COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Forum National Investments Ltd. v. British Columbia (Securities Commission)*, 2019 BCCA 402

Date: 20191114
Dockets: CA46324; CA46325

Docket: CA46324

Between:

Forum National Investments Ltd. and Daniel Clozza

Appellants

And

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

Respondents

- and -

Docket: CA46325

Between:

Robert Logan Dunn, Douglas Corrigan and Mosaic Holdings Ltd.

Appellants

And

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

Respondents

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

On appeal from: The decision of the British Columbia Securities Commission, dated July 22, 2019 (*Re Forum National*, 2019 BCSECCOM 257).

Counsel for the Appellants Forum National Investments Ltd. and Daniel Clozza (CA46324):	P.A.A. Taylor
Counsel for the Appellants Robert Logan Dunn, Douglas Corrigan and Mosaic Holdings Ltd. (CA46325):	S.K. Boyle J.R. Green

Counsel for the Respondents B.C. Securities Commission and Executive Director of the B.C. Securities Commission:	S.M. Zolnay
Place and Date of Hearing:	Vancouver, British Columbia November 6, 2019
Place and Date of Judgment:	Vancouver, British Columbia November 14, 2019

Summary:

The applicants seek leave to appeal an interlocutory judgment of the British Columbia Securities Commission refusing to stay a scheduled hearing under ss. 161 and 162 of the Securities Act on the ground of unreasonable delay. Held: Application dismissed. Granting leave to appeal would unduly hinder the exercise of the Securities Commission's statutory responsibilities. The merits of the appeal do not appear to be strong. If orders are made under s. 161 or 162, it will be open to the applicants to seek leave to appeal then on grounds of procedural fairness.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] Robert Logan Dunn, Douglas Corrigan, Daniel Clozza and Mosaic Holdings Ltd. apply for leave to appeal a decision of the British Columbia Securities Commission pursuant to s. 167 of the *Securities Act*, R.S.B.C 1996, c. 418. The decision of the Securities Commission refused a stay of a hearing to consider whether orders should be made pursuant to s. 161 or 162 of the *Securities Act* in relation to the alleged market manipulation of shares in Forum National Investments Ltd. The hearing is currently scheduled to commence December 9, 2019.

[2] The basis for the stay application was the delay between the commencement of investigation of the issues relevant to the hearing and the scheduled hearing itself. The position of the applicants is that the delay was unreasonable and significantly prejudiced the ability of the applicants to respond to the allegations to be considered by the Securities Commission. The applicants say that the Securities Commission acknowledged that the delay was unreasonable, but in refusing the stay, erred in their application of the principles of administrative delay set out in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*], in light of the more recent decision in *R. v. Jordan*, 2016 SCC 27 [*Jordan*].

[3] Whether to grant leave to appeal an interlocutory decision involves a number of factors, including the significance of the issue, the effect of an interlocutory appeal on the resolution of the principal issues between the parties, and the apparent merits of the appeal.

Interlocutory appeals from decisions of statutory bodies must take into account the public interest considerations relevant to the mandate of the decision-making body. The conclusion that an interlocutory appeal would unduly hinder the exercise of the jurisdiction of a tribunal with important public interest responsibilities is a factor that weighs heavily against the grant of leave, unless there is significant apparent merit to the appeal.

[4] In this case, the Securities Commission has an important public interest mandate. A hearing has been scheduled for December 9, 2019 to determine whether orders should be issued in the public interest pursuant to s. 161 or 162 of the *Securities Act*. An interlocutory appeal would inevitably delay this hearing, which has been too long delayed in any event. It would require a strong case on the merits to justify granting leave to appeal on these issues, particularly as the applicants will not be foreclosed from raising them in proceedings after the merits of the allegations have been determined.

[5] In my opinion, the merits of the proposed appeal are not strong. The *Jordan* test was designed to protect the *Canadian Charter of Rights and Freedoms* [*Charter*] rights to a trial in a reasonable time when a person is charged with an offence within the meaning of s. 11 of the *Charter*. There are offence provisions in the *Securities Act*, but they are not at issue in the s. 161/162 hearing. Furthermore, the *Jordan* rules relate to post-charge delay, not delay in the investigative process, which is the issue raised by the applicants at bar.

[6] For these reasons and the reasons that follow, I am not prepared to grant leave to appeal the interlocutory decision of the Securities Commission refusing a stay of the scheduled hearing to consider whether orders should be made pursuant to s. 161 or 162 of the *Securities Act*.

