COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Thow v. B.C. (Securities Commission)*, 2009 BCCA 46

Date: 20090212
Docket: CA035753

Between:

Ian Gregory Thow

Appellant

And

British Columbia Securities Commission

Respondent

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Groberman

Ronald N. Pelletier	Counsel for the Appellant
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Place and Date of Hearing:	Vancouver, British Columbia September 9, 2008
Place and Date of Judgment:	Vancouver, British Columbia 12 February 2009

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Madam Justice D. Smith

VANCOUVER

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COURT OF APPEAL
REGISTRY

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] Mr. Thow appeals to this Court from a decision of the British Columbia Securities Commission (indexed as 2007 BCSECCOM 758) imposing on him an "administrative penalty" of $6 million (the "decision on penalty"). He argues that because his contraventions of the *Securities Act*, R.S.B.C. 1996, c. 418 occurred at a time when it authorized a maximum administrative penalty of only $250,000, any penalty in excess of that amount was outside the jurisdiction of the Commission.

[2] The Commission acknowledges that Mr. Thow's contraventions of the *Securities Act* pre-dated the amendments that increased the maximum administrative penalty. It interprets the amendments as providing it with jurisdiction to impose the increased penalty even for contraventions that occurred before those amendments were enacted. The sole question on this appeal is whether the Commission's interpretation is sustainable. This requires a consideration of the presumption against retroactive or retrospective application of legislation, and of the exceptions to that presumption.

Factual Background

[3] Mr. Thow was licensed to sell mutual funds. On June 29, 2006, the Executive Director of the Securities Commission issued a notice of hearing against him, alleging that he had committed a number of violations of the *Securities Act* and had misappropriated up to $30 million of money that he had been entrusted to invest on behalf of his clients.

[4] The hearing before the Commission took place on six days between late May and early July 2007. Although Mr. Thow had notice of the hearing, he did not attend or take part in it. The Executive Director placed evidence before the Commission in respect of only 26 of Mr. Thow's clients. In the decision on liability, indexed as 2007 BCSECCOM 627, the Commission found that between January 2003 and May 2005, those clients had entrusted Mr. Thow to invest a total of $8.7 million, and that he instead appropriated most of the money to himself. The total losses to those 26 investors amounted to $6 million.

[5] The Commission found, at paragraph 178 of the decision on liability (repeated at paragraph 8 of the decision on penalty) that Mr. Thow had:

> 1. failed to deal fairly, honestly and in good faith with his clients, contrary to section 14(2) of the *Securities Rules*, B.C. Reg. 194/97 and the rules of the Mutual Fund Dealers Association, when he lied to them and took their money;
>
> 2. traded in securities without being registered to do so, contrary to section 34(1)(a) of the *Securities Act*, when, while registered as a mutual fund salesperson, he traded securities that were not mutual funds;
>
> 3. made misrepresentations, contrary to section 50(1)(d) of the *Securities Act*, when he made untrue statements of material facts about the securities he offered to his clients, and when he omitted material facts about those securities; and
>
> 4. perpetrated a fraud, contrary to sections 57(b) and 57.1(b) of the *Securities Act*, when he made misrepresentations to his clients, and used their funds for his own purposes instead of investing them as his clients intended.

[6] The Commission considered the circumstances of the violations to be particularly serious. It stated, at paragraph 181 of the decision on liability (repeated at paragraph 11 of the decision on penalty):

> This case represents one of the most callous and audacious frauds this province has seen. Thow preyed on his clients by offering them non-existent securities and instead using the funds to support his lavish lifestyle. He took their money and betrayed their trust. He has left a trail of financial devastation and heartbreak.

[7] The Commission made a number of orders under s. 161 of the *Securities Act*, effectively permanently prohibiting Mr. Thow from participation in the securities industry. Mr. Thow did not seek leave to appeal those orders. The Commission also imposed an "administrative penalty" of $6 million under s. 162 of the *Securities Act*; that order is the subject of this appeal.

Statutory Provisions

[8] At the time that Mr. Thow contravened the *Act* and regulations, s. 162 of the *Securities Act* read as follows:

> 162 If the commission, after a hearing,
>
> (a) determines that a person has contravened
>
> (i) a provision of this Act or of the regulations ...and
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> (b) considers it to be in the public interest to make the order,
>
> the commission may order the person to pay the commission an administrative penalty of,
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> ...
>
> (d) in the case of an individual, not more than $250 000.

