpowder") and to have billed $2.4 million US for that touting.

[19] He was alleged to have met with Commission investigative staff on July 8, 2010 and to have made false or misleading statements to them about the circumstances surrounding his payment for touting services.

[20] By the Notice of Hearing he was advised that the Executive Director would seek to establish misconduct on his part, consisting of:

a) publishing false or misleading statements in the Report, contrary to s. 50(1)(d) of the *Act*;

b) making false or misleading statements on July 8, 2010 during the course of the compelled interview, contrary to s. 168.1(1)(a) of the *Act*;

c) facilitating the secret promotion of securities in or from British Columbia and, in doing so, harming the reputation and credibility of the Province's securities market and regulatory environment.

[21] He was notified the Executive Director would seek to establish the public interest called for the Commission to issue orders under ss. 161 and 162 of the *Act*.

Liability

[22] Following a hearing on July 22-24, 2013 and the receipt of submissions by October 8, 2013, the Commission delivered its liability judgment on July 8, 2014. It examined in detail, and separately, the allegations of conduct contrary to the public interest and one allegation of misrepresentation involving Guinness. The allegation Mr. McCabe made false or misleading statements to the Commission was not addressed, as it was considered to be superfluous to the first substantive findings of wrongdoing.

Acting contrary to the public interest

[23] The Commission concluded that Mr. McCabe was the sole author of the Report and wrote all relevant editions at his home in Abbotsford. Mr. McCabe himself acknowledged he was responsible for all the Report's editorial content. The Commission found him to have acted contrary to the public interest by distributing grossly promotional and misleading information about Guinness, Tuffnell and Gunpowder in the Report. There was found to be no evidence of any reasonable basis for claims made in the Report about Guinness' prospects. Statements made about Guinness were found to be grossly misleading and designed to significantly increase the trading volumes in the shares of Guinness in order to inflate its stock prices.

[24] Mr. McCabe was found to have prepared the Report in "questionable circumstances". He took instructions from Mr. Speckert to publish reports about a public company with which Mr. Speckert had no apparent connection and without any knowledge of Mr. Speckert's motives. He made arrangements for payment designed to conceal the flow of funds to him from whomever Mr. Speckert represented.

[25] The Commission rejected Mr. McCabe's defence that he did not personally publish the relevant editions of the Report, issue invoices or receive funds. It held:

> 108. McCabe's argument that it was Landon, not him, that engaged in the impugned conduct is irrelevant. The issue is whether McCabe engaged in conduct contrary to the public interest. If he did, it matters not whether he acted personally or by causing a corporation that he alone controlled to take those actions. It would be completely at odds with the Supreme Court of Canada's interpretation of the public interest mandate in Canadian securities regulation if the Commission were rendered powerless to address conduct contrary to the public interest because the perpetrator acted through a corporate entity he controls.
>
> 109. In any event, the evidence shows that the relevant conduct was McCabe's, not Landon's. It was McCabe personally who communicated with Speckert … about the promotions of Guinness …
>
> 110. It was McCabe who wrote and signed, in his personal capacity, the relevant editions of Elite Stock Report. In the disclaimer section of the *Elite Stock Report* McCabe identifies "*Elite Stock Report"* as the publisher of the

> reports. *Elite Stock Report* was not a corporate entity. We find that it was a trade name that McCabe used to publish his reports.
>
> 111. There is no evidence that McCabe made any mention of Landon in his discussions with Speckert …

[26] Mr. McCabe was found to be the acting and directing mind of Landon and Landon was found to be "no more than a conduit through which McCabe invoiced his services, received payment, and paid expenses" (at para. 113). Landon was found to have no distinct role in the impugned conduct, but rather did only what Mr. McCabe caused it to do.

