

CANADA / JUDGMENT

Khorchidian v. British Columbia (Securities Commission)

2019 BCCA 411

COURT

British Columbia Court of Appeal

DECIDED

14 November 2019

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2019 BCCA 411 Khorchidian v. British Columbia (Securities Commission) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Khorchidian v. British Columbia (Securities Commission), 2019 BCCA 411 Date: 20191114 Dockets: CA45292; CA45311; CA45477 CA45753; CA46002; CA46005 Dockets: CA45292; CA46002 Between: Raffi Khorchidian Appellant And British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission Respondents

- and - Dockets: CA45311; CA45753; CA46005 Between: EuroHelvetia TrustCo. S.A. also known as EHT Corporate Services S.A. and David Craven Appellants And British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission Respondents
- and - Docket: CA45477 Between: British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission Respondents And Garo Aram Deyrmenjian Appellant Before: The Honourable Mr. Justice Tysoe (In Chambers) On appeal from: Decisions of the British Columbia Securities Commission, dated April 25, 2018 (Re Deyrmenjian, 2018 BCSECCOM 125) and November 2, 2018 and March 11, 2019 (Re Deyrmenjian, 2019 BCSECCOM 93). Oral Reasons for Judgment Counsel for the Appellant, Raffi Khorchidian -- CA45292 and CA46002 (appeared via teleconference November 14, 2019): L.D. Ridgedale L.B. Shepherd Counsel for the Appellants, EuroHelvetia TrustCo. S.A. also known as EHT Corporate Services S.A. and David Craven --CA45311, CA45753 and CA46005 (appeared via teleconference November 14, 2019): A.M. Gunn, Q.C. Counsel for the Appellant, Garo Aram Deyrmenjian --CA45477 (appeared via teleconference November 14, 2019): R.W. Cooper, Q.C. Counsel for the Respondents: D.J. Chapman J.L. Whately Place and Date of Hearing: Vancouver, British Columbia November 13, 2019 Place and Date of Judgment: Vancouver, British Columbia November 14, 2019 Summary: The three applicants apply for leave to appeal liability and sanction decisions of the Securities Commission in respect of s. 57(a) of the Securities Act, R.S.B.C. 1996, c. 418. Held: The applications are granted except that the appeals in respect of the sanctions are limited to asserting that the sanctions should be set aside if the other appeals are allowed.

- [1] TYSOE J.A.: Before the Court are six applications for leave to appeal decisions of the British Columbia Securities Commission (the "Commission") in connection with its determination that there had been a contravention of s. 57(a) of the Securities Act, R.S.B.C. 1996, c. 418 (the "Act"), by three of the four applicants, directly or indirectly, engaging in or participating in conduct relating to the shares of Kunekt Corporation ("Kunekt") when they knew, or reasonably should have known, that the conduct resulted in or contributed to an artificial price for the shares. The fourth applicant was found liable under s. 168.2 of the Act as being a director of one of the other applicants who authorized or permitted the contravention of s. 57(a).
- [2] The applicants wish to appeal two decisions of the Commission. The first decision, dated April 25, 2018 and indexed as 2018 BCSECCOM 125, found that the applicants had contravened s. 57(a). The second decision, dated March 11, 2019 and indexed as 2019 BCSECCOM 93, dealt with an earlier dismissed application under s. 171 of the Act to revoke or vary certain findings made in the April 25, 2018 decision and imposed sanctions on the applicants for the contravention of s. 57(a).
- [3] Kunekt is a Nevada company. It was a reporting issuer in British Columbia at the material times by virtue of Multilateral Instrument 51-105 (Issuers Quoted in the U.S. Over-the-Counter Markets). It had endeavoured to pursue a business in financial account cards, but had abandoned its patent application. In December 2010, when its shares were trading at \$0.55 or less, Kunekt disclosed that it had entered into a letter of intent to acquire a company in order to pursue a mobile device business.
- [4] Between January and April 2011, a company referred to as Capital Financial Media ("CFM"), which was in the business of publishing tout sheets for small public companies, circulated grossly misleading statements about Kunekt by way of a mass email distribution. As an example, the tout sheets suggested that Kunekt would become the next Apple and that it was giving investors "an all-but-guaranteed chance to garner 5,192% gains". As a result of this promotion, the trading volume of Kunekt shares reached a single-day high of 17.2 million shares and the price of the shares reached \$2.89 a share at the end of February 2011. The share price fell to \$0.77 a share by the end of April and was down to \$0.03 a share by the end of 2011.
- [5] CFM issued four invoices for the promotional campaign in the amounts of \$600,000, \$836,000, \$800,000 and \$800,000. The Commission relied primarily on the evidence regarding the payment of these invoices and the trading of Kunekt shares to draw inferences that the applicants made or permitted the payment of these invoices and knew or ought reasonably to have known that that this conduct would result in or contribute to an artificial price for the Kunekt shares. The evidence considered by the Commission consisted of documents and sworn interviews introduced through one witness, who was a Commission investigator.

