# COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20160304
Docket: CA42714

**IN THE MATTER OF THE *SECURITIES ACT***
**R.S.B.C. 1996, c. 418**

Between:

**Thalbinder Singh Poonian and Shailu Sharon Poonian**

Appellant

And

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

Respondents

(Before: The Honourable Madam Justice Fenlon
(In Chambers)

On appeal from: decisions of the British Columbia Securities Commission, dated August 29, 2014 (2014 BCSECOMM 318) and March 13, 2015 (2015 BCSECCOM 96)

## Oral Reasons for Judgment

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|---|---|
| Counsel for the Appellants: | J. Narwal and M. Magaril |
| Counsel for the Respondents: | L.T. Doust, Q.C. and D. Hainey |
| Place and Date of Hearing: | Vancouver, British Columbia<br>February 26, 2016 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>March 4, 2016 |

[1] **FENLON J.A.**: Thalbinder Poonian and Shailu Poonian seek leave to appeal both the liability decision of the British Columbia Securities Commission made on August 29, 2014 (2014 BCSECCOM 318) (the "Liability Decision")and the sanctions decision made March 13, 2015 (2015 BCSECCOM 96)(the "Sanctions Decision").

**Background**

[2] The Poonians were found to have breached s. 57(a) of the *Securities Act*, R.S.B.C. 1996, c. 418 [the *Act*], along with Robert Leyk, Manjit Sihota and Perminder Sihota in a scheme to artificially inflate the shares of OSE Corp. ("OSE"). I have already described the nature and effect of their collective conduct in reasons issued in relation to Mr. and Mrs. Sihota's application for leave to appeal (CA42715). I will not repeat that here.

[3] I note only that the Panel found Mr. Poonian was the "mastermind" of this scheme. His actions in setting up the scheme included acquiring control of the shares and the board of OSE, personally controlling trading in the accounts of 17 different nominees as well as entering into the agreement with Phoenix to pay commissions for inducing the unsophisticated and vulnerable Phoenix clients to purchase OSE shares.

[4] The Panel found that Mrs. Poonian – an experienced investor and corporate officer – was actively and extensively involved in the manipulation. Her actions included acquiring and trading OSE shares, funding OSE share purchases on behalf of secondary participants, and making and receiving numerous other payments used to fuel the manipulation.

[5] In the Sanctions Decision, the Panel made orders prohibiting the Poonians from acting as directors or officers of public as well as private companies; imposed a disgorgement order under s. 161(1)(g) making the Poonians jointly and severally liable with other respondents in the amount of $7,332,936; and imposed an administrative penalty under s. 162 requiring Mr. Poonian to pay $10 million and Mrs. Poonian to pay $3.5 million.

[6] The Poonians would advance seven grounds of appeal if leave is granted, alleging that the Panel:

1. Failed to observe the principles of natural justice and procedural fairness by failing to assist the self-represented appellants in presenting their case;
2. Erred in law by refusing to order the Executive Director (the "Director") to disclose relevant documents, contrary to the principles of natural justice and procedural fairness;
3. Erred in law by misapplying s. 161(1 )(g) of the *Act* to find the respondents jointly and severally liable without evidence that the respondents were enriched, without considering the role of third parties, and without considering that part of the aggregate net trading gain was already recovered by way of settlement agreements with the Ontario Securities Commission and the Investment Industry Regulatory Organization of Canada;
4. Erred in law and exceeded its jurisdiction by ordering administrative penalties totaling $21,500,000 (the "Collective Administrative Penalty"), and individually against each of the appellants in excess of $1 million without particularizing more than a single contravention of s. 57(a) of the *Act,* without linking such contraventions to the Collective Administrative Penalty, and without giving notice to the appellants that more than a single contravention of the *Act* was being alleged in the notice of hearing;
5. Erred in law, and exceeded its jurisdiction, in imposing penal sanctions;
6. Unreasonably prohibited the appellants from acting as directors or officers of any issuers; and
7. Erred in law in ordering the Collective Administrative Penalty because the order was made *per incuriam* and without adequate reasons. The order is arbitrary, overly broad, grossly disproportionate, contrary to the principles of fundamental justice, and contrary to the principles enshrined in s. 7 of the *Charter.*

## The Liability Decision

[7] The first two proposed grounds of appeal allege that the Poonians were denied natural justice and procedural fairness during the liability hearing which, if successful, would warrant setting aside the Liability Decision.

[8] Two denials of natural justice are asserted. First, that the Panel did not assist the Poonians, who were self-represented, to understand the process. The Poonians argue that they did not understand that they could not rely on exculpatory

statements they made in a compelled interview without entering that evidence on the record.