[27] The Commission considered Mr. McCabe's argument that it has no jurisdiction because the editions of the Report were sent only to US residents and the shares of Guinness were only traded in the United States. The Commission held:

> 128. This argument overlooks the facts that McCabe, at the time a British Columbia resident, wrote these reports from his home in British Columbia, and received the $5 million in fees for publishing them, in bank accounts he controlled, at least one of which was in British Columbia.
>
> 129. Although the targets of the touting may have been investors in the US, and the companies concerned traded only in the US, McCabe engaged in misconduct in British Columbia. Tolerance of that misconduct could not help but impugn the reputation of our markets.

Misrepresentation

[28] The Commission found Mr. McCabe to be the author of the statements in the February, March and May editions of the Report that were intended to effect trades in Guinness shares. The Commission focused upon a statement in each of the Reports that a particular Guinness property held "an estimated recoverable resource in excess of 1,000,000 ounces of gold". The Commission found there was nothing whatsoever to substantiate Mr. McCabe's claim that the property had such a resource. The statement was untrue, related to a material fact, and would reasonably be expected to have a significant effect on the market price of Guinness shares.

[29] The Commission considered Mr. McCabe's argument that the Commission had no jurisdiction because the misrepresentation only came into existence when statements in the Report were received and acted upon in the United States. The Commission found:

> 176. This argument has no merit. The executive director proved that McCabe, with the intention of effecting a trade in a security, made untrue statements of material facts about Guinness. That encompasses the entire prohibition contained in section 50(1)(d).
>
> 177. Nothing in section 50(1)(d) says anything about the notion of misrepresentations "coming into existence", much less a requirement that a misrepresentation be "received" or "acted upon", in the United States or anywhere else. McCabe's suggestions otherwise are baseless inventions.

[30] The Commission found that Mr. McCabe's misrepresentations in question were not technical or accidental but gross misrepresentations invented by Mr. McCabe in the face of contrary facts in the public record.

[31] Because the Commission concluded that additional findings of misrepresentations would have no material impact upon the orders that would be appropriate in the circumstances, it made no finding as to whether Mr. McCabe contravened s. 168.1(1) by understating the amounts he received for the Guinness promotion or by considering the allegation that he misled commission investigators on July 8, 2010.

Sanctions

[32] Following a further hearing on November 21, 2014, the Commission delivered the sanctions decision on December 18, 2014. Mr. McCabe was sanctioned for acting contrary to the public interest. The submission that his conduct was benign was rejected; his conduct was described as egregious. The Commission issued a permanent market and trading prohibition against Mr. McCabe under s. 161(1)(b)(ii), with an exception to the trading prohibition to permit him to trade through a registered dealer.

[33] Mr. McCabe opposed the issuance of an order under s. 161(1)(g) on the grounds that the purpose of such an order was to compensate aggrieved investors, and it was not available in this case because there were no aggrieved investors. The Commission rejected that submission, agreeing with the panel in *Michaels (Re)*, 2014 BCSECCOM 457, that compensation or restitution is not the purpose of s. 161 of the *Act*. The Commission made an order under s. 161(1)(g) for disgorgement of $2,776,993 by Mr. McCabe, the equivalent of the amount paid to him in US dollars for the Guinness promotion.

[34] Turning to the administrative penalty under s. 162, the panel considered a submission made by the Executive Director that the penalty should be between $5.5 and $8 million, two to three times what Mr. McCabe was paid for his misrepresentations about Guinness.

[35] If the Commission was to impose an administrative penalty, Mr. McCabe said it should be in the range of $65,000, being an appropriate penalty for a single contravention of the *Act* involving a single misrepresentation affecting the value of the shares of a single company. Given that the maximum allowable penalty under s. 162 was $1 million per contravention, he argued that a penalty significantly less than the maximum was warranted.

[36] Adopting the analysis in *Manna Trading Corp Ltd. (Re)*, 2009 BCSECCOM 595, the Commission found there were multiple contraventions of the *Act*. The Commission held:

> 44. We agree with the executive director that McCabe's misrepresentation should not be characterized as a single contravention of the Act for the purposes of determining the administrative penalty. The misrepresentation was repeated in three separate editions of *Elite Stock Report* which, while identical in content, each bore a separate date. The reports were distributed on three different dates to a total of approximately three million households with at least a month elapsing between each distribution. McCabe was paid separately for each report.

