Citation: 2013 BCSECCOM 436

Thalinder Singh Poonian, Shailu Sharon Poonian, Robert Joseph Leyk, Mangit Singh Sihota and Perminder Sihota

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

Panel	Suzanne K. Wiltshire	Commissioner
	George C. Glover, Jr.	Commissioner
	Audrey T. Ho	Commissioner
Hearing Date	September 30, 2013	
Date of Decision	October 11, 2013	
Appearing		
Leonard T. Doust, Q.C. David Hainey	For the Executive Director	
Jeremy West	For Thalbinder Singh Poonian and Shailu Sharon Poonian	
Sean K. Boyle Andrew Crabtree	For Manjit Singh Sihota and Perminder Sihota	

Ruling

Introduction

¶ 1 This ruling concerns the applications by Thalinder Singh Poonian and Shailu Sharon Poonian (the Poonians) and Mangit Singh Sihota and Perminder Sihota (the Sihotas) to stay the proceedings against them. We dismiss the applications, for the following reasons.

Background

¶ 2 On August 2, 2012, the executive director issued a notice of hearing and temporary order under section 161(2) of the *Securities Act*, RSBC 1996, c. 418 (2012 BCSECCOM 306) against the Poonians, the Sihotas and Robert Joseph Leyk (the respondents).

¶ 3 In the notice of hearing, the executive director alleges that the respondents contravened the *Securities Act* by manipulating the shares of a company that was listed on the TSX Venture Exchange.

¶ 4 In the temporary order, the executive director prohibited the respondents from: trading in and purchasing securities, with exceptions; conducting investor relations activities; and acting as directors or officers of any issuer, with exceptions.

¶ 5 On February 1, 2013, a Commission panel heard the executive director's application to extend the temporary order and reserved its decision.

¶ 6 On February 8, the Commission panel gave its decision and extended the temporary order, as previously varied, until a hearing is held and a decision is rendered.

¶ 7 Sometime before March 25, Perminder Sihota filed in the Court of Appeal, notice of an application for leave to appeal the panel's decision to extend the temporary order. The Commission and the executive director were both named as parties in the notice.

¶ 8 On March 25, counsel for Perminder Sihota (who also acts for the Sihotas on the stay application) sent an email to the director of enforcement and staff litigation counsel (both acting for the Commission's executive director) and to the Commission's associate general counsel (acting for the Commission on the application for leave to appeal) and asked about their availability on April 24, 25 or 26 for the hearing of the Court of Appeal application.

¶ 9 Counsel for the Sihotas did not receive a response from counsel for the executive director and on April 9, again emailed the director of enforcement and staff litigation counsel about dates for the leave application.

¶ 10 On April 10, having received no response from counsel for the executive director, counsel for the Sihotas filed in the Court of Appeal his Notice of Motion and Motion Book which set the application down for hearing on April 25.

¶ 11 On April 11, the director of enforcement sent an email, copied to the executive director, responding to the Sihotas' counsel's March 25 email. In her email, the director of enforcement stated that she had been away and that counsel for the executive director would not be available April 24, 25 or 26 for the application.

¶ 12 Later in the day on April 11, the director of enforcement sent another email to counsel for the Sihotas and copied the executive director. In her email, the director of enforcement stated that she had not yet decided who would act for the executive director on the application for leave to appeal and that counsel for the executive director would not be ready on April 25.

¶ 13 She also suggested that counsel for the Sihotas request reasons for the panel's decision to extend the temporary order, pursuant to section 18 of the Securities Regulation.

¶ 14 Through subsequent emails, counsel for the Sihotas and the director of enforcement arranged to meet at the Commission's office on April 12 at noon which they did.

¶ 15 At 6:36 pm on April 12, the director of enforcement sent the following email to David Thompson, the Commission's general counsel:

> Hello David,
> As you know, [counsel for the Sihotas] served us with Notice of Leave Application on behalf of Perminder Sihota. I have persuaded him to adjourn his leave issue in the hopes we can settle with his client. One of his arguments in his materials is that if no reasons are given then the Commission should be given less deference. Can you advise me if the Commission is intending to issue written reasons?
> Thanks
> Teresa

¶ 16 At 7:12 pm, the general counsel sent the following email to the director of enforcement:

> Teresa, the panel will issue reasons. David

¶ 17 At 9:06 pm, the director of enforcement responded with the following email, with a copy to the executive director:

> Thank you, David. Any guess at an ETA? I know they have been kept quite busy.
> T[ersesa]

¶ 18 At 8:17 am on Saturday, April 13, the general counsel responded to the director of enforcement, with a copy to the executive director:

> I asked for it by March 27. And I have reminded the chair since. I expect some movement this weekend and I will follow up on Tuesday. If the appeal is going ahead, Doug [associate general counsel] will work with the panel. David

¶ 19 On April 15, the director of enforcement sent an email to the Sihotas' counsel in which she stated that she had been advised on Saturday morning that "the panel was due to give reasons on March 27th".

¶ 20 On April 19, counsel for the Sihotas adjourned the application for leave to appeal.