Background

[7] The background of this application is extensive, and is set out in detail in the Securities Commission's decision, recorded at 2019 BCSECCOM 257. For purposes of the leave application, I will summarize the main events that led to the stay application.

[8] On July 9, 2012, the Securities Commission issued an Investigation Order into the trading of securities of Forum National Investments Ltd. ("Forum"). The Investigation Order was directed to Forum, as well as several individuals, including the applicants Daniel Clozza ("Clozza") and Robert Dunn ("Dunn").

[9] On July 20, 2012, the executive director of the Securities Commission issued a temporary cease trading order and notice of hearing against Forum and three other individuals, including Clozza. That notice of hearing did not allege that any of those persons

contravened any specific provisions of the *Securities Act*, instead describing the conduct as contrary to the public interest.

[10] On August 8, 2012, a panel of the Securities Commission dismissed the executive director's application to extend the temporary order against all of those persons.

[11] On December 10, 2013, the Commission issued a Non-Disclosure Order "to protect the integrity of the investigation" (the "NDO"). Those named in the NDO included Forum, Clozza, and Dunn, as well as other individuals and corporate entities.

[12] On June 15, 2018, the executive director of the British Columbia Securities Commission issued an amended notice of hearing against Forum, Dunn, Douglas Corrigan ("Corrigan"), Clozza and Mosaic Holdings Ltd. The amended notice of hearing alleges that the named parties jointly participated in a market manipulation of Forum's shares, contrary to s. 57(a) of the *Securities Act*. The amended notice of hearing was issued within the six-year limitation period set out in s. 159 of the *Securities Act*.

[13] On August 8, 2018, hearing dates with respect to the allegations in the amended notice of hearing were set, with the hearing to commence on February 4, 2019.

[14] On January 10, 2019, Dunn and Corrigan applied for an adjournment of the hearing dates set to commence on February 4, 2019. Clozza applied for the same on January 11, 2019.

[15] On January 17, 2019, a panel of the British Columbia Securities Commission acceded to those requests and rescheduled new hearing dates to commence on May 6, 2019.

[16] In April 2019, further adjournment applications were brought by Forum and Clozza. One ground for the adjournment applications was that the hearing should await the outcomes of Forum's and Clozza's requests under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165. These adjournment applications were dismissed.

[17] On May 6, 2019, the scheduled date for the commencement of the hearing, Dunn and Mosaic Holdings Ltd. advised that they were bringing applications for an order for a stay of proceedings arising from the original notice of hearing and the amended notice of hearing or, in the alternative, an order that the proceedings be struck on a summary basis, in both cases as a matter of procedural fairness. Clozza and Corrigan joined in this application.

[18] The executive director of the Securities Commission asked for time to respond to these applications. May 23, 2019 was set as the date to hear oral submissions on these applications.

[19] On May 23, 2019, oral submissions from the parties on the applications were heard by a panel of the Securities Commission. Judgment was reserved until July 22, 2019, when extensive reasons were delivered by the Securities Commission, dismissing the stay application.

The Commission's Decision

[20] The Securities Commission began by reviewing in somewhat greater detail the background I have described, and then focused on the central delay argument of the applicants. The Securities Commission summarized the argument as a submission that the decision in *Jordan* should be viewed as having altered the principles to be applied in administrative proceedings pertaining to delay since the Supreme Court of Canada's decision in *Blencoe*.

[21] The Commission dealt briefly with this argument, commenting that:

> [95] We agree with the executive director that the principles in *Jordan* are not applicable to the circumstances of these applications. The decision in *Jordan* dealt with the application of constitutional rights to post charge delay in a criminal proceeding. The applications for a stay in this matter were not seeking a remedy under the *Charter*. These applications clearly were founded in remedies derived from administrative law principles. Thus, these are different circumstances from those in *Jordan* and we do not think it appropriate to extrapolate principles from that decision to modify the law as set out by the Supreme Court of Canada in *Blencoe*. In our view, these applications are governed generally by the principles of law as set out in *Blencoe*.

[22] This is the analysis the applicants say is deficient, and should be reviewed by this Court.

[23] Having held that *Blencoe* provided the correct analytical framework for assessing the significance of delay in administrative proceedings, the Securities Commission considered the decision in detail and cited in particular this passage from the decision:

> 101 In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L (W.K.)*, [1991] S.C.R. 1091, at p. 1100; *Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.