[37] Finding there to have been multiple contraventions, the Commission determined the sanction by looking at Mr. McCabe's conduct globally:

> 86. We have already found that the penalty imposed in *Brookmount* [2012 BCSECCOM 445] is not determinative of the appropriate penalty in this case. We have also found that, based on *Manna*, McCabe contravened section 50(1)(d) of the Act multiple times. Rather than considering each contravention individually, we have reviewed the conduct globally to determine a penalty appropriate for all of the contraventions.

[38] An administrative penalty $1.5 million was imposed.

Proposed Grounds of Appeal

[39] Mr. McCabe does not seek to appeal the finding that he acted contrary to the public interest or the imposition of sanctions other than the monetary sanctions imposed under s. 161 and 162 of the *Act*. He seeks leave to appeal in order to advance the following arguments:

a) Absence of jurisdiction: The conduct that was the subject of the misrepresentation allegation was publication in the United States of statements about an American company whose shares traded exclusively in that country. There was no evidence of any allegation of a Canadian receiving the Report. The commission did not have jurisdiction to sanction him for that conduct.

b) Deficiencies in the Notice of Hearing: When the Commission intends to prosecute an individual in his personal capacity for the actions of a corporation, notice must be given of the intention to seek relief under s. 168.2 of the *Act*. This was not done in this case and he ought not to have been sanctioned for the corporate acts of Landon.

c) Findings in relation to other touting: It was a clear error for the Commission to make a consequential finding in respect of the other entities, the touting of Tuffnell and Gunpowder, because no such allegation was made in the Notice of Hearing.

d) Disgorgement order: Mr. McCabe says no payment was made to him personally. Further, the payment made to Landon was not contingent upon a misrepresentation by Mr. McCabe. A disgorgement order under

s. 161(1)(g) may only be made in relation to amounts obtained, or payment or loss avoided, directly or indirectly, as result of the failure to comply.

e) Administrative penalty: the Commission imposed a penalty substantially in excess of the maximum for a single contravention, but provided no explanation as to how the number of contraventions was arrived at or the number of contraventions for which the administrative penalty was imposed.

Discussion

Absence of Jurisdiction

[40] If leave to appeal is granted, Mr. McCabe seeks to argue the jurisdiction of the Commission has a geographical limit. He says no market in British Columbia was affected by his representations. There was no trading or exchange of affected securities in British Columbia. The Report published information exclusively about stocks traded on United States exchanges. The Report was neither produced nor circulated in British Columbia; it was acknowledged there was no evidence of anyone receiving the Report in Canada; it was printed in Fargo and mailed in the United States to Americans. If there was a misrepresentation Mr. McCabe says it occurred when the publication was read by recipients in the United States.

[41] The Executive Director says the Commission has jurisdiction over Mr. McCabe personally as he was resident at all material times in British Columbia. The Executive Director says a person who commits impugned conduct in British Columbia must be subject to the laws of British Columbia. It was Mr. McCabe's authorship of the misrepresentations that contravened the *Act.* Publication and distribution elsewhere was undertaken by his agents. The misrepresentation occurred when he made statements he knew to be false. The Commission has jurisdiction to regulate ethical conduct of individuals in British Columbia and this is the most appropriate forum in which to hear complaints about inappropriate touting by residents of British Columbia. If Mr. McCabe's position on this issue is accepted,

the Executive Director says the Commission will be powerless to regulate persons within British Columbia who engage in wrongful or fraudulent behavior, so long as the conduct targets investors outside British Columbia.

[42] On this question, as on others, the Executive Director argues this Court should defer to the tribunal's expertise and let any reasonable interpretation of its home statute stand. All issues on appeal fall into the category of reasonable decisions made by a tribunal which has expertise in interpreting its own statute.