¶ 21 On April 30, he wrote to the director of enforcement, stating that he had agreed to adjourn the leave application in order to facilitate without prejudice settlement discussions and asked when he would hear from the executive director about those discussions. He suggested resetting the Court of Appeal application in order to give both parties an incentive to move the matter forward.

¶ 22 The director of enforcement replied on April 30, stating that the assigned staff litigation counsel was occupied with a lengthy hearing but that they were meeting that afternoon. She also stated that the panel's reasons were "due in March" and that she did not know when they would be issued.

¶ 23 On May 8, the director of enforcement wrote to the secretary to the Commission, stating that she thought the reasons would be due by the end of the week, based on the Commission's guidelines, and asked the secretary to confirm. (The guideline referred to is the Commission's timing guideline for the delivery of reasons after a hearing).

¶ 24 On May 9, the executive assistant to the Chair wrote to all parties on behalf of the secretary to the Commission, stating that the panel was aware of the guidelines for issuing reasons and that the parties would be advised immediately when reasons were available.

¶ 25 On May 15, counsel for the Sihotas and counsel for the executive director agreed not to set down the application for leave to appeal until the panel issued its reasons.

¶ 26 On May 23, the Sihotas made a request to the Commission under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to receive copies of

> Emails exchanged between Teresa Mitchell-Banks [director of enforcement] and David Thompson between Thursday, April 11, 2013 and Monday, April 15, 2013 (inclusive) which in any way relate to matters associated with proceedings commenced by [the Notice of Hearing] and, in particular without limiting the generality of the foregoing, emails relating to reasons for a decision [to extend the temporary order] and emails relating to Ms. Sihota's appeal of that decision.

¶ 27 On June 19, the chair of the Commission responded to the Sihotas' FIPPA request and provided copies of the emails between the director of enforcement and the general counsel on April 12 and 13, which are set out above.

¶ 28 On June 25, the Sihotas' counsel wrote to staff litigation counsel. He expressed concern that there were *ex parte* communications between representatives of the executive director, acting within their prosecutorial or enforcement mandate, and the adjudicative side of the Commission. He asked for disclosure and production of

> details and documents relating to any communications between representatives of the Executive Director and the Commission in connection with [the Sihotas].

¶ 29 The Sihotas' counsel sent a similar letter on the same day to external counsel representing the executive director on the leave to appeal application. He asked for

> any other communications that representatives of [the executive director] have had with the Commission in connection with this proposed appeal . . . [including] any communications which in any way relate to the timing of the leave application.

¶ 30 On June 27, the staff litigation counsel responded that all appropriate disclosure had been made. On July 10 the executive director's external counsel informed the Sihotas' counsel that he understood the executive director's staff counsel had responded to his request.

¶ 31 On July 12, the Commission panel issued its reasons for extending the temporary order (2013 BCSECCOM 131).

¶ 32 On August 13, the Sihotas gave notice to the executive director of their current application for a stay of the proceedings against them.

¶ 33 On September 12, external counsel for the executive director on these stay applications (not the same external counsel acting for the executive director on the leave to appeal application) wrote to applicants' counsel in response to a request from the Poonians' counsel for additional disclosure. He stated, in part:

> I am advised that there were no other communications between separate arms of the Commission relating to the matters set out in [the Poonians' counsel's] letter.
>
> I am advised that Doug Muir of the office of the General Counsel was advising the panel on legal matters in relation to the hearing. Although it is our position that David Thompson did not serve in an adjudicative role with respect to this matter, in the spirit of providing the fullest of disclosure, I am further advised that after his email exchange with [the director of enforcement] on April 12 and 13, 2013, David Thompson periodically inquired with the panel chair and Doug Muir about the timing for the reasons. I am advised that at no time did David Thompson have any communications with the panel about their ruling or their reasons for making the ruling.

¶ 34 On September 18, the Poonians gave notice to the executive director of their application for a stay of proceedings against them.

¶ 35 We heard the applications on September 30 and reserved our decision. The respondent Leyk was not present in person or by counsel at the hearing.

¶ 36 The hearing regarding the allegations set out in the notice of hearing is scheduled to start October 28, 2013.

Positions of the parties

¶ 37 The applicants argue that the fact that the director of enforcement, representing the prosecutorial arm of the Commission, communicated *ex parte* with the Commission's general counsel about this proceeding means a panel hearing the allegations would not appear to be independent, which creates a reasonable apprehension of bias. They say this will deny them procedural fairness and natural justice at the hearing of the allegations.

¶ 38 The applicants do not argue that the panel members who heard the application to extend the temporary order, or the panel members who will hear the allegations, are actually biased. Nor do they argue that the institutional structure of the Commission gives rise to bias.

¶ 39 They say that a permanent stay of proceedings is the only remedy.

¶ 40 The executive director argues that there were no *ex parte* communications between counsel for the executive director and members of the hearing panel and, therefore, there was no improper influence or reasonable apprehension of bias.

¶ 41 The executive director also argues that the facts do not support a finding that the panel's decision to provide reasons for extension of the temporary order was improperly influenced and that no informed person would conclude that the panel was improperly influenced or did not decide fairly.