- [6] The first three invoices were paid from a Swiss bank account in the name of the applicant, EuroHelvetia TrustCo. S.A. ("EHT"), a Swiss wealth management firm which had the applicant, David Craven, as one of its two managing directors. Only representatives of EHT had signing authority over the account. Both of the applicants, Garo Aram Deyrmenjian and Raffi Khorchidian, were clients of EHT.
- [7] There was no evidence at the hearing before the Commission regarding an outside source of the funds used to pay the first invoice, and the Commission found that they were funds belonging to EHT.
- [8] There was evidence that on the days of the payment of the second and third invoices the sums of \$840,000 and \$810,000 were wired to EHT's account from an account in the name of a company whose assets were beneficially owned by Mr. Khorchidian. The Commission found that by permitting these wire transfers Mr. Khorchidian engaged in conduct that resulted in or contributed to the artificial price for Kunekt shares.
- [9] The fourth invoice was paid from a Swiss bank account opened by EHT in the name of a company beneficially owned by Mr. Khorchidian. There was evidence that on the day of the invoice's payment the sum of \$850,000 was wired into the account from an account of a company whose assets were beneficially owned by Mr. Deyrmenjian. The Commission found that by permitting this payment Messrs. Khorchidian and Deyrmenjian engaged in conduct that resulted in or contributed to the artificial price for Kunekt shares.
- [10] There was also evidence that in November 2010, prior to CFM's promotional campaign, 13.8 million Kunekt shares, representing 46% of its free trading shares, were deposited into accounts beneficially owned by Messrs. Khorchidian and Deyrmenjian. Trading in those shares after the commencement of the promotional campaign produced net proceeds for the benefit of Messrs. Khorchidian and Deyrmenjian in the amounts of \$7.15 million and \$7.14 million, respectively.
- [11] Based on inferences drawn by it, the Commission found that Messrs. Khorchidian and Deyrmenjian knew or ought reasonably to have known that their conduct in permitting transfers of funds to CFM would result in or contribute to an artificial price for the Kunekt shares contrary to s. 57(a).
- [12] The Commission also drew the inference that, as a result of EHT paying the first CFM invoices from its own funds, EHT knew or ought reasonably to have known that funding this payment would result in an artificial price for the Kunekt shares contrary to s. 57(a) and that Mr. Craven was liable under s. 168.2 in respect of EHT's breach of s. 57(a) because he was one of its managing directors and had signed the documents authorizing the payment of CFM's three invoices from EHT's bank account.

