

CANADA / JUDGMENT

British Columbia (Securities Commission) v. Tak

2021 BCSC 2283

COURT

Supreme Court of British Columbia

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2021 BCSC 2283 British Columbia (Securities Commission) v. Tak

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia (Securities Commission) v. Tak,

2021 BCSC 2283

Date: 20211124

Docket: S178794

Registry: Vancouver

Between:

The Executive Director of the British Columbia

Securities Commission

Petitioner

And

Harish Tak

Respondent

Before: The Honourable Madam Justice Francis

Reasons for Judgment

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B. Pascutto

Place and Date of Trial/Hearing:

Vancouver B.C.

October 13-14, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 24, 2021

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I. Overview

- [1] The British Columbia Securities Commission (the "Commission") petitions the Court to find Harish Tak in contempt for his refusal to comply with a Summons to Attend before an Investigator that was issued by the Commission (the "Summons"). Mr. Tak argues that he is entitled to a constitutional exemption from testifying before a Commission investigator on the basis that his rights under s. 7 of the Canadian Charter of Rights and Freedoms would be infringed if he were compelled to testify.
- [2] While the petition is framed in the law of contempt, on the hearing of the petition the parties confined their submissions to Mr. Tak's constitutional claim. The Commission is no longer seeking an order for Mr. Tak's committal for contempt, although it does seek to compel him to testify pursuant to the Summons.

- [3] Mr. Tak submits that his right against self-incrimination, protected by ss. 7 and 13 of the Charter, would be violated if he were compelled to testify before the Commission. In Canada, ss. 13 and 7 of the Charter provide evidentiary immunity so that compelled testimony cannot be used in a subsequent proceeding to incriminate a witness. However, Mr. Tak submits that he risks criminal prosecution in the United States, where he does not have the same assurance that his compelled testimony cannot be used to incriminate him in a later proceeding.
- [4] In the U.S., according to Mr. Tak, the Fifth Amendment protects the right to silence but does not provide subsequent evidentiary immunity for witness testimony. The problem, as Mr. Tak frames it, is that if he is compelled to testify in Canada pursuant to the Summons, he has a serious risk of his evidence being used against him in a subsequent U.S. prosecution, thus violating his Charter protected right against self-incrimination.
- [5] For the reasons that follow, I decline to order that Mr. Tak is entitled to a constitutional exemption from testifying, nor am I prepared to impose restrictions on the Commission's use of Mr. Tak's evidence. I am not satisfied that Mr. Tak's s. 7 right against self-incrimination is engaged and therefore there is no basis for the relief he seeks.
- [6] There are a number of cases from other Canadian courts in which parties have sought constitutional exemptions from the compulsion to testify, including in the context of investigations by securities regulators, on the basis of a risk of self-incrimination in another jurisdiction, often the United States. In all of those cases, other Canadian superior and appellate courts have declined to grant the constitutional exemption sought. There are three reasons why applications of this nature have been consistently denied by courts across this country: 1) the predominant purpose of the summons is not the incrimination of the witness; 2) the Charter does not have extraterritorial application in this context; and 3) subsequent use immunity is provided in any event. As discussed below, I find that all three of these reasons for denying a constitutional exemption apply in this case, any one of which would be sufficient to allow the alternative relief sought by the petitioner, and to order that Mr. Tak must comply with the Summons. Nevertheless, for the sake of completeness, I have separately discussed each of the three bases upon which Mr. Tak's constitutional exemption is denied.

II. Background

- [7] The Summons relates to the Commission's investigation into the trading and distribution of securities in NewGen Biopharm Corp. ("NewGen") and Breathtec Biomedical Inc. (the "Investigation").

- [8] As part of the Investigation, the Commission inquired into the activities of a brokerage firm based in Vancouver, British Columbia, Mackie Research Capital Corporation, as well as four of its brokers (the "Brokers"). Mr. Tak had a brokerage account at Mackie. He was a client, and is the brother, of one of the Brokers. According to the Commission, Mr. Tak is not a target of the Investigation but may have relevant evidence.
- [9] At the same time that the Investigation has been taking place, there has been an active ongoing investigation by the U.S. Securities and Exchange Commission ("SEC") in relation to trading in the shares of NewGen and its public disclosures.
- [10] On May 30, 2017, Commission staff issued the Summons, which required Mr. Tak to attend at the Commission offices to give evidence under oath (the "Interview"). The Interview was scheduled to take place on August 17, 2017. Prior to that date, Mr. Tak's lawyer asked the Commission for an undertaking that it would not share any information it obtained from Mr. Tak with U.S. government authorities. The Commission declined to provide such an undertaking. Mr. Tak attended the Interview but refused to answer any questions.
- [11] There is no evidence that Mr. Tak faces criminal charges or that he is the subject of any criminal investigation in Canada or the U.S. Nevertheless, he has expressed a concern that there is a risk that his compelled information may be used against him in a future U.S. criminal prosecution.

