COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Morabito v. British Columbia (Securities Commission),* 2023 BCCA 395

Date: 20231016
Dockets: CA49296; CA49302

Docket: CA49296

Between:

Mark Morabito

Appellant

And

Executive Director of the British Columbia Securities Commission; British Columbia Securities Commission; and Global Crossing Airlines Group Inc., formerly known as Canada Jetlines Ltd.

Respondents

- and –

Docket: CA49302

Between:

Global Crossing Airlines Group Inc., formerly known as Canada Jetlines Ltd.

Appellant

And

Executive Director of the British Columbia Securities Commission; British Columbia Securities Commission; and Mark Morabito

Respondents

Before: The Honourable Justice Willcock
(In Chambers)

On appeal from: A decision of the British Columbia Securities Commission, dated August 17, 2023 (*Re Morabito,* 2023 BCSECCOM 405).

Oral Reasons for Judgment

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Place and Date of Hearing:	Vancouver, British Columbia October 12, 2023
Place and Date of Judgment:	Vancouver, British Columbia October 16, 2023

Summary:

This is an application for leave to appeal from a decision of a panel of the British Columbia Securities Commission dismissing parallel applications to permanently stay the underlying proceedings as an abuse of process. The parties agree that if leave is granted, those proceedings should be stayed pending the disposition of the appeal. The applicants contend the panel erred in misapprehending the legal test for determining whether a process has become abusive, in reaching findings of fact or drawing inferences not supported by the record, and in failing to require the executive director to bear an evidentiary burden of answering allegations of abuse. The Commission says the applicants have not satisfied the high bar for establishing that leave to appeal an interlocutory decision of the Commission should be granted. It contends there is no merit to the proposed appeal and that an appeal would hinder the Commission's ability to carry out its statutory enforcement mandate in the public interest. Held: Application allowed. Leave applications should not be dismissed solely because the proposed appeal is from an interlocutory decision of the Commission. In the circumstances of this case, given the significant merit in the proposed appeal, the general importance of the questions raised, and the importance of the proposed appeal to the applicants, granting leave is in the interests of justice.

WILLCOCK J.A.:

Nature of Application

[1] The applicants, Mark Morabito and Global Crossing Airlines Group Inc., formerly known as Canada Jetlines Ltd. ("Jetlines"), apply for leave to appeal from a decision of a Panel of the British Columbia Securities Commission dismissing their applications for orders staying proceedings before the Commission as an abuse of process: *Re Morabito*, 2023 BCSECCOM 405.

[2] The applicants also seek an interim order staying proceedings before the Panel pending the disposition of this appeal. The Commission and the Executive Director of the Commission (the "Director") oppose the applications for leave on the basis the proposed appeal has no merit, and on the basis the impugned order is interlocutory and granting leave will unduly hinder the progress of the underlying proceeding.

[3] It is not contested that if leave to appeal is granted, proceedings before the Panel should be stayed pending the disposition of the appeal.

Factual Background

[4] By Notice of Hearing issued on October 7, 2021, the Director alleged that by failing to make timely disclosure of material information—the termination of a letter of intent ("LOI") to lease aircraft required to meet an announced intended start-up date for its proposed low-cost flights—Jetlines contravened provisions of the *Securities Act*, R.S.B.C. 1996, c. 418. The Director alleged Mr. Morabito, the executive chairman and a director of Jetlines, contravened the *Securities Act* by authorizing the contravention. It further alleged Mr. Morabito had engaged in insider trading while aware of the undisclosed material information in the period between the termination of the LOI in December 2017, and disclosure of the termination in March 2018.

[5] The Notice of Hearing was issued following an Investigation Order, issued on August 14, 2018, that directed Commission staff to investigate whether Mr. Morabito and his spouse had engaged in insider trading. The Morabito's unsuccessfully applied to the Commission for an order revoking that Order. Leave to appeal that decision was granted on the question of whether the Commission panel erred by placing the onus on the Morabito's to satisfy the panel that revoking the decision to issue the Investigation Order would not be prejudicial to the public interest. The appeal was dismissed for reasons indexed at 2022 BCCA 279 ("*Morabito 2022*"). This Court found the onus of persuasion on an application to quash an Investigation Order lies on the applicant. However, Madam Justice Newbury, writing for the Court, expressed the view that the Morabitos' complaints about the pace of the investigation and the Director's tactics were "not without some justification": at para. 92.

