COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sihota v. British Columbia Securities Commission,* 2013 BCCA 473

Date: 20131025
Docket: CA041292; CA041294

CA041292

Between:

Manjit Singh Sihota and Perminder Sihota

Appellants

And

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

Respondents

- and -

Docket: CA041294

Between:

Thalbinder Singh Poonian and Shailu Sharon Poonian

Appellants

And

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

Respondents

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

On appeal from an order of the British Columbia Securities Commission
dated October 11, 2013 (2013 BCSECCOM 436)

Oral Reasons for Judgment

Counsel for the Appellants (CA041292), Manjit Singh Sihota and Perminder Sihota:	S.K. Boyle A. Crabtree
Counsel for the Appellants (CA041294), Thalbinder Singh Poonian and Shailu Sharon Poonian	J.D. West
Counsel for the Respondents:	L.T. Doust, Q.C. D.A. Hainey
Place and Date of Hearing:	Vancouver, British Columbia October 25, 2013
Place and Date of Judgment:	Vancouver, British Columbia October 25, 2013

Summary:

Applications for leave to appeal an order of the British Columbia Securities Commission dismissing applications for a stay of proceedings on grounds of an apprehension of bias and compromise of the Commission's independence.
Held: the applications are dismissed. Taking the appropriate factors into account, it would not be in the interests of justice to grant leave to appeal.

[1] **TYSOE J.A.**: The proposed appellants in these two appeals apply for leave to appeal an order dated October 11, 2013 of a panel of the British Columbia Securities Commission (the "Commission") and, if granted, for a stay of the proceedings before the Commission.

[2] The proceedings before the Commission are enforcement proceedings alleging that the applicants contravened the *Securities Act*, R.S.B.C. 1996, c. 418, (the "Act") by manipulating shares in a company listed on the TSX Venture Exchange. The proceeding was commenced by the issuance of a notice of hearing dated August 2, 2012, and a 30-day hearing is presently scheduled to commence on October 28, 2013.

[3] Also on August 2, 2012, the Commission issued a temporary order containing restrictions on the ability of the applicants to trade in securities, to act as directors or officers of companies that are issuers under the *Act* and to engage in investor relations activities. On February 8, 2013, a panel of the Commission (the "First Panel") extended the temporary order until a decision on the allegations is made (the "Extension Order").

[4] The First Panel did not give reasons at the time it made the Extension Order CA040704).

[5] On March 11, 2013, a notice of application for leave to appeal the Extension Order was filed with this Court on behalf of one of the applicants, Ms. Sihota. Discussions ensued between counsel for Ms. Sihota and the Commission's Director of Enforcement, and one of the

things they discussed was whether the First Panel would be issuing reasons for the making of the Extension Order. The Director of Enforcement advised counsel that written reasons had been expected by March 27 and they were expected to be forthcoming at some point.

[6] As a result of a freedom of information request, certain emails between the Director of Enforcement and the General Counsel of the Commission came to the knowledge of the applicants. In an email sent on April 12, 2013 to the General Counsel, the Director of Enforcement advised that counsel for Ms. Sihota would argue that less deference should be given to the First Panel if no reasons for the Extension Order were given, and she enquired if the First Panel was intending to issue reasons. The General Counsel responded that the First Panel would be issuing reasons, and the Director of Enforcement asked whether he could guess at an “ETA”. The General Counsel replied the following day that he had expected the reasons by March 27, that he had reminded the chair of the First Panel and that he would follow up the next Tuesday.

[7] Upon receiving these emails, each set of the applicants made an application for a permanent stay of the proceedings against them. Following a pre-hearing conference to discuss the delivery of evidence on behalf of the Executive Director of the Commission, counsel for the Executive Director wrote a letter dated September 12, 2013 stating that he did not intend to tender any additional evidence. The letter also stated that in the spirit of providing the fullest of disclosure and although it was their position that the General Counsel of the Commission did not serve an adjudicative role in this matter, counsel was advised that the General Counsel had periodically inquired with the chair of the First Panel and the lawyer from the office of the General Counsel giving legal advice to the First Panel about the timing of the reasons. Counsel further advised that at no time did the General Counsel have any communications with the First Panel about their ruling or their reasons for making the ruling.

[8] The applicants’ stay application was heard on September 30, 2013 by a different panel of the Commission (the “Second Panel”), one member of which was also a member of the First Panel. At the hearing, the September 12, 2013 letter was admitted into evidence for the truth of its contents.