[9] Section 52 of the *Securities Amendment Act*, S.B.C. 2006, c. 32 – which came into force on May 18, 2006 – repealed and replaced s. 162. The new version of s. 162 provides for an administrative penalty of "not more than $1 million for each contravention."

The Presumption Against Retrospectivity

[10] Laws generally operate only from the date of their enactment. Indeed, the idea that laws operate prospectively is a fundamental aspect of the Rule of Law (see, for example, Joseph Raz, "The Rule of Law and Its Virtue" in *The Authority of the Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at p. 214; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at p. 270). As noted by Elizabeth Edinger in "Retrospectivity in Law" (1995), 29 U.B.C.L.R. 5 at 12, "The common theme of judges and scholars throughout the centuries has been that retrospective laws are unfair or unjust."

[11] The principle that laws should generally operate only prospectively is of particular importance in respect of penal laws. The principle requires that persons not be punished for acts which were lawful at the time they were committed, and also that punishment for unlawful acts not exceed that provided for at the time they were committed. Section 11 of the *Canadian Charter of Rights and Freedoms* places constitutional limits on retroactivity of penal laws:

> 11. Any person charged with an offence has the right
>
> ...
>
> g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international

> law or was criminal according to the general principles of law recognized by the community of nations;
>
> ... and
>
> i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[12] Section 11 of the *Charter* has been held not to be generally applicable to disciplinary penalties imposed by administrative tribunals: *R. v. Wigglesworth*, [1987] 2 S.C.R 541. *Wigglesworth* (at 561, para. 24) and *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737 suggest, however, that s. 11 can apply to proceedings where the potential penalty "by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity." While the appellant contends that the administrative penalty imposed in this case was of a punitive nature, he has not argued that s. 11(i) of the *Charter* is directly applicable to his situation. Nonetheless, the same fundamental values that lie behind section 11(i) of the *Charter* animate the argument put forward by the appellant.

[13] In Canadian law, apart from the restrictions imposed by the *Charter*, retrospective application of laws is limited by applying an interpretive presumption that laws operate only prospectively. The discussion of the presumption in E.A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264 has been cited with approval in numerous cases, including decisions of the Supreme Court of Canada. At pp. 268-69 Driedger distinguishes between

"retroactive" and "retrospective" laws. He describes the proper use of these terms as follows:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.
> [Emphasis in original]

[14] The parties to this appeal have spent some time arguing as to whether the application of the new legislation by the Securities Commission in this case is properly described as "retroactive" or "retrospective". Arguments can be made in favour of either characterization. On the face of it, attaching a new penalty to a completed act is simply attaching new consequences, for the future, to an event that has already taken place; it fits within the description of "retrospective" application of a statute.

[15] It can be argued, however, that the penalty attached to an infraction is an inherent part of the definition of the infraction, and that a change in the maximum penalty attached to a completed act is a "retroactive" application of legislation. This latter characterization appears to be the one adopted by Professor Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths Canada Ltd., 2002) at p. 559:

> Under the definition of retroactivity accepted by Canadian courts, a provision increasing the fine or term of imprisonment attaching to an

> offence would be considered retroactive if applied to offences committed before commencement of the provision.

[16] While the distinction between "retroactive" and "retrospective" application of legislation can be useful in some contexts, it is not, in my view, particularly helpful in resolving the case at bar. As Driedger notes in his article at p. 269, the interpretive presumption applies against both retroactivity and retrospectivity:

> The presumption applies to both, but the test for retroactivity is different from that of retrospectivity. For retroactivity, the question is: Is there anything in the statute to indicate that it must be deemed to be the law as of a time prior to its enactment? For retrospectivity, the question is: Is there anything in the statute to indicate that the consequences of a prior event are changed, not for time before its enactment, but henceforth from the time of enactment, or from the time of commencement if that should be later.

[17] I would agree with the comments that Edinger makes at p.11 of her article:

> Correct classification enhances clarity of analysis, but it is immaterial for purposes of resolution of the temporal application problem whether a law is retroactive or retrospective. Both forms of temporal application are considered problematic and are subject to the same legal principles in every context in which the issue arises.

[18] For the purposes of this judgment, I am content to describe the Securities Commission's application of the new legislation as "retrospective", though the result and reasoning would be identical if it were described, instead, as "retroactive".