[24] The Securities Commission went on to discuss the delay from the commencement of the investigation to the amended notice of hearing, and made the following comments:

> [102] There is no doubt that there has been substantial delay:
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> - with respect to Clozza, there have been almost seven years between the date of the original notice of hearing issued against him and May 2019 when hearing dates were set to commence the hearing on the merits of this matter;
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> - with respect to Dunn, there have been almost six years between the date of the original Investigation Order naming him and June 2018 when the amended notice of hearing was issued naming him as a respondent; and
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> - with respect to Corrigan and Mosaic, there have been almost six years between the date of the misconduct described in the amended notice of hearing and June 2018 when the amended notice of hearing was issued naming them as respondents.
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> [103] The length of these delays are unusual by traditional Commission procedural standards. However, the question is whether these delays were unreasonable or inordinate in the circumstances. As described by the Supreme Court of Canada, that analysis must be contextual and specific to each case, including the complexity of the case and whether the applicant has contributed to the delay.
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> [104] We find that the delay was not unreasonable or inordinate with respect to Clozza; we have concerns about the reasonableness of the delay with respect to Dunn; and, we find the delay was unreasonable with respect to Mosaic and Corrigan, for the following reasons:
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> - although long and arduous, the procedural history with respect to this matter before the Commission, the Commission's attempts to have Clozza attend an interview with Commission staff and subsequent court proceedings for contempt in relation to those orders to attend compelled interviews, do not leave any significant unexplained gaps in the timeline in relation to Clozza from July 2012 through until the present day;
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> - the executive director made it clear during the temporary order proceedings in 2012 that, although he had issued a notice of hearing, the investigation into the alleged misconduct was in the early stages and was ongoing;
>
> - many of the delays in the proceedings against Clozza stem from his decision not to attend an interview with Commission staff and subsequent court proceedings in relation to that decision;
>
> - similarly, the procedural history with respect to the Commission's attempts to have Dunn attend an interview with Commission staff and subsequent court proceedings for contempt in relation to that decision do not leave any significant gaps in the timeline from July 2012 until the end of 2015;
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> - we then have an unexplained delay in proceedings against Dunn commencing at the beginning of 2016; and
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> - we have no explanation for the delay in bringing proceedings against Corrigan and Mosaic – we have no evidence of the reasons for the delay or any explanation therefor (other than as set out below).

[25] The Securities Commission concluded, however, that applying *Blencoe* principles, no significant prejudice had been shown by any of the applicants arising from the delay. After reviewing the submissions of the applicants, the Securities Commission characterized them as "vague assertions of prejudice rather than establishing serious actual prejudice." (para. 112).

[26] The Securities Commission considered abuse of process as a separate issue and concluded that a case for abuse of process within the standard set by *Blencoe* had not been established. The stay application was accordingly refused.

[27] It was apparent that the Securities Commission was concerned about the length of time that has elapsed from the start of the investigation to the amended notice of appeal, concluding their decision with this passage:

> [127] We conclude with a note about the delay evident in the investigation and the prosecution of these proceedings against Mosaic and Corrigan and, to a lesser extent, Dunn. The delay in bringing proceedings against these parties since the Commission first became aware of the misconduct has been significant. We were given some information that explained that delay, but no explanation was given for that part of the delay from the beginning of 2016 to June 2018 with respect to Dunn, nor for the almost six year delay with respect to Mosaic and Corrigan. The length of that delay causes us concern. It also causes us concern that the delay coincided with the existence of the NDO and that the amended notice of hearing was issued at almost the latest possible date within the limitation period (and as a result, the time within the limitation period only covers a small portion of time during which certain of the respondents' alleged misconduct took place). Serious and significant questions should be asked with respect to the causes for these delays. A dismissal of these applications does not condone the delay. However, as set out above, the delay has not resulted in significant actual prejudice to the applicants sufficient to grant any stays under the *Blencoe* test, and, importantly, there is a significant public interest in these proceedings determining whether any of the applicants have engaged in market manipulation, which is very serious misconduct under our Act. For all these reasons, these proceedings should carry on to a hearing on the merits of the allegations in the amended notice of hearing.

[28] The applicants submit that the Securities Commission erred by not giving effect to the argument that the *Blencoe* principles should be taken as modified by the *Jordan* decision. They do not argue that the *Jordan* decision has direct application, but rather that the *Charter* values expressed in *Jordan* should be adapted for administrative tribunals that are adversarial in nature, and that if such adaptation were to occur, the delay that so concerned the Securities Commission should be sufficient to support a stay of proceedings.