[9] Having reviewed the portions of the transcript relied on by the Poonians to support this submission, there is nothing to suggest that they could have been misled or were not adequately informed by the Panel on this issue.

[10] Mr. Poonian is an experienced and sophisticated former corporate executive and registered salesperson, with no apparent linguistic barriers. The hearing transcripts demonstrate that the Panel clearly explained the hearing process to the appellants, including the necessity to testify and be subjected to cross-examination in order to establish their version of events and have that evidence considered by the Panel. Mr. Poonian was cautioned that what he said from the counsel table would not and did not constitute evidence that could be considered by the Panel, and he indicated that he understood that point.

[11] Counsel on this application referred generally to "exculpatory evidence" that Mr. Poonian thought he could rely on from his compelled statement. However, nothing in the transcript of Mr. Poonian's submissions suggests he was trying to refer to his compelled statement. Rather, he was allowed to put documents into evidence without testifying, and was stopped a few times during his submissions when he went beyond referring to what was in the documents and tried to give evidence during argument.

[12] The second breach of natural justice is said to stem from the Commission's failure to produce relevant documents. The Poonians made requests for documents before the liability hearing. They filed a complaint with the Office of the Information and Privacy Commissioner (the "OIPC") under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*]. After the Liability Decision, the Privacy Commissioner made orders that resulted in 600 additional documents being disclosed. The appellants say they could have used those documents at the liability hearing in several ways, including to show someone else was the

mastermind, and that other accounts had similar patterns of suspicious trading in OSE not linked to them and the other respondents.

[13] The Commission submits that statutory tribunals like the Commission are "masters in their own house" and entitled to deference with respect to procedural decisions so long as they comply with the rules of fairness and natural justice. In this case, the Panel found that staff had met their obligation to disclose all documents relevant to the allegations contained in the notice of hearing. Further, the Commission argues that none of the documents sought by the appellants through the OIPC proceedings or *FIPPA* requests (and not disclosed in proceedings before the Commission) were relevant to the allegations or could have assisted the appellants in putting forward any viable defence. Most of those documents related to companies other than OSE or were communications between Commission staff and other regulators, which, the Commission submits, are not relevant to the issues raised in the notice of hearing.

[14] The appellants put 14 of the post-Liability Decision documents before the court. Some of them relate to their requests to the Privacy Commissioner and to the Securities Commission to produce documents. Some were letters conveying documents that had been produced and some were simply responses to the requests. Others were investigator work product with respect to which the underlying documents, i.e. phone records, trading records, bank records and cancelled cheques had been disclosed to the Poonians. One document is a draft copy of an Ontario Securities Commission order approving a settlement relating to respondents in the Ontario proceedings. The Settlement Agreement itself was disclosed and exhibited in the hearing. One document which shows someone else trading in the nominee account suspiciously is not a defence to Mr. Poonian's suspicious trading and the Panel's findings of fact made on the basis of an extensive record before it of Mr. Poonian's trading and involvement.

[15] The test for leave to appeal is well settled: *Sihota v. British Columbia Securities Commission*, 2013 BCCA 473, by Mr. Justice Tysoe at para. 11:

> [4] The criteria for granting leave to appeal from a decision on a statutory appeal were stated in *Queens Plate Development Ltd v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 at 109 – 110, Taggart J.A. (in Chambers) as follows:
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> … it seems a justice may have regard for one or more of the matters listed below:
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> (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from
>
> (b) whether the appeal is limited to questions of law involving:
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> (i) the application of statutory provisions...;
>
> (ii) a statutory interpretation that was particularly important to the litigant ...; or
>
> (iii) interpretation of standard wording which appears in many statutes
>
> (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...;
>
> (d) whether there is some prospect of the appeal succeeding on its merits...; although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued.
>
> (e) whether there is any clear benefit to be derived from the appeal ...; and
>
> (f) whether the issue on appeal has been considered by a number of appellate bodies ....
>
> [case citations omitted]
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> * * *
>
> [6] In *Smolensky v. British Columbia Securities Commission*, 2006 BCCA 254, Chief Justice Finch added the requirement at para. 9 that an applicant:
>
> … must satisfy the test found in *Hockin v. Bank of British Columbia* (1989), 37 B.C.L.R. (2d) 139 (C.A.) at 143:
>
> > Whether the point on appeal is of significance both to the litigation before the court and to practice in general; whether the appellant has an arguable case of sufficient merit; the benefit to the parties of an appellate decision in practical terms; and, most importantly, whether the appeal will unduly hinder the progress of the action.