[6] As a result of supplemental disclosure by the Director (compelled by the applicants on at least two applications, summarized at 2023 BCSECCOM 150), Mr. Morabito and Jetlines learned Commission staff had communicated with Jetlines' former CEO, Stanley Gadek, in the course of the investigation. They also learned the Director knew, in June 2021, that Mr. Gadek was terminally ill.

[7] Mr. Gadek died in August 2021, prior to the issuance of the Notice of Hearing. The applicants assert Mr. Gadek had evidence which could have helped them defend the allegations levelled against them. They say critical evidence was lost with the death of Mr. Gadek, as the Director did not take steps to preserve it.

[8] The applicants then brought on the stay applications founded upon abuse of process. The Director took the position the Panel would be better able to determine whether Mr. Gadek's evidence was critical to the applicants after hearing the Commission case. The Panel agreed. At the close of the Director's case, the stay applications were dismissed for reasons indexed at 2023 BCSECCOM 405. The Panel granted an adjournment sought by the applicants, but required the continuation of the liability hearing to commence no later than December 19, 2023. The hearing is now set to continue, and I understand it is anticipated the applicants' case will take three days.

The Stay Decision

[9] The Panel understood the applicants' submissions to be premised on two arguments: (1) the unavailability of the evidence of Mr. Gadek had prejudiced their right to make full answer and defence to the allegations; and (2) the whole of the proceeding had been so tainted by unfairness on the part of the Director as to make it an abuse of process.

[10] In considering the first ground for a stay, the Panel purported (at para. 95) to have considered "whether any evidence that the Former CEO may have given, had he been interviewed, would have afforded Morabito and/or [Jetlines] defences to [the] allegations that would not be available without it". It concluded:

> [103] Given the specific allegations in the Notice of Hearing, we do not see how any testimony that the Former CEO may have given would have afforded Morabito or [Jetlines] a defence against those allegations that would not otherwise be available to him or it. The facts are as they are, and there are people other than the Former CEO who can attest to them. The test for materiality is objective. Neither the opinions, nor the hopes, nor the

> business judgement of the issuer's executives, affects the determination whether information was material and should have been disclosed. Accordingly, we find that the lack of the Former CEO's testimony cannot be said to create significant prejudice to the Applicants.

[11] Turning to the applicants' second ground, the Panel analyzed the applicants' "specific concerns about the way in which the investigation was conducted, as well as concerns regarding the executive director's approach to disclosure", which had been raised by the applicants. It found:

a) the applicants' complaints about aspects of how the investigation had been conducted were "not without some justification": at para. 115;

b) the failure to interview certain people, including directors or employees of Jetlines or the individuals responsible for or directly involved with Jetlines' disclosure obligations, was not evidence of bias, but "may [have] simply reflect[ed] staff's assessment of who might have evidence relevant to [the] allegations": at para. 118;

c) "a more focused and transparent approach to disclosure by the executive director would have been more efficient … [but] some of the delay ... associated with document production was occasioned by ... baseless speculation by the Applicants": at para. 122;

d) there was no evidence the decision not to interview Mr. Gadek was improperly motivated: at para. 126;

e) "the executive director knew in June 2021, but did not tell Morabito or [Jetlines], that [Mr. Gadek] was terminally ill" and "the initial disclosure of documents by the executive director to the Applicants did not include any reference to discussions the director had had with [Mr. Gadek] before [his] death": at para. 127;

f) there was no basis on which to conclude the failure to disclose to Mr. Morabito or Jetlines it had had discussions with Mr. Gadek was an improper tactical decision, since "it is also possible that the … director regarded any information that could have been provided by [Mr. Gadek] as irrelevant to the allegations made against" Mr. Morabito or Jetlines: at para. 127; and

g) in response to complaints regarding the Director's decision to present his evidentiary case through a single witness, an investigator assigned to the matter after the investigation was complete, that decision was not "improper or abusive" as "the executive director is free to choose how he will present his case, and to take the risks attendant upon his choice": at para. 129.

[12] The Panel held:

> [134] Had we concluded that [Mr. Gadek's] evidence could have afforded the Applicants a defence at the merits hearing that is not otherwise available to them, we would have considered that a strong foundation for a claim of abuse of process. However, as discussed above, given the specific allegations made in the Notice of Hearing, the objective test applicable to the finding of materiality that underpins all of those allegations, and the other sources of evidence available for factual matters relating to the efforts to obtain both aircraft and Transport Canada approval, we do not find that to be the case.
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> [135] In addition, having considered carefully the concerns raised by the Applicants and all the circumstances relevant to the public interest in this context, we have concluded that although neither the conduct of the investigation nor the executive director's disclosure in this hearing process was perfect, the flaws did not individually or collectively constitute an abuse of process.
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> [136] … the Applicants speculate freely, draw inferences and make conclusions that paint the executive director's staff's intentions in the worst possible light. Without evidence of improper motives, we decline to do the same.
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> [Emphasis added.]