[29] The applicants also submit that even under the *Blencoe* principles, the stay should have been granted, because they had shown significant actual prejudice within the meaning of *Blencoe*.

The Application for Leave to Appeal

[30] Pursuant to s. 167(1) of the *Securities Act*, a person directly affected by a decision of the Securities Commission may appeal to the Court of Appeal with leave of a justice of this Court. On September 26, 2019, two applications for leave to appeal were filed in the two proceedings identified in the style of cause. In each case, the central issue was the same — whether leave should be granted to appeal the decision of the Securities Commission refusing the stay on the basis that the Securities Commission erred in applying the principles of the *Blencoe* decision.

[31] Because the applications for leave to appeal were filed more than two months after the decision sought to be appealed, the applicants need an extension of time to bring their application and file the necessary application materials. The Securities Commission does not object to the extension, and accordingly, I grant the extension.

[32] The factors for consideration in a leave application under s. 167 were summarized by Finch C.J.B.C. for the Court in *Smolensky v. British Columbia Securities Commission*, 2006 BCCA 254, in these terms:

> [9] On this application for leave to appeal, the applicant must satisfy the test for leave for a statutory appeal: *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, [2000] B.C.J. No. 2184 at paras. 9-11; and 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.
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> > [Emphasis added.]

[33] This expression of the test was followed by Chiasson J.A. in *Botha v. British Columbia (Securities Commission)*, 2009 BCCA 214 (in Chambers), with this additional comment:

> [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).

[34] The principles set out in *Smolensky* and *Botha* were applied more recently in *Sihota v. British Columbia Securities Commission*, 2013 BCCA 473 (in Chambers), where Justice Tysoe was considering an application for leave to appeal the refusal of a stay of an impending hearing. Justice Tysoe specifically adverted to hindering the progress of the proceedings in these terms:

> [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.
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> ...
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> [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.
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> [Emphasis added.]

[35] In my view, the observations of Tysoe J.A. about the impact of the leave decision on the scheduled hearing apply to the case at bar.

[36] The Securities Commission has a broad statutory mandate to regulate the securities industry in the public interest: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557. One of the significant enforcement tools of the Securities Commission is the authority to make orders when appropriate under ss. 161 and 162 of the *Securities Act*. The hearing that has been scheduled to determine whether to make such orders is set to commence December 9. I have been advised that there are other applications the applicants either have brought or intend to bring that may delay the hearing, but as matters now stand, the delays of which the applicants complain will come to an end in a few weeks, unless I grant leave and an adjournment of the s. 161/162 hearing pending determination of the appeal becomes unavoidable.

[37] If the hearing goes ahead and no order is made by the Securities Commission, the appeal of the refusal to stay the hearing will be unnecessary. If the hearing goes ahead and the Securities Commission does issue orders under s. 161 or 162 of the *Securities Act*, it will be open to the applicants to seek leave to appeal the final order of the Securities Commission. I have confirmed with counsel for the Securities Commission that the Securities Commission would not take the position that the applicants were foreclosed from arguing this delay point if I deny leave and the applicants find it necessary to seek leave to appeal from the final decision of the Securities Commission.

[38] I recognize of course that the applicants would prefer to obtain a determination of the validity of the stay order in the hope that it will be possible to avoid the necessity of having to

respond to the Securities Commission on the merits at all. But in my view the interlocutory nature of the application weighs heavily against the grant of leave to appeal.

[39] Having said that, I would not dismiss the leave application solely on the basis that this is an interlocutory decision. If the merits of the appeal are particularly strong, the interests of justice may favour hearing the appeal now, notwithstanding the usual practice of the Court not to grant leave to appeal an interlocutory decision, even if the unavoidable consequence of the grant of leave to appeal is to adjourn the Securities Commission's scheduled hearing. Thus, I turn to the merits of the application.

Merits of the Decision

The application of Jordan to the Blencoe principles

[40] The applicants acknowledge that *Jordan* involved the protection of the right of any person "charged with an offence" to be tried within a reasonable time under s. 11(b) of the *Charter*, and that *Jordan* was concerned with post-charge delay, neither of which is at issue in these proceedings, but they argue that the reasoning in *Jordan*, particularly as it applies to questions of prejudice from delay, should be applied to proceedings before the Securities Commission.