III. Compelled testimony and protection from self-incrimination under the Charter

- [12] The principles of fundamental justice protected by s. 7 of the Charter include the principle against self-incrimination. This protection is in addition to the specific protection against self-incrimination provided by ss. 11(c) and 13 of the Charter. In *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, the Supreme Court of Canada held that, under s. 7, persons who are compelled to testify must be provided with subsequent "derivative use immunity" in addition to the "use immunity" guaranteed by s. 13 of the Charter. In certain circumstances, in addition to future use immunity, the court can grant an exemption from compulsion to testify: para. 2.

A. The Predominant Purpose Test

- [13] In *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 [Branch], the Supreme Court of Canada discussed those circumstances in which Charter protection from self-incrimination will require exemption from compulsion to testify. The Court adopted the "predominant purpose" test and held that, where the predominant purpose for seeking evidence is to obtain incriminating evidence against the person being compelled to testify, that person may be exempted under s. 7 of the Charter from compulsion to testify: para. 7. Where the predominant purpose is not to incriminate the witness, but rather a legitimate public purpose, the witness must testify, but they will have use and derivative use immunity with respect to their evidence: para. 9.

- [14] In *Branch*, Justices Sopinka and Iacobucci described the predominant purpose test as striking "the appropriate balance between the interests of the state in obtaining the evidence for a valid public purpose on the one hand, and the right to silence of the person compelled to testify on the other": para. 7. The Court considered a summons under the BC Securities Act, S.B.C. 1985, c. 83 [BC Securities Act] and held that the orders and summons in that case were in furtherance of the predominant purpose of a goal which is of substantial public importance, namely obtaining evidence to regulate the securities industry. As a result, the proposed testimony of Mr. Branch fell to be governed by the general rule applicable under the Charter: a witness may be compelled to testify, but receives evidentiary immunity in return: para. 35. Mr. Branch was thus denied the constitutional exemption that he sought.
- [15] Mr. Tak submits that *Branch* calls for a broad reading of constitutional exemptions, one that requires looking beyond the predominant purpose test. Specifically, he argues that a fundamental premise of our Charter regime with respect to protection against self-incrimination is that a witness in Canada must testify when compelled to do so, because the Charter provides that witness with use and derivative use immunity. As Mr. Tak's lawyer stated in his oral submissions, "once you take away that right, the ability to compel that person is lost."
- [16] As a result, Mr. Tak submits that *Branch* calls for a multi-part test. First, the court must look at whether the witness will receive effective use and derivative use immunity. If not, they are not compelled to testify. The predominant purpose test only comes into play at the second stage, in the event that the witness will receive effective use and derivative use immunity. In these circumstances, even where use and derivative use immunity is provided for, the witness will still be exempt from testifying if the predominant purpose of seeking the witness's evidence is to incriminate them.
- [17] I do not find that *Branch* bears the interpretation that Mr. Tak seeks to impose on it. While it is true that the Court discusses the importance of effective subsequent derivative use immunity, nowhere in *Branch* does the Court state that constitutional exemptions from compulsion to testify are available in circumstances outside the predominant purpose framework. *Branch* stands for the proposition that, where the predominant purpose of compelling a person's testimony is to incriminate that person, s. 7 may entitle that person to exemption from compulsion. It does not establish a second category of exemption from giving evidence on the basis of a future risk to use or derivative use immunity. In asking the court to interpret *Branch* as imposing two separate categories of constitutional exemption from compulsion, Mr. Tak is asking me to read into the case something that is simply not there.
- [18] Mr. Tak's expansive view of entitlement to constitutional exemptions is also not supported by the authorities he relies upon to support his exemption from compulsion to testify.