[19] While retrospective application of laws is problematic from a jurisprudential standpoint, such application is sometimes appropriate, and even necessary to the proper functioning of the legal system. As Lon L. Fuller noted in *The Morality of Law* (revised edition) (New Haven, Conn.: Yale University Press, 1969) at p. 44:

> One might suppose that the principle condemning retroactive laws could ... be readily formalized in a simple rule that no such law should ever be passed or should be valid if enacted. Such a rule would however, disserve the cause of legality. Curiously, one of the most obvious seeming demands of legality – that a rule passed today should govern what happens tomorrow, not what happened yesterday – turns out to present some of the most difficult problems of the whole internal morality of law.

[20] The presumption against retrospectivity does not apply to all statutes. In his article, at p. 271, Driedger describes the application of the presumption as follows:

> [T]here are three kinds of statute that can properly be said to be retrospective, but only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Secondly, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Thirdly there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not a consequence of the event; these do not attract the presumption.

[21] Driedger gives several examples of statutes falling within the third category. Most of his examples involve statutes that disqualify persons who have been convicted of particular criminal offences from engaging in professions or callings.

[22] In *R. v. Vine* (1875), L.R. 10 Q.B. 195, a statute passed in 1870 prohibited persons convicted of felonies from holding licences to sell spirits. The individual in question in that case had been convicted in 1865, and purportedly obtained a licence in 1873. The court held the licence to be void. Cockburn C.J. reasoned as follows at 199 :

> The question is, whether a person who had been convicted of felony before the Act was passed became disqualified on the passing of the Act. I think he did. If one could see some reason for thinking that the

> intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of [the appellant's] argument, founded on the rule which has obtained in putting a construction upon statutes – that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public houses in which spirits are retailed being kept by persons of doubtful character.

[23] Similarly, in *Re A Solicitor's Clerk*, [1957] 1 W.L.R. 1219, [1957] 3 All E.R. 617 (QBD), a statute giving the Law Society the authority to prohibit the employment of a clerk who had been convicted of larceny was found to be applicable to persons whose convictions pre-dated the statute.

[24] The common theme of the cases in Driedger's third category is that they impose sanctions against persons not as penalties for past misconduct, but to protect society against future misconduct. Past misconduct is treated as an indicator of propensity or of bad character, and is used to identify people who pose a particular risk to society. Driedger acknowledges difficulties in defining the precise limits of this third category of statutes; after considering and interpreting a number of cases, he concludes at p. 275:

> In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply.

[25] The Supreme Court of Canada had an opportunity to consider this third category in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301. Regulatory proceedings had been commenced before the Commission with the

object of determining whether Mr. Brosseau should be prohibited from trading in securities, and whether certain exemptions under the statute should cease to apply to him. The jurisdiction of the Securities Commission to impose such sanctions was of recent origin – it had not existed at the time of Mr. Brosseau's alleged contraventions.

[26] In deciding that the Securities Commission did have jurisdiction to impose sanctions under the new statutory provisions, the Supreme Court of Canada adopted Driedger's analysis of the presumption against retrospectivity. It quoted from Driedger's article, stating, at p. 319, that the presumption against retrospectivity is inapplicable to "enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public." This description of the exception to the presumption against retrospectivity was critical to the decision of the Securities Commission in the case at bar.

The Reasoning of the Securities Commission

[27] Before the Securities Commission, the Executive Director (the only party represented) argued that the Commission did not have jurisdiction to apply the amendments to s. 162 of the *Securities Act* retrospectively. She cautioned the Commission against applying *Brosseau* too widely and contended that properly construed, the goal of s. 162 of the *Securities Act* is punishment rather than protection of the public.

[28] The Commission carefully considered the question of whether the goal of s. 162 of the *Securities Act* is punitive or protective. It considered a number of cases, and focussed particularly on two Supreme Court of Canada decisions: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132 and *Re Cartaway Resources Corp.* 2004 SCC 26, [2004] 1 S.C.R. 672.