- [13] Finally, the Commission rejected the argument of EHT and Mr. Craven that it did not have jurisdiction over them. It concluded that their conduct had a real and substantial connection to British Columbia and that it had jurisdiction to make orders in the public interest under ss. 161 and 162 of the Act.
- [14] In September 2018, EHT and Mr. Craven made an application under s. 171 to revoke or vary findings in the April 25, 2018 decision. Three affidavits were filed in support of the application. One affidavit attached a redacted statement of EHT's bank account showing two deposits of \$300,040 into the account on the same day that the first CFM invoice in the amount of \$600,000 (or more precisely, \$600,042.60) was paid out of the account. A second affidavit dealt with the confidentiality laws of Switzerland. The third affidavit, which was sworn by the liquidator of EHT, stated that neither of the parties who deposited these sums had waived the confidentiality provisions of their agreements with EHT and that neither of these parties were part of EHT's group of entities. The Commission dismissed the application on November 2, 2018 and gave its reasons in its March 11, 2019 decision.
- [15] The primary reason for the Commission's dismissal of the s. 171 application was that it did not consider the additional evidence to be compelling in the sense of being sufficient to result in the Commission reaching a different conclusion. In that regard, the Commission held that there was not clear, convincing and cogent evidence from which to reasonably infer that someone other than EHT or a member of its group had funded the payment of CFM's first invoice. The Commission also was of the view that the new information was reasonably available at the time of the initial hearing and that it would be prejudicial to the public interest to vary or revoke the findings against EHT and Mr. Craven.
- [16] The March 11, 2019 decision also dealt with the sanctions to be imposed on the applicants. Messrs. Khorchidian, Deyrmenjian and Craven were restrained from acting as a director or officer of an issuer or registrant, and all four applicants were restrained from trading in securities and from being involved in certain other activities in relation to securities. Messrs. Khorchidian and Deyrmenjian were ordered to pay the Commission the sums of \$7.15 million and \$7.14 million they respectively profited from trading in Kunekt shares and to pay administrative fines of \$850,000 and \$700,000, respectively. EHT and Mr. Craven were ordered to pay administrative fines of \$700,000 and \$850,000, respectively.
- [17] If leave to appeal is granted, each of the applicants wish to challenge the findings that there were contraventions of s. 57(a) and the sanctions imposed by the Commission. EHT and Mr. Craven also wish to challenge the dismissal of their s. 171 application and the ruling that the Commission had jurisdiction over them.
- [18] EHT and Mr. Craven first wish to argue that the Commission erred in concluding that they had a real and substantial connection to British Columbia. Each of the applicants wish to argue that the admissible evidence was not sufficient to establish a breach of s. 57(a), although Mr. Khorchidian frames the argument as breaches of the principles of natural justice and procedural fairness as a result of the Commission providing insufficient reasons

and relying on unreliable hearsay evidence. Each of the applicants wish to argue that the sanctions should be set aside if their appeals are successful, and Mr. Deyrmenjian, EHT and Mr. Craven also wish to argue that the sanctions against them were disproportionate, unreasonable and punitive. Mr. Deyrmenjian further wishes to argue that the Commission erred in its application of s. 161(1)(g) of the Act by ordering disgorgement of trading profits received into his trading account but disbursed to third parties.

[19] Appeals from the Commission are brought directly to the Court of Appeal under s. 167(1) of the Act with leave of a justice of this Court. The applicable principles on applications for leave to appeal from statutory tribunals were set out by Justice Taggart in *Queens Plate Development Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 at 109-110 (Chambers), [Queens Plate], which can be summarized as follows:

- 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:
 - i. The application of statutory provisions; ii. Statutory interpretation that was particularly important to the litigant; or iii. Interpretation of standard wording that 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 an appeal succeeding on its merits in the sense that 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.

[20] I will observe at this stage that factors (c) and (f) above are not applicable to any of the six leave applications and that factor (e) above is applicable to all six applications because the applicants would clearly benefit if they are successful in the appeals. Before I address the other factors, I wish to review some general principles.

[21] While an appeal raising a question of law is an important consideration on the Queens Plate analysis, the absence of such a question will not always prevent leave from being granted when the statutory provision does not require this as a condition: see *Grosvenor Canada Limited v. South Coast British Columbia Transportation Authority*, 2015 BCCA 304 at paras. 18-19.

[22] While the question of what inference should be drawn by a tribunal from the proven facts does not raise a question of law (see *Wong v. British Columbia Securities Commission*, 2018 BCCA 192 at para. 27), the making of an inference based on conjecture or speculation amounts to an error of law (see *R. v. White* (1994), 89 C.C.C. (3d) 336 (N.S.C.A.) at 351).