[43] In *Torudag v. British Columbia (Securities Commission),* 2011 BCCA 458, leave was granted to Mr. Torudag on the issue of the jurisdiction of the Commission to adjudicate enforcement proceedings against an out-of-province individual conducting trades on the TSX Venture Exchange. Through Mr. Torudag's agency, mineral claims had been sold from a Québec resident to Icon Industries Limited, a reporting British Columbia company listed on the Exchange. Before the announcement of the purchase, Mr. Torudag bought about 120,000 shares of Icon Industries Limited. Many of the sellers were residents of British Columbia. When news of the agreement to purchase mineral claims became public knowledge, the shares of Icon Industries Limited substantially appreciated in value over a short time period. Mr. Torudag was found to have engaged in insider trading.

[44] Mr. Justice Hall, for the Court, observed that the Commission would have jurisdiction if a "meaningful connection" between the impugned conduct and British Columbia could be shown to exist. This was a test he found to be difficult to distinguish from that which required that there be a "real and substantial connection" to the jurisdiction. He noted, at para. 19, what ought to be established for there to be jurisdiction was "a state of facts demonstrating circumstances in which it would be appropriate for a tribunal to take jurisdiction over a legal issue or controversy". The fact that the trading concerned securities of a British Columbia reporting company was a "significant circumstance" and considered sufficient to constitute a real and substantial connection to the jurisdiction to permit the Commission to properly take jurisdiction.

[45] In my opinion, leave should be granted to Mr. McCabe to argue that the Commission did not have jurisdiction to sanction him for the misrepresentations in the Report. There is a substantial question whether the test described in *Torudag* was met in this case. There is at least arguable merit to this ground of appeal. The extent of jurisdiction of the Commission is a question of general importance. The proposed appeal may arguably be said to raise a question of law arising from facts going to jurisdiction which do not appear to be contentious.

Deficiencies in the Notice of Hearing

[46] With respect to the Notice of Hearing, Mr. McCabe says he was entitled to rely upon the express language in the Notice, which said the Executive Director would prove that Landon published the tout sheet distributed by direct mail. He claims to have relied on the Notice when he tailored his defence, assuming, based on the Notice of Hearing, the allegations of misrepresentation would be made against the company.

[47] Mr. McCabe intends to argue that s. 168.2 of the *Act* is intended to permit the Commission to sanction an individual in his or her personal capacity for acquiescing or permitting the conduct of a corporation found to be in contravention or non-compliance with the *Act.* Here, the Executive Director did not rely upon that section in the Notice of Hearing and Mr. McCabe says he was entitled to assume the Executive Director would not advance the argument that he, as director of Landon, was responsible for Landon's conduct. Mr. McCabe says that in subsequent cases involving corporate conduct, the Commission expressly cited s. 168.2 in the Notice of Hearing. He says the Landon corporate veil was pierced without notice that it would occur. He argues such an error led to procedural unfairness and this Court has granted leave to review this type of procedural fairness, citing *Doman v. British Columbia (Superintendent of Brokers)* (1996), 85 B.C.A.C. 210, 31 B.C.L.R. (3d) 357 (Southin J.A. in Chambers).

[48] The Executive Director says this is not a case where the Commission was looking to determine who was responsible as an agent for wrongs committed by a

corporation. The Commission found that Landon was an agent for Mr. McCabe. None of the impugned conduct was corporate conduct. Mr. McCabe conceded that he personally wrote the Reports in question. The Executive Director says the Notice of Hearing gave adequate notice to Mr. McCabe of the case that would be made against him. No reliance upon s. 168.2 was necessary and no objection was taken to the Notice of Hearing prior to the issuance of the decisions from which this appeal is brought.

[49] Mr. McCabe submits guidance from this Court is needed in respect of the degree to which the allegations against respondents to proceedings by the Commission are confined to those set out in the Notice of Hearing. The issue whether s. 168.2 must be expressly referred to in a Notice of Hearing has not been decided by this Court, and the extent of information required in a Notice of Hearing has been the subject of little appellate review. This Court has confirmed that the Commission is the master of its own procedure, and that procedural fairness requires that sufficient notice be given to permit an appreciation of the case to be met: *British Columbia (Securities Commission) v. Pacific International Securities Inc.*, 2002 BCCA 421; Mr. McCabe says, however, the notice requirements should be further elaborated upon.