- [19] In *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2005] O.J. No. 2191, (S.C.J.) [Catalyst], the court-appointed inspector of Hollinger Inc. (the "Inspector") sought an order to examine Conrad Black and others. The respondents resisted the application on the basis that they were facing SEC and potential criminal proceedings in the U.S., and there was a risk of their compelled evidence in Canada being used against them in those proceedings.
- [20] Justice Campbell considered the "in terrorem argument" (discussed below), and agreed with the decision of Cumming J. in *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2000] O.J. No. 2077 (S.C.J.), which held that the Charter does not apply extra-territorially and cannot be given extra-territorial effect to govern how criminal proceedings in a foreign country are to be conducted: para. 40. However, he ultimately declined the application for a constitutional exemption on the basis that the respondents had not discharged the burden of establishing that the questions from the Inspector had the predominant purpose of incriminating the respondents.
- [21] The respondents appealed to the Ontario Court of Appeal. In *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2005] O.J. No. 4666 (C.A.), the appeal was dismissed. The Court of Appeal relied on the predominant purpose test in concluding that the appellants were not entitled to a constitutional exemption:
- [7] The next issue is whether the appellants are entitled to a constitutional exemption from answering any questions. They are not. They are only entitled to a constitutional exemption if their evidence would be used against them in a criminal prosecution here. A constitutional exemption is not appropriate in the circumstances of this case as the purpose of the inquiry being conducted under the Canada Business Corporations Act is fact-finding only and not prosecutorial.
- [22] Mr. Tak does not dispute that the predominant purpose for which the Commission seeks to compel his evidence is not to incriminate him. As in *Branch*, the Summons is in furtherance of the predominant purpose of securities regulation. The public importance of this purpose was stated by Sopinka and Iacobucci JJ. in *Branch* at para. 35:

Clearly, this purpose of the Act justifies inquiries of limited scope. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry. Often such inquiries result in proceedings which are essentially of a civil nature. The inquiry is of the type permitted by our law as it serves an obvious social utility.

- [23] It would seem clear on its face, therefore, that Mr. Tak, like Mr. Branch, is subject to the general rule under the Charter as it pertains to self-incrimination: he can be compelled to testify but will receive evidentiary immunity in return. While Mr. Tak argues that he is unlike Mr. Branch in that the self-incrimination risk he faces is outside of Canada and

therefore he does not have any assurance of use or derivative use immunity with respect to his compelled evidence, Branch does not support Mr. Tak's argument that he is entitled to a constitutional exemption on this basis.

B. Extra-Territorial Application of the Charter

[24] The question of whether the risk of self-incrimination in another jurisdiction gives rise to an exemption from compulsion to testify in Canada gives rise to obvious questions about the extraterritorial application of the Charter. Under the scenario that causes Mr. Tak concern, namely a future U.S. criminal proceeding in which he would be unable to rely on his Fifth Amendment right to silence because his evidence would already have been compelled by the Commission, any violation of Mr. Tak's s. 7 rights would be at the hands of U.S. government prosecutors.

[25] *Spencer v. The Queen*, [1985] 2 S.C.R. 278, is an early Charter case in which the Supreme Court of Canada considered the extraterritorial scope of s. 7 protection. Mr. Spencer was compelled to testify in a Canadian prosecution against a person charged under the Income Tax Act, R.S.C. 1952, c. 148. Mr. Spencer's evidence related to information he obtained when he was manager of a bank in the Bahamas. Under Bahamian law, the disclosure of Mr. Spencer's evidence would constitute an offence. He therefore argued that his rights under s. 7 were engaged because he would face a deprivation of liberty in the Bahamas if he were compelled to testify in Canada. Justice La Forest held at para. 5:

The infringement of Mr. Spencer's liberty or security, if any, does not result from the operation of Canadian law, but solely from the operation of Bahamian law in the Bahamas. Under these circumstances the Charter has no application. To allow Mr. Spencer to refuse to give evidence in the circumstances of this case would permit a foreign country to frustrate the administration of justice in this country in respect of a Canadian citizen in relation to what is essentially a domestic situation. Indeed such an approach could have serious repercussions on the operation of Canadian law generally.