[29] In *Asbestos*, the Supreme Court of Canada considered the breadth of the jurisdiction of the Ontario Securities Commission to intervene in activities related to Ontario's capital markets when the Commission was of the opinion that it was in the public interest to do so. In discussing the legislative provision that was in issue, Iacobucci J., for the unanimous Court, made a number of observations concerning the jurisdiction of regulatory bodies in general, and securities commissions in particular. At paragraph 42 he observed that, "[t]he focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults." He went on, at paragraph 43, to contrast administrative sanctions available under the Ontario *Securities Act* with quasi-criminal sanctions under the same legislation:

> The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the [Ontario Securities Commission] under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets. In

> contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively.
> [Citations omitted]

[30] It is important to recognize that the administrative sanctions that the Supreme Court was considering in *Asbestos* did not include provisions such as the one in issue in this case. The ability to impose a monetary administrative penalty on a person who violated the *Securities Act* was not, at the time of that case, within the jurisdiction of the Ontario Securities Commission. Nonetheless, Iacobucci J.'s observations regarding the purpose of administrative sanctions are applicable, as well, to the broadened powers of securities commissions under current legislation. Administrative sanctions and penalties, in contradistinction to criminal fines, are, as Iacobucci J. went on to observe at paragraph 45 of the decision, "preventive in nature and prospective in orientation."

[31] In *Cartaway*, the Supreme Court was called upon to consider whether the British Columbia Securities Commission could properly impose monetary penalties with the goal of deterring people other than the wrongdoer from contravening securities legislation. The Commission had imposed administrative penalties of $100,000 (at the time, the maximum administrative penalty available) against two individuals who were found to have unlawfully violated the prospectus requirements of the *Securities Act* by splitting private placements and relying on an exemption for which they did not qualify. A major question on appeal was whether or not general deterrence was a proper consideration for the Commission in fixing the amount of an administrative penalty.

[32] In this Court, the majority had held that general deterrence was not a proper consideration for the Securities Commission in determining the amount of an administrative penalty. Ryan J.A., dissenting in part, was of the opinion that considerations of general deterrence were within the scope of the Securities Commission's jurisdiction. At paragraph 60 of the Supreme Court of Canada's decision Lebel J., for a unanimous Court, preferred the views of Ryan J.A.:

> [N]othing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos*, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others."

[33] After considering the *Asbestos* and *Cartaway* cases and others, the Commission found (at paragraph 41 of the decision on penalty) that the following points were established:

- the paramount objective of the Act, and the role of the commission, is to protect the public and ensure public confidence in our markets
- the Act is designed to discourage detrimental forms of commercial behaviour
- the purpose of the commission's public interest jurisdiction is not punitive; it is protective and preventive – the commission's orders are prospective in their orientation, used to prevent likely future harm to capital markets
- this interpretation is consistent with regulatory legislation in general, "whose focus is on the protection of societal interests, not punishment of an individual's moral faults"
- general deterrence is an appropriate factor in formulating an administrative penalty under section 162 in the public interest; it falls

> squarely within the public interest jurisdiction of securities comm ssions to maintain investor confidence in the capital markets
>
> • the deterrence, both specific and general, associated with an order made under section 162 is prospective in orientation and aimed at preventing future conduct
>
> • where conduct can be addressed under both section 161(1) and 162, the commission may use both provisions to craft the order that is most in the public interest
>
> [citations omitted]

[34] Subject to what I will say about the use of the word "punitive", it appears to me that all of these points are sound, and in accordance with case authority. The Commission then reasoned that, given the preventative focus of administrative penalties under s. 162, they could properly be said to fall within the exception to the presumption against retrospectivity discussed in *Brosseau*. At paragraphs 42 - 43 of its decision on penalty, the Commission stated:

> It follows that:
>
> • rebutting the presumption against the retrospective operation of the amendments to section 162 is consistent with the general pattern of the Act, and
>
> • the goal of orders made under section 162 are [*sic*] not to punish the person in question but to protect the public.
>
> We therefore find that the presumption against the retrospective operation of the amendments to sections 161(1) and 162 is rebutted, and we have the jurisdiction to apply those sections as they now read.

Standard of Review

[35] It is common ground that the issue in this case is not one on which the court need accord deference to the Securities Commission. Neither ss. 58 or 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, are applicable to the Securities Commission (see s. 4.1 of the *Securities Act*); accordingly, the standard of review is

to be determined by taking into consideration the factors set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In the case at bar, we are concerned neither with a matter that lies within the specialized expertise of the Securities Commission, nor with a matter entrusted to its discretion. Instead, the issue here is "one of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Dunsmuir*, para. 60, quoting *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at para. 62). Accordingly, a standard of correctness applies.

Does the Presumption Against Retrospectivity Apply in this Case?