[50] In *Pacific International*, this Court concluded, at paras. 9-10, that the hearings conducted by the Commission are regulatory, not judicial, and the level of procedural fairness required and the means adopted to provide it must be reviewed with that in mind. Deference is afforded to the Commission's broad procedural discretion because it has a base of experience on which to gauge the efficacy of the procedures it adopts. The Commission must proceed fairly, but it must also be given scope to perform its public-interest functions efficiently and effectively.

[51] The question before me is whether there is an arguable case that the Commission failed to provide procedural fairness because the Notice of Hearing did not alert Mr. McCabe to the Executive Director's intention to establish that Mr. McCabe was personally responsible for a misrepresentation published in the

Report. The procedural question is distinct from the substantive issue of whether the Commission properly dismissed the defence advanced by Mr. McCabe that the misrepresentation was the corporate act of Landon.

[52] In my opinion, there is no arguable legal issue in relation to the alleged inadequacy of the Notice of Hearing. First, while the Notice of Hearing did refer to Landon as the publisher of the Report, it also clearly identified the Executive Director's intention to establish that Mr. McCabe "made stock purchase recommendations under his own name" in the Report. Second, Mr. McCabe sought, unsuccessfully, to establish at the hearing that the representations were made by Landon. The Commission did not find Mr. McCabe to be responsible for corporate acts but rather found that the impugned acts were Mr. McCabe's personal acts. The Notice of Hearing might have been insufficient to permit the Commission to attribute a contravention to Mr. McCabe as a result of his authorization, permission or acquiescence to a contravention or non-compliance by Landon, pursuant to s. 168.2, but no such attribution was sought or made. This was not a Notice of Hearing akin to the one at issue in *Doman*, where Southin J.A. found there was "not a shred of allegation" in the Notice of Hearing for the finding made by the Commission in granting leave to appeal.

[53] Having reviewed the Notice of Hearing and the liability decision in context, I am not persuaded that the applicant has identified a serious point of law that warrants the granting of leave in relation to this alleged inadequacy of the Notice of Hearing.

Findings in relation to other touting

[54] The applicant submits that it was an error for the Commission to make findings in relation to the touting of Tuffnell and Gunpowder because no allegation of wrongful conduct in relation to that touting was made in the Notice of Hearing.

[55] The Executive Director says Mr. McCabe's conduct in relation to parties other than Guinness was part of the narrative that was considered in determining whether

he acted contrary to the public interest. It did not form a part of the misrepresentation finding against Mr. McCabe, which is the subject of the appeal.

[56] The Commission noted, at para. 13 of the liability decision, that the Executive Director alleged that by secretly promoting Guinness, Tuffnell and Gunpowder, Mr. McCabe harmed the reputation and credibility of the Province's security markets and thereby engaged in conduct contrary to the public interest. The Tuffnell and Gunpowder promotions were described in detail at paras. 68-84 in the context of the public interest analysis and formed part of the conclusion in relation to that charge. In particular, the Commission made the following findings in relation to Tuffnell and Gunpowder:

a) Mr. McCabe wrote and distributed grossly promotional and misleading information about the companies in the Report (para. 85);

b) The content, layout and tenor of the issues of the Report presented information that was grossly misleading (paras. 90-96);

c) The publications were highly lucrative (para. 102);

d) Mr. McCabe made no inquiries into the companies or the interests of those employing him (para. 103);

e) He personally spoke with those seeking to have the companies touted (para. 109);

f) He did not directly contact the companies touted (para. 116).

[57] The Notice of Hearing referred to the touting of Tuffnell and Gunpowder at paras. 24-27. It alerted Mr. McCabe to the Executive Director's intention to lead evidence that Mr. McCabe agreed to do conduct investor relations for Tuffnell and Gunpowder, that he was paid $2.4 million US for the work, that he was paid by wire transfers to Hong Kong accounts he controlled and that he performed the work without making any inquiries.

