COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Rosiek v. British Columbia (Securities Commission)*, 2010 BCCA 257

Date: 20100304
Docket: CA037664

Between:

Dianne Sharon Rosiek

Appellant
(Plaintiff)

And

British Columbia Securities Commission

Respondent
(Defendant)

Before: The Honourable Madam Justice Levine
(In Chambers)

Oral Reasons for Judgment

Counsel for the Appellant:	P.A.A. Taylor
Counsel for the Respondent:	G.R. MacLennan
Counsel for the Attorney General of British Columbia	L. Greathead S.A. Bevan
Place and Date of Hearing:	Vancouver, British Columbia March 4, 2010
Place and Date of Judgment:	Vancouver, British Columbia March 4, 2010

[1] **LEVINE J.A.**: This is an application for leave to appeal from decisions of the British Columbia Securities Commission imposing liability and sanctions on the applicant with respect to contraventions of the *Securities Act*, R.S.B.C. 1996, c. 418. The decisions of the Commission resulted in an order requiring the applicant to pay a total of $22 million to the Commission. This amount includes $16 million in disgorgement or restitution under s. 161(1)(g), and administrative penalties of $6 million, comprising $1 million for each contravention of the *Act*, as provided in s. 162.

[2] The applicant raises four grounds of appeal. Two concern the procedures followed the by Commission during the investigative stage, and two of the grounds of appeal are constitutional challenges to the administrative penalties of $6 million.

[3] The background of this matter is a "Ponzi" scheme, called the "Manna" scheme, in which the Commission found the applicant played a central role. The Commission found that 800 investors deposited about $16 million and received as little as $3 million and no more than $5.6 million back. There were several individuals and entities involved.

[4] During the investigation, the applicant was required to attend an interview pursuant to the investigation powers of the Commission under ss. 142-144 of the *Act*. She was not represented by counsel at the interview. The morning of the interview, she was provided with a copy of an amended investigation order which included two additional parties as subjects of investigation, in addition to those set out in the summons she had initially received. She indicated immediately and repetitively that she wished an adjournment to consult with counsel, but was denied an opportunity to do so by the investigator, and the interview proceeded without counsel.

[5] The second procedural matter raised by the appellant is that pre-hearing notices provided to the members of the Commission included information concerning the conviction of the appellant in 1995 on drug charges in the United States.

[6] The matter continued to hearing and resulted in the sanctions of $22 million.

[7] The applicant claims that she was denied procedural fairness with respect to her right to counsel, and with respect to the inclusion of irrelevant prejudicial evidence in the pre-hearing notices.

[8] The constitutional grounds of appeal are that the total amount of the administrative penalties is *ultra vires* the Province, in that it is a penal sanction, outside the legislative power of the Province to empower the Commission to impose, and that because of the severity of the sanctions, s. 11 of the *Charter* should be applied with respect to the Commission's procedures, including the right to counsel, the right to remain silent and the standard of proof beyond a reasonable doubt.

[9] The test for leave to appeal from a tribunal such as the Securities Commission is as set out in *Queens Plate Development Ltd. v. British Columbia (Assessor of Area No. 9 – Vancouver)* (1987), 16 B.C.L.R. (2d) 104 (C.A.) (Taggart J.A. in chambers). The two factors that are relevant in this case are whether there is some prospect of the appeal succeeding on its merits, and whether there is any clear benefit to be derived from the appeal.

[10] I will deal first with the constitutional matters.

[11] There are procedural flaws underlying the constitutional claims which are fatal to the application for leave to appeal.

[12] These matters were not raised before the Commission. Thus there is no consideration, analysis or decision of the Commission on the challenges to its authority or procedure. The effect of the absence of consideration of these issues by the Commission cannot be overcome by the admission of fresh evidence in this Court. In *Martin v. Nova Scotia (Workers Compensation Board)*, [2003] 2 S.C.R. 504, 2003 SCC 54 at para. 30, Justice Gonthier, writing for the Court, summarized clearly the need for the contextual analysis of a tribunal with particular expertise in the examination of constitutional challenges:

> Second, *Charter* disputes do not take place in a vacuum. They require a thorough understanding of the objectives of the legislative scheme being

> challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies. This need is heightened when, as is often the case, it becomes necessary to determine whether a *prima facie* violation of a *Charter* right is justified under s. 1. In this respect, the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court: see *Douglas College*, *supra*, at pp. 604-5. As La Forest J. correctly observed in *Cuddy Chicks*, *supra*, at pp. 16-17:
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> > It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. . . . The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance.

[13] Further, the primary argument of the applicant on this leave application was that the total amount of the administrative penalties ($6 mm.) was beyond the authority of the Province to legislate. That claim was not set out in the Notice of Constitutional Question served on the Attorney General of British Columbia. While that Notice could presumably be amended with leave, a question on which I make no decision, the absence of this issue in the Notice further compounds the procedural flaws underlying these grounds of appeal.

[14] I deny leave to appeal on the constitutional issues.

[15] That leaves the issues of procedural fairness. These are the refusal of the investigators to adjourn the compelled interview to allow the applicant to consult counsel, and the inclusion in the pre-hearing notices of the clearly irrelevant information concerning the applicant's 1995 conviction on drug charges.

[16] These matters are of concern. The Commission, of all tribunals, is subject to a high standard of fairness. Courts must be careful, however, not to impose criminal law standards on administrative tribunals, and to appreciate the different powers and purposes of regulatory investigations.

[17] Here, the legal question is whether the refusal to adjourn a compelled interview, where previous adjournments had been granted to provide the applicant the opportunity to retain counsel, in the context of the amended investigation order, is a breach of procedural fairness, and if it is, does that lead to the conclusion that leave to appeal should be granted?

[18] The legal question is an appropriate and important question for this Court to consider, but in my opinion, in the particular factual circumstances of this case, leave should not be granted because an appeal would have no clear benefit.

[19] Not every breach of procedural fairness requires a remedy. The question for the Court would, in the end, be whether the procedural deficiencies resulted in an unfair hearing.

[20] The appellant does not contest any of the findings of fact made by the Commission after the hearing (where she provided evidence by affidavit and refused to be cross- examined). The appellant's evidence was exculpatory — she claimed that she had only an administrative role in the scheme. This was not accepted by the Commission, which found, on other overwhelming evidence, that she played a central role. Thus, even if this Court found there was a breach of procedural fairness in the investigation stage, there is no basis on which it could determine that the deficiencies resulted in an unfair hearing.

[21] In any event, the only possible remedy, in my view, could be an order for a new hearing, at which the body of unchallenged evidence would remain unchanged.

[22] Similar reasoning applies with respect to the inclusion of the irrelevant evidence in the pre-hearing notices.

[23] I therefore conclude that there is no clear benefit to be derived from an appeal on the grounds of procedural fairness.

[24] I order that the application for leave to appeal is dismissed.

R. E. Levine J.A.

The Honourable Madam Justice Levine