[36] *Brosseau*, *Asbestos*, and *Cartaway* all concerned the jurisdiction of securities commissions to impose penalties. In each case, the result depended critically on the purpose for which the penalties were imposed. Some of the language used to describe penalties in the three cases is also similar – in particular, the drawing of a distinction between "punitive" sanctions, and penalties which are not "punitive".

[37] Despite the similarity in the language used in the three decisions, it must be recognized that the issues in the cases were somewhat different. *Brosseau*, like the present case, concerned the retroactive application of statutory amendments. In contrast *Asbestos* and *Cartaway* were concerned with the scope of considerations that a securities commission can take into account in imposing a sanction.

[38] *Asbestos* and *Cartaway* establish that securities commissions, not being criminal courts, may not impose penalties that are "punitive" in the sense of being designed to punish an offender for past transgressions. They may, however, impose

penalties that place burdens (even very heavy burdens) on offenders, as long as the penalties are designed to encourage compliance with regulations in the future. In essence, penalties may be directed at general or specific deterrence and at protection of the public; penalties that are purely retributive or denunciatory, however, are not appropriately imposed by administrative tribunals.

[39] *Asbestos* and *Cartaway*, then, are cases about the proper role of administrative tribunals in administering regulatory regimes. They concern the limits of proper administrative sanctions. In defining those limits, the Supreme Court of Canada distinguished between penal orders that function to punish an offender and those that attempt to protect society. The former are the exclusive purview of the courts administering in punishing offences; the latter may be imposed, as well, by administrative bodies.

[40] In discussing retrospectivity in *Brosseau*, the Supreme Court of Canada was not so much concerned with the role of the Securities Commission *per se*, but rather with an assessment of the fair operation of the Rule of Law. While the concept of "punishment" has been used by the courts to analyse both the limits of regulatory sanctions and the appropriateness of retrospective operation of penal statutes, it is not clear to me that the word is used identically in those discussions.

[41] While some of the language used in *Brosseau* may be interpreted as supporting a very broad "protection of the public" exception to the presumption against retrospectivity, I do not think that that was the Court's intention. The Court's reasons in *Brosseau* draw heavily on Driedger and on the cases he cites. The

reasons do not suggest any intention to broaden the exception, and there was no need to do so in order to resolve the issues in the *Brosseau* case.

[42] Soon after the decision in *Brosseau*, the Federal Court of Appeal rejected the idea that the "protection of the public" exception to the presumption against retrospectivity had been broadened. In *Re Royal Canadian Mounted Police Act*, [1991] 1 F.C. 529, at paragraph 34, MacGuigan J.A., for a unanimous court, noted that a broad "protection of the public" exception to the presumption would effectively eliminate the presumption entirely:

> [I]t must at least be recognized that there cannot be any public-interest or public-protection exception, writ large, to the presumption against retrospectivity, for the simple reason that every statute, whatever its content, can be said to be in the public interest or for the public protection. No Parliament ever deliberately legislates against the public interest but always visualizes its legislative innovations as being for the public good.

[43] MacGuigan J.A. characterized the exception to the presumption against retrospectivity much more narrowly, at paragraph 32:

> [T]here is an exception to the presumption against retrospectivity where there is (1) a statutory disqualification, (2) based on past conduct, (3) which demonstrates a continuing unfitness for the privilege in question. To my mind this is quite a narrow exception to the general presumption ....

[44] I agree, generally, with that characterization of the cases underlying the exception. The cases have all involved situations in which a past conduct is used to identify a person as one who poses a particular risk for the future, and ought, therefore, to be disqualified or otherwise restricted from activities for the protection of

the public. In other words, the penal sanction imposed is not intended to penalize past conduct at all (though it may, incidentally, have that effect). Instead, it is designed to directly prevent future offending conduct from occurring.

[45] The *Royal Canadian Mounted Police Act* case may be overly restrictive in suggesting that the exception to the presumption against retroactivity extends only to statutory disqualification cases, *per se*. There is no reason in principle, for example, that it would not extend to a requirement that a person who has violated a regulatory regime resume activities in the regulated area only under supervision, after undertaking training, or with special reporting obligations.

[46] The exception does, however, appear to be applicable only where a prejudicial sanction is imposed, not for penal purposes, but as a prophylactic measure to protect society against future wrongdoing by that person. While the imposition of such sanctions may, incidentally, inflict hardship on the wrongdoer, the infliction of such hardship is not the goal.