[58] There was notice to Mr. McCabe of the Executive Director's intention to adduce some evidence in relation to the touting of Tuffnelll and Gunpowder. That evidence was relied upon by the Commission in finding that Mr. McCabe acted contrary to the public interest. That finding is not challenged. The impugned liability finding was not founded upon evidence with respect to the touting of Tuffnell or Gunpowder. In my view, there is no serious point of law that warrants the granting of leave in relation to the evidence of other touting received and considered by the Commission.

Disgorgement order

[59] Mr. McCabe's argument, founded in part upon principles described in the dissenting reasons of Vice Chair Cave in *Streamline Properties Inc. (Re),* 2015 BCSECCOM 66 [*Streamline*], that he ought not to have been ordered to disgorge money he did not receive is, in substance, a challenge to the Commission's findings of fact. The Commission found that Mr. McCabe personally facilitated the secret promotion of securities. That finding is not challenged. The Commission found Landon was simply a vehicle used by Mr. McCabe to arrange for printing and mailing the Report. The Commission expressly found that Mr. McCabe personally authored the relevant issues of the Report and that the Report itself indicates it is published by Mr. McCabe. Landon's name appears nowhere in the publication. The Commission found Mr. McCabe was the actor and that Landon did not make the subject misrepresentation. In my view, there is no apparent merit in an appeal from those findings and I cannot see any reasonable prospect of such an appeal succeeding.

[60] Mr. McCabe also seeks leave to argue that the money paid to him was not shown to be sufficiently connected to the representation so as to be characterized as an amount obtained, or payment made, directly or indirectly, as result of the contravention, under s. 161(1)(g) of the *Act*.

[61] This, too, is a challenge to the Commission's findings of fact. The Commission considered Mr. McCabe's assertion that Landon was paid for services rendered before a single word was published and that money was paid

unconditionally without any direction that the publication would express positive or negative views on Guinness' prospects. It heard Mr. McCabe's argument that the misrepresentation that Guinness possessed in excess of 1,000,000 ounces of gold in reserves on its property did not emanate from Mr. Speckert and had no nexus to the funds received. The Commission found there was no question what was being bought and sold. The Commission found it was clear what business Mr. McCabe was in and that Mr. Speckert knew what he was buying and was not "crossing his fingers".

[62] The proposed appeal from the disgorgement order does not meet the test described in *Queens Plate* and *Botha*. It raises no distinct question of law and no question of general importance. Such an appeal would resolve no novel or unresolved question of law. I would not grant leave to appeal the sanction imposed under s. under s. 161(1)(g) of the *Act*.

Administrative penalty

[63] Section 162 of the *Act* permits the imposition of an administrative sanction of not more than $1 million per contravention. Mr. McCabe seeks leave to argue that in imposing a global administrative penalty of $1.5 million, the Commission erred by concluding that there was more than one contravention of the *Act* or, in the alternative, by failing to determine the number of contraventions that occurred for the purpose of determining the maximum penalty permitted and then appropriately fixing the penalty. Mr. McCabe says the Commission's failure to enumerate precludes him from mounting a meaningful challenge to the penalty.

[64] The former complaint is another challenge to a factual finding by the Commission: that there were at least three contraventions. The latter complaint is a challenge to the method of assessment of the administrative penalty employed when the Commission looked at Mr. McCabe's role in the Guinness promotion globally. In my view, neither complaint can be said to ground a serious point of law that warrants the granting of leave.

[65] The Commission has determined how it will determine what administrative penalty under s. 162 should be imposed for multiple contraventions after a comprehensive assessment of the respondent's improper conduct and the public interest. In *Thow (Re)*, 2007 BCSECCOM 758, the Commission first considered the May 8, 2006 amendment to s. 162 which increased the maximum administrative penalty from $250,000 to $1 million per contravention. It held that there was room for the exercise of discretion in applying s. 162, which should be preserved:

> [82] We anticipate future panels will apply section 162 in varying ways, depending on what is appropriate in the circumstances of the cases before them.