[9] In reasons dated October 11, 2013, the Second Panel dismissed the stay applications on the basis that the communications in question did not give rise to a reasonable apprehension of bias. The applicants say the Second Panel (i) erred in admitting the September 12, 2013 letter into evidence and not allowing any cross-examination of the source of the information contained in the letter, (ii) erred in its conclusion that there was not a reasonable apprehension of bias, and (iii) failed to address their primary argument that the Commission’s independence had been compromised and the applicants were denied the

requisite procedural fairness and natural justice.

[10] An appeal of the decision of the Securities Commission to this Court is authorized under s. 167 of the *Act* if leave to appeal is granted by this Court.

[11] In *Botha v. British Columbia (Securities Commission),* 2009 BCCA 214, Mr. Justice Chiasson said the following about the criteria for granting leave on a statutory appeal:

> [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:
>
> … it seems a justice may have regard for one or more of the matters listed below:
>
> (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from
>
> (b) whether the appeal is limited to questions of law involving:
>
> (i) the application of statutory provisions...;
>
> (ii) a statutory interpretation that was particularly important to the litigant ...; or
>
> (iii) interpretation of standard wording which appears in many statutes
>
> (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...;
>
> (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;
>
> (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 ....
>
> [case citations omitted]
>
> * * *
>
> [6] In *Smolensky v. British Columbia Securities Commission*, 2006 BCCA 254, Chief Justice Finch added the requirement at para. 9 that an applicant:
>
> … must satisfy the test found in *Hockin v. Bank of British Columbia* (1989), 37 B.C.L.R. (2d) 139 (C.A.) at 143:
>
> Whether the point on appeal is of significance both to the litigation before the court and to practice in general; whether the appellant has an arguable case of sufficient merit; the benefit to the parties of an appellate decision in practical terms; and, most importantly, whether the appeal will unduly hinder the progress of the action.
>
> [7] Also of significance is the fact this is a proposed appeal from an interlocutory order of the Commission. Generally, this Court does not entertain such appeals, but it may do so if it is in the interests of justice: *British Columbia Securities Commission v. Scharfe*, 2002 BCCA 704, per Lambert J.A. (in Chambers).

[12] I respectfully agree that the factors considered on leave applications pursuant to s. 7 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 are also to be taken into account on applications

for leave of statutory appeals. In particular, if the statutory proceeding has not yet been completed, the Court should consider whether an appeal will unduly hinder the progress of the statutory proceeding.

[13] I will now comment on each of the above factors in the context of the present applications.

[14] It is my view that the issues on the proposed appeal raise questions of some importance to proceedings before the Securities Commission generally, but I would not say they are issues of utmost importance.

[15] None of the issues in this matter involve specific questions of statutory interpretation, although it would be necessary to have regard to the provisions of the *Act* generally in order to identify the different functions of the Commission.

[16] There is no difference of opinion in decisions of the Commission with respect to the proposed grounds of appeal, and counsel have not referred me to any appellate decisions dealing with the precise issues raised by this matter.

[17] Most of the submissions of counsel made at the hearing of these applications related to the merits of the proposed grounds of appeal. It would be inappropriate for me to comment in any detail about the merits other than to say that, while the appeals are not frivolous or bound to fail, I do not regard the merits to be strong.

[18] I question where any clear benefit would be derived from the appeals. Even if this Court were to conclude that there was a reasonable apprehension of bias or that the Commission's independence was compromised, it seems to me there is considerable doubt that a permanent stay of the proceedings against the applicants would be considered to be the appropriate remedy in the circumstances of this case.

[19] If I were to grant leave to appeal, it is probable that the hearing scheduled for October 28 would not proceed. Counsel have advised that an expedited appeal could be heard early next year, but a new hearing would have to be arranged if the appeal were to be dismissed, and the proceedings before the Commission would be delayed for a number of months. I also note that if the hearing proceeds on October 28 and if the ultimate ruling is adverse to the applicants, it may be open to them to seek leave to appeal the final ruling on, among others, the grounds that there was a reasonable apprehension of bias and that the Commission's independence was compromised.

[20] Taking all of the above factors into account, it is my conclusion that it would not be in the

interests of justice to grant leave to appeal the October 11, 2013 order. The applications are dismissed.

"The Honourable Mr. Justice Tysoe"