[47] The concept of "punishment" is an elastic one, and its meaning must be taken in context. In *Cartaway* and *Asbestos*, the Supreme Court of Canada used the concept to describe those penalties imposed on an offender to mark moral disapprobation of his or her conduct. In *Brosseau*, in contrast, I believe that the Court used the word "punish" in a broader context, to describe all sanctions imposed for the *purpose* of penalizing an offender. On the other hand, penalties imposed solely for the *purpose* of protecting society from the offender in the future, were not

considered "punishment", even if they had the *effect* of placing burdens on the offender.

[48] In my view, the Securities Commission erred in this case by assuming that the test used in *Cartaway* to determine whether or not general deterrence was a proper factor for the Commission to consider in imposing a penalty was identical to the test to determine whether legislation comes within the exception to the presumption against retrospectivity. The two issues involve different considerations.

[49] Here, the Commission's imposition of the fine was arguably not "punitive" in the narrow sense of the word; that is, it may not have been imposed as a punishment for Mr. Thow's moral failings, and it may not have been motivated by a desire for retribution or to denounce his conduct. Nonetheless, it was "punitive" in the broad sense of the word; it was designed to penalize Mr. Thow and to deter others from similar conduct. It was not merely a prophylactic measure designed to limit or eliminate the risk that Mr. Thow might pose in the future.

[50] Accordingly, I am of the view that the Securities Commission erred in finding that the presumption against retrospectivity was inapplicable to the increase in the maximum administrative penalty authorized by the 2006 legislation.

The *Interpretation Act*

[51] The presumption against retrospective operation of a statute is, of course, merely an aid to interpreting the statute. Where a court is able to discern a clear intent that a statute operate retrospectively, the presumption is rebutted.

[52] The respondent argues that the provisions of the *Interpretation Act*, R.S.B.C. 1996, c. 238 serve to override the presumption against retrospectivity. In particular, it relies on s. 36 of the *Act*, which provides a default transitional regime where a statutory provision is repealed and replaced. It also argues that because the old penalty has been repealed, an inability to apply the new penalty would result in an absence of jurisdiction to impose any penalty at all.

[53] In my view, s. 36 of the *Interpretation Act* is consistent with the general law with respect to the interpretation of statutes, and in particular, with the presumption against retrospectivity. Nothing in the section compels a retrospective interpretation of the legislation in issue in this case.

[54] With respect to the argument that a failure to apply the new legislation would create a situation in which no penalty could be imposed, it seems to me that s. 35(1)(d) of the *Interpretation Act* is a complete answer:

> 35 (1) If all or part of an enactment is repealed, the repeal does not
> ...
> (d) subject to section 36(1)(d), affect an offence committed against or a contravention of the repealed enactment, or a penalty, forfeiture or punishment incurred under it ....

[55] Section 36(1)(d) deals with reductions in penalties, not with situations in which enhanced penalties are provided for in new legislation:

> 36 (1) If an enactment (the "former enactment") is repealed and another enactment (the "new enactment") is substituted for it,
> ...
> (d) when a penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjusted after the repeal must be reduced or mitigated accordingly ....

[56] Accordingly, the penalty provisions of s. 162 of the *Securities Act* as they read prior to the 2006 amendment apply to Mr. Thow's case.

Result

[57] The appellant seeks to have an administrative penalty of $250,000 substituted for the penalty of $6 million imposed by the Securities Commission.

[58] In *Biller v. Securities Commission*, 2001 BCCA 208, 199 D.L.R. (4th) 124, this Court held that the maximum penalty provided for under s. 162 was a maximum to be imposed at a hearing, rather than a maximum for each contravention. That interpretation governs the legislation that applies to Mr. Thow.

[59] It has not been suggested that an administrative penalty less than the maximum should have been imposed on Mr. Thow. In light of the Commission's finding that Mr. Thow engaged in "one of the most callous and audacious frauds this

province has seen", the imposition of the maximum administrative penalty is appropriate.

[60] I would, therefore, allow the appeal and reduce the administrative penalty to $250,000.

"C.A. Ryan J.A."
The Honourable Madam Justice Ryan

I agree:

"D. Smith J.A."
The Honourable Madam Justice Smith

I agree:

"H.M. Groberman J.A."
The Honourable Mr. Justice Groberman