[26] Since *Spencer*, there have been decisions from the Supreme Court of Canada that take a more expansive view of Charter protection in circumstances in which constitutionally benign Canadian government action may have severe consequences abroad. For example, in *United States v. Burns*, 2001 SCC 7 [Burns], the s. 7 rights of two individuals accused of murder were held to be engaged on an application for their extradition to a jurisdiction, the U.S., that maintains the death penalty. In *Suresh v. Canada* (Minister of Citizenship and Immigration), 2002 SCC 1 [Suresh], a convention refugee faced deportation to Sri Lanka, where he risked being tortured. The Court reaffirmed the principle that, where there is a sufficient connection between Canadian government action and a deprivation of life, liberty or security of the person, the Charter may be engaged: paras. 54 - 55.

[27] In two Alberta cases, the territorial limits of the application of the Charter have been considered in the context of securities investigations.

- [28] The facts in *Alberta (Securities Commission) v. Brost*, 2008 ABQB 161 are similar to the facts in this case. The Alberta Securities Commission ("ASC") issued a summons for Mr. Brost to attend an examination with respect to an ongoing ASC investigation. Mr. Brost was the subject of an investigation in the United States by the SEC. Mr. Brost was concerned about the use that the SEC could make of his ASC examination, and he refused to attend the interview. Justice Horner accepted the ASC's argument that a Charter breach was not possible on these facts because Charter rights do not apply to conduct outside Canada, with the exception of conduct by Canadian governmental agents acting under the authority of the Canadian government. If testimony obtained by the ASC were used in the course of a U.S. prosecution, it would be U.S. prosecutors taking such actions. The conduct of U.S. prosecutors is not subject to the Charter: paras. 43-44.
- [29] In *Beaudette v. Alberta (Securities Commission)*, 2015 ABQB 57, Justice Anderson considered similar issues, this time in the context of a challenge to the constitutionality of ss. 42 and 46 of the Alberta Securities Act, R.S.A. 2000, c. S-4. In that case, the ASC served Mr. Beaudette with a summons requiring him to produce documents and attend an examination. Mr. Beaudette sought assurances from the ASC that his evidence would not be shared with U.S. law enforcement.
- [30] In his constitutional challenge, Mr. Beaudette made the same argument that Mr. Tak makes in this application. Specifically, he argued that his right to be protected from self-incrimination would be violated if he were compelled to testify before the ASC and his compelled testimony was shared with the SEC, thereby leading to a risk of his evidence being used in a criminal prosecution against him in the U.S.
- [31] The Court in *Beaudette* engaged in a lengthy analysis of Supreme Court of Canada jurisprudence on the extraterritorial application of the Charter. The cases reviewed by Anderson J., such as *Burns* and *Suresh*, clearly limit the extraterritorial application of the Charter to very specific circumstances. Where actions of Canadian officials are constitutionally permitted, but result in actions abroad that "shock the Canadian conscience" (such as torture or death), s. 7 may be invoked: para. 71. In this context, Anderson J. noted:
- [72] While I acknowledge the possibility that Mr. Beaudette may face prosecution in the United States, there is no suggestion that he will be subjected to extreme measures such as the death penalty or torture. While the United States has adopted measures to protect against self-incrimination that do not fit comfortably with those chosen by Canada, it cannot be said that the American approach shocks the Canadian conscience. Neither do I believe that leaving the determination of what evidence will be admissible against Mr. Beaudette in a U.S. prosecution, if any, to the U.S. courts leads to a violation of Canada's obligations in respect of international law or fundamental human rights.
- [32] As such, the Court rejected the constitutional challenge to the relevant provisions of the Alberta Securities Act on the basis that no violation of s. 7 had been established.

[33] Mr. Beaudette appealed to the Alberta Court of Appeal. In reasons indexed at 2016 ABCA 9, the Court of Appeal upheld the chambers judge's decision, specifically with respect to the territorial application of the Charter. At para. 46, the Court stated:

The fact that evidence that might be useful in the courts of a foreign rule of law democracy with which Canada has friendly relations may become easier for that foreign state's authorities to locate or acquire because of the operation of a Canadian law does not make the Canadian law per se the author or sponsor of an infringement of s 7 of the Charter.

[34] The Alberta Court of Appeal considered the Supreme Court of Canada's jurisprudence on extraterritoriality and concluded that "Canadian courts are not authorized, let alone instructed, by the Charter to arrogate the jurisdiction to evaluate, let alone to control, the investigative or judicial processes of friendly foreign rule of law democracies": para. 49.