Analysis

Applicable Law

¶ 42 There are two issues to be decided on these applications. The first is whether there is a reasonable apprehension of bias. The second is what is the appropriate remedy, if there is a reasonable apprehension of bias.

¶ 43 The principle behind the reasonable apprehension of bias test is the "firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies": *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 as cited in *Brosseau v. Alberta (Securities Commission)* [1989] 1 S.C.R. 301, at paragraph 40.

¶ 44 In *Canada (Minister of Citizenship and Immigration) v. Tobiass* [1997] 3 S.C.R. 391, at paragraph 71, the court stated the following with respect to impartiality (also referred to as independence):

> The essence of judicial independence is freedom from outside interference. Dickson C.J., in *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56, described the concept in these words, at p. 69:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

¶ 45 The Supreme Court of Canada describes the test for reasonable apprehension of bias as follows:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly".
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> *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 as cited in *Wewaykum Indian Band v. Canada* 2003 SCC 45, paragraph 60.

¶ 46 The grounds for apprehension must be "substantial" and the test is not based on the "very sensitive or scrupulous conscience": *Wewaykum*, paragraph 76, citing *Committee for Justice and Liberty*. Application of the test is "highly fact-specific": *Wewaykum*, paragraph 77.

¶ 47 As noted above, the applicants did not argue actual bias. They argued that there is a reasonable apprehension of bias with respect to the panel that will hear the allegations set out in the notice of hearing as a result of the fact that the director of enforcement communicated *ex parte* with the general counsel about whether reasons would be issued and the timing of those reasons.

Application of the law to the facts

¶ 48 We find that an informed person, viewing the matter realistically, practically and having thought the matter through, would not conclude that a Commission panel would not decide the allegations against the respondents fairly. In other words, we find no reasonable apprehension of bias.

¶ 49 In this case, the communications in issue were not with a panel member nor even with an advisor to the panel. As explained in the September 12 letter from the executive director's counsel, Mr. Thompson did not advise the panel in this matter. In his April 12 and 13 emails to the director of enforcement, Mr. Thompson did no more than confirm that the panel would issue reasons and speculate on the timing of those reasons. Those emails happened after the Sihotas' counsel had filed the Notice of Motion and Motion Book which set the application for leave to appeal down for hearing.

¶ 50 Any subsequent discussions between Mr. Thompson and Mr. Muir, who did advise the panel, or between Mr. Thompson and the panel chair, were about the timing of the reasons.

¶ 51 Overall, the communications dealt with administrative issues relating to a hearing, which is part of Mr. Thompson's duties.

¶ 52 Most significantly, none of the communications, either between the director of enforcement and Mr. Thompson, Mr. Thompson and Mr. Muir, or Mr. Thompson and the panel chair, could have had an impact on the panel's decisions to either extend the temporary order or to issue reasons for that decision – those decisions already had been made before the communications happened.

¶ 53 The decision to extend the temporary order was made on February 8, shortly after the hearing of the application. That was, of course, before the notice of application for leave to appeal was filed. And, as seen from Mr. Thompson's April 13 email, before March 27 the panel had decided to issue reasons. Therefore it is not possible that the communications on April 12 and 13, or subsequent inquiries by Mr. Thompson of Mr. Muir or the panel chair concerning timing of the reasons, could have impacted the panel's decision to extend the temporary order or to issue reasons.

¶ 54 The applicants are left with the argument that Mr. Thompson's periodic inquiries of the panel chair and Mr. Muir about the timing of the reasons (mentioned in counsel's September 12 letter) give rise to the inference that inappropriate communication will take place in the future. They say this creates a reasonable apprehension that the panel that will hear the allegations is biased and a stay of proceedings therefore is required.

¶ 55 We disagree. The evidence is that the periodic discussions concerned timing of the reasons. Since the reasons have been issued, timing is no longer an issue that needs to be discussed. The evidence in counsel's September 12 letter is that David Thompson did not have any communications with the panel about their ruling or their reasons for making the ruling. There is no evidence that contradicts this. We do not make the inference sought by the applicants.

¶ 56 In addition, as noted by counsel for the Sihotas, the usual practice at the Commission is that parties to a proceeding wishing to communicate with the Commission, including a Commission panel, regarding that proceeding are to send correspondence to the secretary to the Commission, with a copy to all parties. The secretary to the Commission, or staff acting on her behalf, responds to the party and copies all parties to the proceeding. This is the appropriate practice set out by the Supreme Court of Canada in *Tobiass* at paragraphs 74 and 75. With this practice, all parties are apprised of communication by any party respecting the proceeding.

¶ 57 While some of the communications in issue on these applications did not follow this practice, for reasons already given we do not find that the fact of the communications, nor their substance, give rise to a reasonable apprehension of bias and therefore there is no need for us to consider an appropriate remedy.

¶ 58 The applications are dismissed.

¶ 59 October 11, 2013

For the Commission

"Suzanne Wiltshire"

Suzanne K. Wiltshire
Commissioner

"George Glover"

George C. Glover, Jr.
Commissioner

"Audrey Ho"

Audrey T. Ho
Commissioner