- [23] Inferences drawn by the Commission will be reviewed deferentially and the Court will be reluctant to interfere with them: see *Seabrook v. British Columbia (Securities Commission)*, 2003 BCCA 194 at para. 13. However, appellate courts may interfere if the drawing of an inference amounts to speculation or conjecture: see *ICBC v. Atwal*, 2012 BCCA 12 at paras. 40-42, and *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paras. 26-28.
- [24] Where leave to appeal is allowed, the justice granting leave may limit the issues on appeal: see *Huber v. British Columbia (Securities Commission)* (1994), 3 C.C.L.S. 98 (B.C.C.A.).
- [25] I will begin my consideration of the other Queens Plate factors in conjunction with the leave applications of EHT and Mr. Craven. In my view, EHT's and Mr. Craven's leave application in respect of the April 25, 2018 decision does raise a question of general importance as to the jurisdiction of the Commission over them. In determining whether there was a real and substantial connection between them and British Columbia, I do not consider that the question has necessarily been answered by the decision of this Court in *Torudag v. British Columbia (Securities Commission)*, 2011 BCCA 458. I also consider that the issue of whether the liability findings against EHT and Mr. Craven were based on conjecture or speculation raises a question of general importance in a circumstance where, as accepted by the Commission, a finding of liability under s. 57(a) must be established by clear, convincing and cogent evidence.
- [26] I am satisfied that the issue of the Commission's jurisdiction and the issue of whether the Commission based its findings against EHT and Mr. Craven on conjecture or speculation each raises questions of law. Conversely, I am not satisfied that the issue of the dismissal of their s. 171 application or the issue of the sanctions imposed against them raise questions of law.
- [27] It follows from my comment regarding *Torudag* that it is my view that there is a substantial question to be argued on appeal with respect to the Commission's jurisdiction. It is also my opinion that there is a substantial question to be argued on appeal with respect to the issue of whether the Commission's findings against EHT and Mr. Craven were impermissibly based on conjecture or speculation.
- [28] Accordingly, it is my view that leave to appeal should be granted to EHT and Mr. Craven in respect of the April 25, 2018 decision. As the November 2, 2018 dismissal of their s. 171 application is inexplicably intertwined with the Commission's finding of liability on the part of EHT and Mr. Craven, and as there is an issue whether the Commission may have improperly reversed the onus onto EHT in the course of its decision, I would also grant leave on their second application.
- [29] On the other hand, it is my view that it would not be appropriate to grant leave to appeal the sanctions imposed on EHT and Mr. Craven except to the extent of asserting that the sanctions should be set aside if either of their other appeals is allowed. The Commission is owed deference with respect to the sanctions imposed by it and, in this case, the Commission carefully reviewed the relevant factors as set out in *Re Eron Mortgage*

Corporation, [2000] 7 B.C.S.C.W.S. 22. In my opinion, the proposed appeal does not raise a question of general importance or a question of law, and it is very unlikely that a division of this Court would interfere with the sanctions imposed by the Commission.

- [30] I now turn to the applications of Messrs. Khorchidian and Deyrmenjian. I will first express my view that Mr. Khorchidian's proposed arguments regarding the principles of natural justice and procedural fairness have no merit. The Commission's reasons were sufficient in terms of describing how it came to its conclusions on liability and the Commission is entitled to consider hearsay evidence. The real issue is whether the inferences drawn against Messrs. Khorchidian and Deyrmenjian were impermissibly based on conjecture or speculation.
- [31] As with the applications of EHT and Mr. Craven, I am satisfied that this issue raises a question of general importance and a question of law. However, it is my view that the arguments of Messrs. Khorchidian and Deyrmenjian on this issue carry less force than the arguments of EHT and Mr. Craven because there was evidence that, unlike EHT and Mr. Craven, Messrs. Khorchidian and Deyrmenjian profited from CFM's promotional campaign. If the applications of Messrs. Khorchidian and Deyrmenjian had stood on their own, I may not have been inclined to grant leave to appeal.
- [32] However, I have concluded that it is in the interests of justice to grant leave on their applications for two reasons. First, the arguments of Messrs. Khorchidian and Deyrmenjian on appeal will raise the same legal issues as the arguments of EHT and Mr. Craven, and the additional appeals should not delay the EHT/Craven appeals and should not significantly lengthen the time required to hear the appeals. Second, there is a potential for embarrassment if leave is not granted because it is possible the division hearing the EHT/Craven appeals could make comments that have an impact on the inferences drawn by the Commission against Messrs. Khorchidian and Deyrmenjian.
- [33] For the same reasons that I am not prepared to grant EHT and Mr. Craven leave to appeal the sanctions imposed on them generally, I decline to grant Messrs. Khorchidian and Deyrmenjian leave to appeal the sanctions imposed on them except to the extent of asserting that the sanctions should be set aside if their appeals on liability are allowed. The argument of Mr. Deyrmenjian that the Commission erred in applying s. 161(1)(g) has no merit because the Commission followed the approach set out in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, which included the shifting of the onus to Mr. Deyrmenjian to disprove the reasonableness of the Commission's determination of the amount obtained by him.
- [34] In summary, I grant all six applications for leave to appeal except that the appeals in respect of the sanctions imposed on the applicants will be limited to asserting that the sanctions should be set aside if the other appeals are allowed. "The Honourable Mr. Justice Tysoe"

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Prepared on 27 October 2026 · Esheria