[35] At its highest, Mr. Tak's risk is of a future criminal proceeding in a rule of law jurisdiction with constitutionally mandated procedural protections that may not be the same as those provided under Canadian law, but which do not meet the threshold of so shocking the Canadian conscience that otherwise constitutionally acceptable Canadian actions should be limited so as to avoid foreign consequences. As such, I find that, due to the limits on the territorial application of the Charter, Mr. Tak's s. 7 rights are not invoked by virtue of the risk he may face in a future criminal proceeding in the United States.

C. Risk of Self-Incrimination in U.S. Proceeding

[36] Mr. Tak submits that the appropriate first step for the court on this application is to ascertain the risk of Mr. Tak's right against self-incrimination being violated in the U.S. In my view, for reasons discussed above, it is not necessary to consider U.S. law in this application. The predominant purpose of the Investigation is securities regulation, not the criminal prosecution of Mr. Tak. Therefore, his evidence is compellable. Further, the Charter has no application to a possible future deprivation of Mr. Tak's right against self-incrimination in a U.S. criminal proceeding. However, Mr. Tak correctly notes that there is precedent for the courts considering expert evidence with respect to the law in another jurisdiction in order to ascertain the risk to the applicant of their compelled evidence later being used against them.

[37] In *R. v. Eurocopter Canada Ltd.*, [2004] O.J. No. 2120, 185 C.C.C. (3d) 233 (S.C.J) [Eurocopter], the applicant, Karlheinz Schreiber, was subpoenaed to testify at a preliminary inquiry with respect to charges of fraud against Eurocopter Canada Ltd. Mr. Schreiber argued that it would infringe his rights under s. 13 and s. 7 of the Charter if he were compelled to testify at the preliminary inquiry, because he would not be protected against use or derivative use of his evidence in the prosecution of criminal charges brought against him in Germany.

- [38] While the respondent in Eurocopter raised the question of the extraterritorial application of the Charter, the case appears to have been decided on the basis of an appraisal by the Court of the risks faced by Mr. Schreiber in Germany with respect to the use of the Canadian compelled testimony:
- [53] The success of Mr. Schreiber's application depends on whether or not his rights under the Canadian Charter of Rights and Freedoms will be violated if he is compelled to testify at the preliminary inquiry. Whether or not his Charter rights are violated depends in turn on whether or not evidence given by him at the preliminary inquiry will be used against him in criminal proceedings in Germany.
- [39] Citing *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, Justice Morin held that an individual seeking to restrain government action must demonstrate a "high degree of probability" that a Charter infringement was likely to occur before the court will grant relief: at para. 56. In order to determine whether that high degree of probability existed, the Court assessed the competing opinion evidence of two experts in German law on the question of whether the compelled evidence could be used against Mr. Schreiber in Germany. On considering that evidence, Morin J. concluded:
- [64] On all of the evidence, I am not satisfied that the applicant has proven as a matter of probability that if he is required to testify at the preliminary inquiry then that evidence may be used against him in the proceedings in Germany. In my view, therefore, the applicant has not discharged the burden of proving even on a balance of probabilities, never mind to a high degree of probability, that there will be a violation of his charter rights if he is compelled to testify at the preliminary inquiry. I may say, on the basis of the evidence that I have heard, that I am satisfied that there is a high degree of probability that if Mr. Schreiber is compelled to testify at the preliminary inquiry in *R. v. Eurocopter*, then German law will afford him ample protection against the use of that evidence in the proceedings in Germany.
- [40] In the event I am incorrect about the application of the predominant purpose test and the limitations of the territorial application of the Charter, I have considered the question of whether there is a high degree of probability that, if Mr. Tak testifies for the Commission, his evidence will be used against him in a U.S. criminal proceeding. In order to ascertain the level of probability, I must consider both the likelihood of a criminal prosecution against Mr. Tak taking place, as well as the legal authorities that govern the admission of foreign compelled statements in U.S. criminal prosecutions. On the latter issue, both parties submitted expert evidence from U.S. lawyers.
- [41] There is no evidence of any current criminal investigation of Mr. Tak in the U.S. or in Canada. Unlike Mr. Schreiber, Mr. Tak's concerns about a future criminal prosecution are entirely speculative. There is no basis on which I could find a high degree of probability that Mr. Tak's compelled evidence will be used against him for this reason alone.