[16] I conclude the appellants have not met the test for leave to appeal the first two proposed grounds; they have not established a substantial issue relating to procedural fairness with some prospect of success.

**Disgorgement Penalty**

[17] The third proposed ground of appeal relates to the joint and several nature of the disgorgement penalty under s. 161(1)(g), and the failure of the Commission to relate that penalty to what the Poonians actually obtained as a result of their contraventions.

[18] The Poonians emphasize that the Panel did not consider the nature of a disgorgement order and the significance of disgorgement orders already made by the Ontario Securities Commission against other respondents in Ontario relating to the same sum. The Poonians also submit the Panel should have considered the funds recovered under the settlement with Phoenix. If those individuals and entities have disgorged some of the $7.3 million obtained from OSE investors, the appellants argue that should have been taken into account in setting the disgorgement order against the Poonians. They also adopt the arguments relied on by the Sihotas on this issue.

[19] For the reasons I have given in *Lathigee and Sihota*, I find the Poonians have raised a substantial question of law and I would grant leave to appeal the disgorgement orders made under s. 161(1)(g).

**Bar on the Poonians Acting as Directors and Offices of Any Issuer**

[20] The sixth ground of appeal relates to the order which bars the Poonians from acting as directors or officers of private, non-reporting issuers. The Poonians submit the Panel was unreasonable in refusing them the same exemption it gave the Sihotas. They submit that as self-represented litigants, they did not understand the requirement that evidence must be adduced to show how the order would impact their livelihood as the Sihotas did.

[21] The exemption for the Sihotas was based on very particular facts that did not apply to the Poonians. Mr. Sihota works for a plywood manufacturing company that is employee-owned. His ability to work there and earn income requires him to be a director and officer. There was no suggestion on the application before me that the

Poonians were in a similar situation or could have led such evidence even if they had chosen to testify.

[22] Given the seriousness of the Poonians' misconduct, the Panel determined that permanent bans on the appellants acting as officers and directors of any issuer was in the public interest. That is a matter squarely within the Panel's jurisdiction and area of expertise and in my view would not be disturbed on appeal in these circumstances.

[23] I would not grant leave on this issue.

**Administrative Penalties**

[24] The issues taken with the administrative penalties are set out as the fourth, fifth, and seventh proposed grounds of appeal. The Poonians submit that the Panel erred by imposing, collectively, a penalty of $13.5 million, pursuant to s. 162 of the *Act*. They submit that the notice of hearing provided them with notice of a single count. They submit that the Panel was not permitted to order an administrative penalty in excess of the maximum of $1 million per contravention and say there were only two contraventions alleged against them and found against them.

[25] The Poonians also submit that since the amount of the overall administrative penalty to be allocated to the various respondents was based on the disgorgement penalty (3 x $7 million approximately), it follows that if leave is granted to challenge the disgorgement penalty, leave must also be granted to adjust the administrative penalty.

[26] The Poonians' argument on the lack of notice and the number of contraventions, the size of the administrative penalty and the method of assessment are not persuasive for the reasons I have given in the *Sihota* decision. The notice of hearing alleged over 200 misleading trades. The appellants had sufficient notice to permit them to appreciate the case they had to meet.

[27] Nor am I persuaded that leave must be granted on the administrative penalty if leave is granted on the disgorgement penalty, an argument unique to the Poonians. The challenge to the disgorgement penalty is not to the Panel's finding that $7.3 million was obtained through the stock manipulation. Rather it is to the finding that the parties involved were to be jointly and severally liable for that entire amount, regardless of how much they individually obtained through their own misconduct, and regardless of how much of that sum was being recovered in the Ontario proceedings.

[28] If, on appeal, the appellants were to succeed and have the joint and several aspect of the order set aside, and the contributions of the Ontario respondents considered, that would not alter the Panel's finding of the overall amount of the "ill-gotten gains" from the scheme. The total amount obtained by the collective respondents as a result of the scheme remains the same even if the specific allocation of responsibility for disgorgement of its fruits is altered. It would therefore remain open to the Panel to have concluded that three times that amount, the amount obtained overall, was an appropriate basis for an administrative penalty.

[29] The Panel has broad discretion in setting an administrative penalty which is a matter within its particular expertise. It considered the appropriate factors and, in particular, the magnitude of the stock manipulation in fixing the penalty.

[30] I am of the view, therefore, that the appellants have not established a substantial question of law with a prospect of success and I would not grant leave to appeal on those grounds relating to the administrative penalties.

[31] In summary, leave to appeal the s. 161(1)(g) orders is granted. The balance of the application is dismissed.

"The Honourable Madam Justice Fenlon"