[13] Ultimately, the Panel held Mr. Morabito and Jetlines had failed to discharge their onus "to prove that this is the 'clearest of cases' requiring a stay": at para. 142.

Legal Framework

[14] There is no issue with respect to factors to be considered on an application for leave to appeal from a decision of the Commission. The overarching consideration is the interests of justice. Specific factors are set out in *Party A v. British Columbia (Securities Commission)*, 2020 BCCA 382 at paras. 26–28:

> [26] The governing authority on leave applications from statutory tribunals is *Queens Plate Development Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 (C.A.), 22 C.P.C. (2d) 265 at 109–110; see also *British Columbia Securities Commission v. McLean*, 2010 BCCA

454 at para. 4. In *Queens Plate*, Taggart J.A. (in Chambers) outlined the following factors which may be considered in determining leave in statutory appeals:

> (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from …;
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> (b) whether the appeal is limited to questions of law involving:
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> (i) the application of statutory provisions ...;
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> (ii) a statutory interpretation that was particularly important to the litigant ...; or,
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> (iii) interpretation of standard wording which appears in many statutes …;
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> (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...;
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> (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;
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> (e) whether there is any clear benefit to be derived from the appeal ...; and
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> (f) whether the issue on appeal has been considered by a number of appellate bodies ….
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> [Internal citations omitted.]

[27] In *Smolensky v. British Columbia Securities Commission*, 2006 BCCA 254 at para. 9, Finch C.J.B.C. added that leave applications from statutory tribunals also engage the standard factors for leave, as articulated in *Hockin v. Bank of British Columbia* (1989), 37 B.C.L.R. (2d) 139 at 143 (C.A.):

> (1) whether the point on appeal is of significance both to the litigation before the court and to practice in general;
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> (2) whether the appellant has an arguable case of sufficient merit;
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> (3) the benefit to the parties of an appellate decision in practical terms; and,
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> (4) most importantly, whether the appeal will unduly hinder the progress of the action.

[28] This "extra" step has been followed in a number of decisions, most frequently with respect to appeals from the Commission: *Botha v. British Columbia (Securities Commission)*, 2009 BCCA 214 at paras. 4−7; *Sihota v. British Columbia Securities Commission*, 2013 BCCA 473 at para. 12.

[15] The proposed appeal in this case is interlocutory in nature. In *Forum National Investments Ltd. v. British Columbia (Securities Commission)*, 2019 BCCA 402 [*Forum*], Justice Hunter observed the usual practice of this Court is not

to grant leave to appeal from an interlocutory order of the Commission, but the Court may do so if it is in the interests of justice, such as where the merits of the appeal are particularly strong. He noted:

> [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.
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> [4] In this case, the Securities Commission has an important public interest mandate. A hearing has been scheduled … 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.
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> [Emphasis added.]

[16] In *Forum* and the cases there cited, reference is made to an earlier precedent, *B.C.S.C. v. Scharfe*, 2002 BCCA 704, where Justice Lambert described the exceptions to the usual practice in the interests of justice as follows:

> [5] Counsel for the British Columbia Securities Commission, in opposing this application, refers to the fact that appeals on an interim or interlocutory matter should, generally speaking, not be permitted and that appeals of that kind should await the final decision of the Commission, as they await the final decision of the courts, before being considered in the context of the whole proceedings between the parties. I do not disagree with that, but it is important to recognize that, as was decided in *Mason v. B.C.S.C.*, a decision of a judge in chambers in this Court, on 19 November 2001, Docket CA029124, there must be exceptions in the interests of justice. It was said in that case in para. 6:
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> > But where the interests of justice are at stake and where the question is one of fundamental principle then in considering an application for leave to appeal this Court must balance the time that may be wasted in conducting a Commission hearing with this matter undecided as compared to the time that might be wasted in having a fruitless appeal.

Submissions of the Parties

The Applicants

[17] The applicants submit the Panel erred in law by:

a) misapprehending the legal test for determining whether a process has become abusive;

b) reaching findings of fact or drawing inferences not supported by the record, or even advanced by the Director; and

c) failing, in these circumstances, to require the Director to bear the evidentiary burden of answering the allegations of abuse.

[18] They say the question whether there has been an abuse of process in the context of an administrative proceeding is reviewable on a standard of correctness: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at para. 30.