[41] There are at least three significant hurdles that the applicants would have to overcome to succeed with this argument. The first is the obvious point that s. 11(b) of the *Charter* does not apply to administrative proceedings that do not involve the charging of an offence. This very argument was rejected in *Blencoe* in these terms:

> 88 However, it must be emphasized that this statement was made in the context of s. 11(b) of the *Charter* which provides that a person charged with an offence has the right "to be tried within a reasonable time". The qualifier to this right is that it applies to individuals who have been "charged with an offence". The s. 11(b) right therefore has no application in civil or administrative proceedings. This Court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur concepts which under our *Charter* are clearly distinct. The s. 11(b) guarantee of a right to an accused person to be tried within a reasonable time cannot be imported into s. 7. There is no analogous provision to s. 11(b) which applies to administrative proceedings, nor is there a constitutional right outside the criminal context to be "tried" within a reasonable time.

[42] This principle was well-settled even before *Blencoe*. In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, Wilson J. held that:

> Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable.

[43] This statement was applied to Securities Commission proceedings by Rowles J.A. in *Cicci v. British Columbia (Securities Commission)* (1993), 91 B.C.L.R. (2d) 235 (C.A. in Chambers).

[44] If the Securities Commission were proceeding under s. 155 of the *Securities Act*, which is an offence provision, there may be an argument that s. 11(b) of the *Charter* applies and some analogy is appropriate with *Jordan*. However, ss. 161 and 162 are not offence provisions: see *R. v. Samji*, 2017 BCCA 415. It is difficult to see how the principles outlined in *Jordan* can have any application to the proceeding at bar.

[45] Secondly, *Jordan* dealt with post-charge delay, not investigative delay. The distinction between pre-charge and post-charge delay will be more obvious where a s. 155 offence is alleged. In the case of proceedings under ss. 161 and 162, no obvious analogy exists.

[46] Finally, the argument that *Charter* values expressed in *Jordan* should be applied to administrative proceedings that do not involve being tried for an offence is unsupported by authority and seems on its face directly contrary to the Supreme Court of Canada's conclusions in *Blencoe*.

[47] In making these comments, I do not say that the argument cannot be made. But an argument that requires that an important judgment of the Supreme Court of Canada not be followed is insufficient, in my view, to overcome the reluctance with which this Court will give leave to appeal interlocutory decisions, particularly where the grant of leave is likely to hinder the progress of the Securities Commission's hearing.

The Application of the Blencoe Principles

[48] The applicants argue as well that whether or not *Jordan* changes the principles set out in *Blencoe*, the Securities Commission erred in refusing to stay the hearing. The applicants submit that they showed sufficient prejudice through the death of two witnesses and the existence of the NDO to meet the test of significant actual prejudice.

[49] The concern about the NDO is that the existence of the NDO over several years impaired the ability of the applicants to prepare their case to meet the allegations of market manipulation that were being made against them.

[50] The NDO is specifically authorized by s. 148 of the *Securities Act* for the purpose of protecting the integrity of the investigation. I was advised that the constitutional validity of that section was being challenged before the Securities Commission by these applicants in separate proceedings. Unless and until such a challenge is successful, I consider it unlikely

that a division of this Court would conclude that the mere existence of a statutorily authorized NDO during the investigation process could amount to significant actual prejudice within the meaning of *Blencoe*.

[51] As to the evaluation of the prejudice suffered by the applicants arising from the death of two potential witnesses, I consider it similarly unlikely that a division of this Court would intervene at this stage of the proceedings. If the Securities Commission issues orders under s. 161 or 162 and the applicants are of the view that the prejudice arising from the death of the two witnesses impaired the fairness of the hearing, it is open to them to seek leave to appeal the orders and raise those grounds at that time.

[52] I am unable to see sufficient merit in these arguments to tip the balance in favour of granting leave.

Mr. Corrigan's Eyesight

[53] An additional argument was made that the Securities Commission was insufficiently solicitous of Mr. Corrigan's vision impairment. I am unable to see how vision impairment could be characterized as the type of prejudice that would require that a public interest hearing be stayed.

Conclusion

[54] In my opinion, the applicants have not met the burden of establishing that leave should be granted to appeal the Securities Commission's decision to refuse to stay the hearing. The application for an extension of time to bring this application is granted, but the application for leave to appeal the refusal of the stay is dismissed.

"The Honourable Mr. Justice Hunter"