- [42] I have, however, also considered the opinion evidence of the two U.S. legal experts on the risks faced by Mr. Tak if a criminal prosecution of him were to proceed in the U.S. The Fifth Amendment to the U.S. Constitution contains a self-incrimination clause that states that no person "shall be compelled in any criminal case to be a witness against himself": U.S. Const. amend. V. The two experts who filed opinion evidence had differing views on the question of whether the Fifth Amendment bars the use by prosecutors in a U.S. criminal proceeding of the defendant's foreign compelled self-incriminating statements.
- [43] Michael Quinn, a California attorney whose private practice specialty is securities enforcement defence, provided an affidavit on behalf of Mr. Tak. He opined that "the law on the admissibility of foreign-compelled self-incriminating statements in U.S. criminal trials is uncertain."
- [44] Michael Schachter is a New York lawyer who specializes in white collar defence and securities enforcement. He provided an affidavit on behalf of the Commission. Mr. Schachter was lead counsel for the defendants in *United States v. Allen*, 864 F (3d) 63 (2d Circ 2017) [Allen], the most recent appellate decision in the United States on the use of foreign compelled testimony in U.S. Courts.
- [45] Mr. Schachter disagreed that the law in the U.S. on this point is uncertain. He noted that there is only one American criminal decision dealing with the use of statements compelled in Canada. In *Bram v. United States*, 168 U.S. 532 (U.S. Mass. 1897), the U.S. Supreme Court held that the Fifth Amendment's self-incrimination clause prohibited the admission of statements compelled in Canada in a U.S. criminal proceeding.
- [46] More recently, in *Allen*, the Second Circuit Court of Appeals held that the self-incrimination clause under the Fifth Amendment applies to testimony compelled by foreign government officials. In his affidavit, referring to *Allen*, Mr. Schachter explained that:

The Court based its ruling, in part, on well-established case law holding that the right against self-incrimination is a personal trial right of a defendant in any American criminal case, which is violated when compelled testimony is used directly or indirectly against the defendant at trial.

- [47] Mr. Schachter disagreed with Mr. Quinn's opinion that U.S. law on this point is uncertain:

I am aware of no federal circuit that has adopted the position that testimony compelled by a foreign sovereign is admissible in a U.S. prosecution. To the contrary, as discussed [above], every federal court of appeals to have considered the issue has uniformly decided that the Fifth Amendment precludes the use of foreign compelled testimony in a U.S. criminal prosecution.

- [48] Mr. Quinn prepared a reply affidavit to Mr. Schachter. He noted that *Allen* is a decision of the Second Circuit Court of Appeals and has no binding authority outside of its own geographic jurisdiction. There is no recent U.S. Supreme Court authority on this point.

- [49] Mr. Quinn relied on two U.S. Supreme Court cases, *Colorado v. Connelly* 479 U.S. 157 (1986) [Connelly] and *United States v. Balsys*, 524 U.S. 666 (1998) [Balsys], to support his opinion that the U.S. Supreme Court may ultimately take a different view than the Second Circuit Court of Appeals in *Allen*. Mr. Quinn suggests that these cases undermine the holding in *Allen* that the Fifth Amendment precludes the use of foreign compelled testimony in a U.S. criminal prosecution.
- [50] I agree with Mr. Schachter that the U.S. Supreme Court cases referred to by Mr. Quinn do not call into question the holding in *Allen*. The facts in *Balsys* were the inverse of this case. A witness refused to answer questions in the U.S. based on a fear that his statements may be used against him in a foreign prosecution. The U.S. Supreme Court held that, because the Fifth Amendment applies only to the use of compelled statements in U.S. prosecutions, not foreign prosecutions, the witness had no such protection. Mr. Tak's precise concern is the possibility of a U.S. prosecution against him. It is clear that the Fifth Amendment applies to U.S. prosecutions and nothing in *Balsys* suggests otherwise.
- [51] *Connelly* was a case about the voluntariness of a murder confession and whether a statement made to U.S. law enforcement was voluntary for the purposes of the Fourteenth Amendment's due process clause. It was not a case about the Fifth Amendment right against self-incrimination at all.
- [52] *Mickey v. Ayers*, 606 F (3d) 1223 (9th Cir 2010) [Mickey], another case relied upon by Mr. Quinn to support the contention that the law is unsettled, is also a case about the due process clause under the Fourteenth Amendment, not the Fifth Amendment. It is a case that addresses whether statements made to U.S. law enforcement officials, after the appellant had been allegedly mistreated in a Japanese prison, were voluntary for the purpose of the due process clause.
- [53] Upon reviewing the opinions of the two experts and the case authority upon which they rely, I prefer the opinion of Mr. Schachter. *Allen* is consistent with a clear line of constitutional jurisprudence that supports the near absolute nature of Fifth Amendment protection from self-incrimination, irrespective of whether testimony was compelled by American or foreign government officials. Further, there does not appear to be any reasonable basis on which *Balsys*, *Connelly*, or *Mickey* could be said to dilute the prohibition on the admission of compelled incriminatory statements, foreign or domestic, in a criminal proceeding in the U.S.
- [54] In *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*, 2018 BCSC 2070, this Court considered the question of whether a compelled statement obtained in a foreign jurisdiction may be used as evidence in a U.S. criminal proceeding. That case involved an application for a sealing order in the context of a proceeding brought by the Director of Civil Forfeiture against the defendants with respect to an alleged fraudulent direct mail scheme. One of the concerns raised by the defendants was the possible sharing of compelled evidence produced in the British Columbia action with criminal justice authorities in the