[19] They say the decision in *Abrametz* addresses the approach that should be taken when addressing *inordinate delay* said to amount to an abuse of process. By focusing upon the question that is often determinative in such cases, the extent to which delay has caused prejudice, they say the Panel failed to address the effect of the Director's conduct on the repute of the administration of justice.

[20] Further, they say, contrary to the express direction in *Morabito 2022*, the Director, in response to substantive allegations of abusive conduct, "sat back and provided no explanation", and the Panel erred in failing to require the Director to respond to well-founded complaints. They say the Panel ratified and adopted the Director's approach by speculating about his motives and "filling in the gaps" about why the Director might have failed to disclose Mr. Gadek's terminal illness and failed to preserve his evidence while there was an opportunity to do so.

[21] Mr. Morabito and Jetlines, citing *R. v. Cook*, [1997] 1 S.C.R. 1113 at paras. 57–58, also argue there are limits to the Director's discretion as to how he will respond to an abuse of process application, and the decision not to call a witness can itself amount to or contribute to an abuse of process.

[22] They say the proposed appeal is of general significance to the practice, as (i) the issues raised are of broad relevance to all administrative bodies which are required to identify the correct legal test, after *Abrametz*, for determining whether a proceeding has become an abuse of process for reasons other than delay alone, and (ii) it raises important questions about the Commission's ability to supervise the Director's conduct in light of the Commission's combined investigative and adjudicative function.

[23] Finally, they say the impact of the proposed appeal on the Commission proceeding must be considered against the reality that the proceeding has been ongoing for five years and that the delay "was itself an element of the abuse alleged". A potential delay of a matter of months—which would be incurred only in the event the appeal is dismissed—does not *unduly* hinder the progress of the proceedings in the applicants' submissions.

The Commission

[24] The Commission, citing *Forum*, says the threshold for granting leave should be high. For good reason this Court does not generally entertain appeals from interlocutory orders of the Commission. It says here, as in *Forum*, the proposed appeal will unduly hinder the Commission's public interest responsibility to test serious allegations on their merits.

[25] Unlike *Forum*, it says, this is a challenge to a ruling made while the hearing is underway. The Commission says splitting the hearing to either side of an appeal would constitute a "manifest hindrance".

[26] The Commission also argues there is no merit to the proposed appeal, and there is no prospect the Panel's decision would be reversed by this Court.

[27] First, it says the Panel relied on the correct test for abuse of process. It says the Panel correctly cited and applied *Abrametz* to address the applicants' allegations of delay and abuse of process.

[28] The Commission says, in substance, the applicants challenge findings of fact: whether the applicants had demonstrated bias or improper motive on the part of the Director, and whether the Commission had acted in a way that was manifestly unfair to the applicants.

[29] It says the Panel did not speculate or draw inferences. The applicants sought to have the Panel draw the inference of improper motives, and the Panel correctly refused to do so.

[30] The Commission says the applicants rely inappropriately on the passage in *Morabito 2022* that address the obligation to respond to allegations of abuse of process. Newbury J.A.'s statements in that case about evidentiary burden, they say, were made in the context of an application pursuant to s. 171 of the *Securities Act*.

[31] The Commission argues the proposed appeal does not raise any issues of general importance, submitting the onus in an abuse of process application is already settled law, and the applicants' arguments are directed to findings of fact which are specific to this proceeding only.

[32] As I have noted, it says it would be unduly hindered in the discharge of its statutory obligations by an appeal, which would not be in the public interest.

Analysis

Significance of the Issues to the Practice

[33] In my opinion, the applicants have identified questions of law with implications of general importance to persons subject to prosecution by administrative bodies:

a) first, whether the approach to be employed in determining whether an administrative proceeding has become an abuse of process for reasons other than administrative delay alone requires an analysis that differs substantially from that described in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, and *Abrametz*; and

b) second, whether the Commission erred in failing to require the Director to discharge an evidentiary burden to answer allegations of abusive conduct substantiated with some evidence (see *Morabito 2022* at para. 97).

[34] This first factor militates in favour of granting leave to appeal.

Significance of the Issues to the Parties/Litigation

[35] Without a doubt the proposed appeal is of importance to the parties.

Merits of the Appeal

[36] While the merits threshold on a leave application is generally described as being "relatively low", when leave to appeal from an interlocutory decision of the Commission is sought, the applicant must establish there is significant apparent merit to the appeal or that the interests of justice are at stake.

[37] In my view, there is significant apparent merit in the proposed appeal.