[66] In *Manna Trading Corp Ltd*., 2009 BCSECCOM 595, the Commission held that the respondents had engaged in a pattern of significant and repeated contraventions of ss. 34(1), 61(1), 50(1)(d), 57(b), and 57.1(b) of the *Act*. Each of the respondents was found to have contravened those sections of the *Act* multiple times in their dealings with hundreds of clients. The Commission concluded that there were hundreds, if not thousands, of contraventions for which the Commission could order an administrative penalty. Rather than doing so, the Commission considered the respondents' conduct globally, and made orders under s. 162 that imposed an administrative penalty for all of their respective contraventions. The Commission noted:

> [52] …With the power to order administrative penalties at the rate of $1 million per contravention, each panel will have to consider carefully the circumstances of the case before it and make section 162 orders appropriate to those circumstances.

[67] The method of determining the administrative penalty hinged upon the scale and significance of the wrongdoing but was not determined by the number of contraventions:

> [53] The individual respondents deliberately disregarded the most important fundamentals of our system of regulation. Their activities were at the most serious end of the range of misconduct. They inflicted significant harm on investors. They damaged the integrity of our capital markets. They enriched themselves at the expense of the investors, who lost between US$10 million and US$13 million. In these circumstances, we are making

> orders based on the upper limit – US$13 million. To provide an appropriate deterrent, we have doubled that amount and allocated that total penalty among the respondents in proportion to what we consider their relative culpability.
>
> …
>
> [55] As noted above, each of the respondents committed hundreds of contraventions, so the penalty we are ordering against each respondent, when calculated based on the number of contraventions, is far smaller than the maximum penalty allowed for each contravention.

[68] Mr. McCabe says this Court in *B.C. Securities Commission v. Biller*, 2001 BCCA 208, granted leave and allowed the appeal of the challenge to the Commission's interpretation of the maximum fine it could impose. He says the amended legislation which limits the Commission's ability to impose a maximum sanction "per contravention" must be interpreted and leave should be granted for that purpose.

[69] However, Mr. McCabe does not make out an arguable case that on its findings the Commission could not have found that he engaged in at least three contraventions. Mr. McCabe's argument that there was one misrepresentation conflicts with his own argument that the misrepresentation was not made until the impugned statement was read or heard. Even if the contravention occurred when the statement was made, the statement was made at least three times when three separate editions of the Report were mailed out on three different dates, in exchange for three payments. I agree with the Executive Director's argument that it was entirely reasonable for the Commission to conclude that there were multiple contraventions of the *Act*. As long as there were more than one, it matters not whether many more contraventions occurred for the purpose of the maximum penalty.

[70] The penalty set by the Commission in this case was set in light of the appropriate factors: the amount of money received by Mr. McCabe, the number for investors who received the representation, the apparent effect of representation on the value of the stock, and the number of transactions in the wake of the representation. It is not up to the Court to establish a formula for the imposition of

sanctions. The Commission is best suited to make that determination. The Commission has decided, in similar cases, that the number of contraventions need not be determined for the purposes of imposing an administrative penalty.

[71] An administrative penalty was appropriate in light of the improper transactions. It is not necessary, or appropriate in this case, to allocate the administrative penalty to specific contraventions, as it was in *Streamline*, because this is not an enterprise with several actors where the role of each actor must be described. Here, there was only one person responsible for the multiple contraventions and it cannot be argued that it was unreasonable to assess the administrative penalty on a global basis. There was no principled objection to the Commission doing so.

[72] The penalty was within a range of reasonable outcomes and there is no basis that would justify this Court interfering with the penalty imposed by the Commission.

Conclusion

[73] The application for leave is granted in relation to one question only: whether the British Columbia Securities Commission had jurisdiction to sanction Mr. McCabe for the misrepresentations in the February, March and May 2010 editions of *Elite Stock Report* found to have been a contravention of s. 50(1)(d) of the *Securities Act*, R.S.B.C. 1996, c. 418.

[74] The balance of the application is dismissed.

"The Honourable Mr. Justice Willcock"