United States. The defendants did not produce an expert opinion on U.S. law, but they did rely on the decisions of Mickey and Allen to support the contention that they faced a risk that Canadian compelled evidence could be used against them in U.S. courts.

- [55] Justice Fitzpatrick considered the two U.S. cases and, after determining that Mickey was not on point because it did not address the right against self-incrimination under the Fifth Amendment, held that there was no merit to the concerns expressed by the defendants:
- [96] At its highest, PacNet, the Day Defendants and the Ferlows simply argue that they "don't know" if any evidence compelled in this proceeding can be used in any action that might be taken against them in the U.S. As such, their current concern is therefore only complete speculation that Allen may not be applied in other U.S. courts other than the Second Circuit or that Allen might be overturned by the U.S. Supreme Court at some point in the future.
- [56] Similarly, and with all due respect to Mr. Quinn's expertise, I find that Mr. Tak's concerns about his rights in a future U.S. proceeding are speculative. I cannot find that there is a high degree of probability that a criminal proceeding will be brought against him, much less that the evidence he provides under the Summons will be used against him in a U.S. criminal court.
- [57] As such, were it necessary for me to consider the risks faced by Mr. Tak in a future U.S. prosecution, I would find that those risks are speculative and his right against self-incrimination is not engaged by virtue of being required to comply with the Summons.

IV. Restrictions on use of compelled evidence

- [58] The Commission acknowledges that it shares information with the SEC. Such sharing of information is a necessary element of ensuring securities regulation in a globalized economy. Terms prohibiting the Commission from sharing Mr. Tak's evidence would serve to limit the ability of the Commission to engage in this important work, in service of protecting against a possible future Charter breach that it, at its very highest and best, extremely speculative. However, Mr. Tak argues that there is precedent in both Ontario and British Columbia for the Court imposing restrictions on the Commission sharing his evidence with U.S. authorities in order to ensure that his right against self-incrimination is protected. Mr. Tak primarily relies on two cases to support his position: *A. v. Ontario Securities Commission*, [2006] O.J. No. 1768 (S.C.J.) [A.] and *EchoStar Satellite Corp. v. Quinn*, 2007 BCSC 1225 [EchoStar]. For reasons that follow, I find these cases to be distinguishable.
- [59] In *A.*, a summons was issued to Mr. A as part of an Ontario Securities Commission ("OSC") investigation of a company in which Mr. A had held an executive position. Concurrent with the OSC investigation, a criminal investigation was being pursued in Canada and Mr. A was a suspect, although no charges had yet been laid against him. In addition to concerns about the criminal investigation of him in Canada, Mr. A argued that he was at risk of prosecution in the U.S. Mr. A sought an exemption from compulsion to testify.