[38] First, the Panel itself concluded there was "a strong foundation for a claim for abuse of process", but dismissed the stay application because the applicants had not discharged the burden upon them to prove they had suffered some prejudice. In my view, there is an arguable case the Panel erred in giving inappropriate weight to the presence or absence of prejudice, and thereby failed to give effect to the fact the doctrine of abuse of process "transcends the interests of litigants": *Ontario v. O.P.S.E.U.*, 2003 SCC 64 at para. 12; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 43.

[39] Second, there is some merit in the argument that the Panel failed to require the Director to bear the evidentiary burden described in *Morabito 2022*:

> [97] … In cases where the applicant alleges unprofessional conduct or an abuse of some kind and adduces evidence supporting his or her case, the *evidentiary* burden may well shift to the director to respond in a meaningful way — to explain why a particular tactic was followed, for example, or why an investigation has been inordinately delayed. Respectfully, the public interest would not be served by a regulatory system that the investing public perceives to be biased, unfair or chronically inefficient.
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> [Underline emphasis added; italics emphasis in original.]

[40] The Commission says these comments are limited to the context of that case—applications under s. 171 of the *Securities Act*. However, allegations of abuse levelled against the Director may ground both a s. 171 application *and* an abuse of process application, and it is arguable the passage I have cited applies equally in both contexts. For that reason, there is some prospect a division of this Court would find the Panel failed to give effect to the evidentiary onus, and erred

by not requiring the Director to respond in “a meaningful way” to the applicants’ allegations and by speculating with respect to the Director’s motives.

[41] Finally, there is some prospect a division of this Court will conclude the Panel erred in failing to weigh in the balance the fact the Director effectively shielded investigators from cross-examination on their conduct. The Panel addressed this complaint as follows:

> [129] The Applicants suggest that the executive director’s “striking” decision not to put the principal investigator forward for cross-examination was somehow improper or abusive. We would reject that characterization. In our view, the executive director is free to choose how he will present his case, and to take the risks attendant upon his choice. Either he will succeed in proving the allegations in the Notice of Hearing, or he will not.

[42] This response suggests the Panel was addressing a complaint with respect to how the Director sought to prove *its substantive case* against the applicants. The manner in which the substantive complaint might be proved was not the issue, as the Panel itself noted at para. 141. The complaint was, rather, the Director had precluded the applicants from examining knowledgeable witnesses with respect to the *abuse* allegations, and had thereby abused its prosecutorial discretion, conduct of the sort the Supreme Court of Canada considered might itself amount to an abuse of process in *Cook*. In my view, it is arguable the Panel did not adequately address this allegation.

[43] This allegation is, of course, closely tied to the applicants’ argument the Director is obliged to respond substantively to allegations of abuse supported by the evidence, and the complaint may stand or fall with that allegation.

[44] In sum, I agree with the applicants that the proposed appeal merits the consideration of this Court. This factor militates in favour of granting leave to appeal.

Whether the Appeal Would Unduly Hinder the Litigation

[45] I agree with the Commission that the proposed appeal will, at least temporarily, hinder the ability of the Commission to carry out its statutory enforcement mandate in the public interest.

[46] On the other hand, as the applicants point out: the Director has not been assiduous in prosecuting the case; some delays in the underlying proceedings have been attributable to the Director; and the hearing had not been commenced when the stay application was brought but, rather, was commenced *for the purpose of addressing the stay application.*

[47] Ultimately, I must weigh:

a) the risk that if leave is not granted but the proceedings are later found to have been abusive, the applicants will have been subjected to proceedings they should not have been, and suffer the continuing harm to their reputations arising from the existence of unresolved charges against them; against

b) the risk that if leave is granted but the proceedings are found not to have been abusive, the Commission proceedings will have been materially delayed (perhaps for as long as a year) by an unsuccessful appeal.

[48] Overall, and considering the important public interest mandate of the Commission, in my view, this factor weighs against granting leave to appeal, but not strongly.

[49] Leave applications should not be dismissed solely on the basis the proposed appeal is from an interlocutory decision of the Commission. In my view, given the importance of the questions raised by the proposed appeal, the significance of the proposed appeal to the applicants, and the *prima facie* merit in their proposed arguments, granting leave is in the interests of justice in the circumstances of this case.

Conclusion

[50] I therefore grant the applicants leave to appeal from the Panel's dismissal of their stay applications on the grounds addressed in these reasons; and grant an order staying the liability proceedings arising from the Notice of Hearing issued on October 7, 2021, pending the final disposition of the appeal, or until further order of this Court.

"The Honourable Mr. Justice Willcock"