- [60] In A., it appears that the OSC conceded that Mr. A.'s Charter rights were at risk: para. 45. This concession is not made in this case. It does not appear that the territorial limitation issue, which was determinative in other cases, was argued before the court in A. Justice Campbell refused to exempt Mr. A from testifying pursuant to the OSC summons, on the basis that the predominant purpose of the inquiry was not the determination of penal liability: para. 43.
- [61] In a later decision, indexed at A. v. Ontario (Securities Commission), [2006] O.T.C. 410 (S.C.J.), Campbell J. put in place terms that would govern the securities investigation in order to minimize the risk of a subsequent Charter violation occurring. Justice Campbell made no finding of a breach of Mr. A's Charter rights, but held that nevertheless, in the context of that case, "it is appropriate for the court to provide ongoing supervision where an investigation, although in compliance with the Securities Act, runs the risk of interference with Charter protected values even though no direct breach has been established": para. 6.
- [62] It is important to note that A. took place under the distinct statutory regime of Ontario securities regulation, not the BC Securities Act. Further, Mr. Tak, unlike Mr. A, is not presently the subject of any known criminal investigation in any jurisdiction. Even if he were, based on the expert evidence before me, I cannot find that Charter values would be at risk in a future U.S. criminal prosecution. The considerations that led Campbell J. to impose terms in that case are simply not applicable here.
- [63] In EchoStar, Justice Lynn Smith considered an application for orders giving effect to letters rogatory and requests for judicial assistance issued by the U.S. District Court for the Central District of California, Southern Division (the "California Civil Proceeding"). The respondents raised concerns about self-incrimination should criminal proceedings be initiated against them in the U.S. Justice Smith imposed terms with respect to the production of documents and testimony designed to protect the respondents from the risk of self-incrimination.
- [64] In EchoStar, Smith J. considered the relevant provisions of the B.C. and Canada Evidence Acts through the lens of Charter values:
- [62] No party is arguing in this case that the provisions of s. 53 of the British Columbia Evidence Act or s. 46 of the Canada Evidence Act which give this Court discretion to enforce Letters of Request are unconstitutional. However, in considering these applications, I must take into account the s. 7 and s. 13 Charter rights of the respondents as a matter of public policy, and interpret and apply the legislation and the common law in a manner consistent with "Charter values". While the Charter does not have extraterritorial application, except in certain limited and rare circumstances (see R v. Cook, [1998] 2 S.C.R. 597, R. v. Hape, 2007 SCC 26), a Canadian court should not turn a blind eye to the possible consequences of compelled testimony outside this country, particularly where the compulsion is at the request of a court of the country where those consequences might materialize

- [65] The difference between the circumstances facing Smith J. in EchoStar and those facing the Court on this application is that EchoStar involved applications to enforce letters rogatory which are subject to a robust body of jurisprudence that requires the court, in exercising its discretion, to consider matters of public policy: *Zingre v. The Queen et al.*, [1981] 2 S.C.R. 392 at 401; *Advance/ Newhouse Partnership v. Brighthouse Inc.*, 2005 38 C.P.R. (4th) 559 (Ont. S.C.J.), as cited in EchoStar at para. 38. As such, Smith J. was required in EchoStar to apply a Charter values analysis to the public policy issues necessarily engaged by the exercise of her discretion.
- [66] The BC Securities Act offers me no such discretion. Absent a Charter breach, I have no basis to exempt Mr. Tak from the requirements of s. 144 of the BC Securities Act, nor to impose terms on his complying with the Summons.
- [67] Catalyst, also relied on by Mr. Tak to support the proposition that terms should be imposed on the Commission with respect to the Summons, is also distinguishable. Catalyst involved a court-appointed Inspector, seeking to compel evidence in a process that was under the direct supervision of the Court. The Investigation is a process initiated by the Commission under Part 17 of the BC Securities Act. It is not a process under the direct supervision of the Court and the Court has no basis to interfere with the Commission's exercise of its statutory authority by imposing conditions such as those imposed in Catalyst.
- [68] If the BC Securities Act did grant some measure of discretion for the court to impose Charter values or public policy informed terms on cooperation with a lawfully issued summons under s. 144 of the Securities Act, I would place heavy weight on the obvious social importance of international cooperation in cross-border securities regulation and would find that this important social function outweighs the speculative concerns raised by Mr. Tak.
- [69] For all of the foregoing reasons, I am ordering Mr. Tak to comply with the Summons and attend at the offices of the Commission at a date and time to be set on agreement of the parties, to answer questions that are put to him under oath.
- [70] Should the parties require further direction from me with respect to compliance with the Summons, or should further proceedings be necessary in order to secure Mr. Tak's compliance, I will remain seized.
- [71] If the parties are unable to agree with respect to costs, they may make arrangements to appear before me to speak to same.

"Francis J."

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