

CANADA / JUDGMENT

Pasquill v. British Columbia (Securities Commission)

2021 BCCA 424

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 424 Pasquill v. British Columbia (Securities Commission)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Pasquill v. British Columbia (Securities Commission),

2021 BCCA 424

Date: 20211110

Docket: CA47153

Between:

Earle Douglas Pasquill

Appellant

And

British Columbia Securities Commission

Respondent

And

The Executive Director of the British Columbia Securities Commission

Respondent

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Butler

On appeal from: A decision of the British Columbia Securities Commission,
dated November 5, 2020 (Re Pasquill, 2020 BCSECCOM 457).

Counsel for the Appellant:

J.P. Sullivan

D.L.R. Yaverbaum

Counsel for the Respondents:

L.L. Bevan

S.B. Hannigan

Place and Date of Hearing:

Vancouver, British Columbia

October 18, 2021

Place and Date of Judgment:

Vancouver, British Columbia

November 10, 2021

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Butler

Summary:

Securities Commission, having found appellant participated in a large-scale fraud, ordered him to pay a total of \$36.7 million including administrative penalty. In March 2020, after amendments to the Securities Act came into force, Commission issued a preservation order (formerly called a freeze order) in respect of appellant's "Life Income Fund" or "LIF", a form of RRIF comprised entirely of pension benefits earned by him from his legitimate employment years ago. As part of the package of amendments to the Securities Act, the Court Order Enforcement Act ("COEA") was also amended to state that an exemption from an "enforcement process" for property in a registered plan no longer applied to an enforcement process arising from an order made under the Securities Act. At the same time, provisions of the Pension Benefits Standards Act and a Regulation thereunder stated that pension fund benefits were exempt from execution, seizure or attachment.

Commission ruled that preservation order did not constitute an "enforcement process" under s. 71.3 of the COEA because LIF funds remained in situ; and even if it did, it was 'saved' by the exemption in s.71.3(3)(e) for orders made under the Securities Act. Since PBSA and Regulation made no reference to s. 71.3(4) of the COEA, Commission found the latter prevailed. Further, applying interpretive rule that the specific overrides the general, it ruled that the COEA should prevail since it speaks specifically to an enforcement process arising from an order under the Securities Act.

Appeal allowed. CA found that although the funds in appellant's LIF remain in situ, they had been frozen for the purpose of execution and preservation order was part of an "enforcement process". Public policies underlying both the Securities Act exemption and the exclusion in the PBS legislation discussed. The conflict between the two sets of provisions stood to be resolved by reference to the rule of statutory interpretation to the effect that the specific overrides the general. Commission erred in ruling that the Securities Act exemption is more specific than that in the PBS legislation.

Preservation order set aside as falling outside the Commission's statutory authority.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] The appellant Mr. Pasquill appeals, with leave, a preservation order made by the British Columbia Securities Commission on March 27, 2020 pursuant to s. 164.04(4)(a) of the Securities Act, R.S.B.C. 1996, c. 418 (the "Act"). It restrained the custodian of Mr. Pasquill's "registered investment accounts", and restrained Mr. Pasquill directly, from making any disposition or transmission from those accounts or indeed from any other accounts held in his name, "whether singly or jointly with any other persons".

Factual Background

- [2] The preservation order is the latest in a series of orders made following a decision of the Commission that between February and August 2008, the appellant and others had perpetrated frauds contrary to s. 57(1)(b) of the Act by raising some \$21.7 million from almost 700 investors without disclosing to them the financial condition of the "FIC Group", a group of companies collectively promoted as the "Freedom Investment Club"; and by raising some \$9.9 million from more than 300 investors in a company called "FIC Foreclosure", for the stated purpose of investing in foreclosure properties. Instead, most of the funds had been used to make unsecured loans to other companies in the FIC Group. (See *Re Lathigee and Pasquill et al.* 2014 BCSECCOM 264.) Evidently, the frauds were among the largest frauds ever perpetrated on capital markets in British Columbia. The "Liability Decision" was issued by the Commission on July 8, 2014.
- [3] On March 16, 2015, the Commission issued its "Sanction Decision" (indexed as 2015 BCSECCOM 78) against the appellant, banning him inter alia from participating in capital markets and from being a corporate director. Mr. Pasquill and Mr. Lathigee were ordered jointly and severally to pay the Commission some \$21.7 million, being the "amount

obtained" by means of the frauds -- although the Commission suggested that the appellant had actually "received" less than \$400,000. (See paras. 33-43 of the Decision.) The Commission also levied an administrative penalty of \$15 million. In the result, Mr. Pasquill was liable to pay the Commission some \$36.7 million. He and others were unsuccessful in an appeal of the Sanction Decision to this court: see *Poonian v. British Columbia Securities Commission* 2017 BCCA 207.

- [4] Shortly after pronouncing the Sanction Decision, the Commission filed it as a judgment in the Supreme Court of British Columbia under s. 163 of the Act.
- [5] In late November, 2019, the Commission examined Mr. Pasquill in aid of execution. He acknowledged that he had not made any payment towards his debt to the Commission, and testified that he receives monthly draws of approximately \$6,575 (before tax) from his "life income fund", or "LIF" accounts. It is common ground that these accounts, which had a market value of some \$734,321 at the time of the examination, are a type of registered retirement income fund, or "RRIF". They are derived only from pension income (in this instance, from Mr. Pasquill's pension in respect of his years as an employee of Eaton's) and are obviously intended to provide for a regular flow of income to pensioners. Both the Pension Benefits Standards Act ("PBSA"), S.B.C. 2012, c. 30 and a regulation thereunder, the Pension Benefits Standards Regulation, B.C. Reg. 71/2015 ("PBSR"), define a LIF as a "RRIF that is prescribed to be a life income fund" and which has "locked-in money". As will be discussed in greater detail below, both the PBSA and Schedule 2 to the PBSR state that money in a LIF "must not be assigned, charged, alienated or anticipated and is exempt from execution, seizure or attachment."
- [6] On March 27, 2020, certain amendments to the Securities Act came into force by means of the Securities Amendment Act, 2019, S.B.C. 2019, c. 38. Among other things, what were formerly known as "freeze orders" were renamed "preservation orders" and consequential changes were made to the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 ("COEA"). Again, I will discuss these amendments at greater length below, but I note here that s. 71.3(3) of the COEA provides an exception to a general exclusion at s. 71.3(2) that exempts "registered plans" (a term that includes RRIFs and RRSPs) from any "enforcement process". Subs. (3)(e) now states that this exclusion does not apply to any enforcement proceeding "arising from an order under the Securities Act."
- [7] The meaning of the three exemptions I have mentioned, and their relationship to each other, form the crux of this appeal. I have attached as a schedule to these reasons a copy of all the relevant provisions for easy reference.

- [8] On the day the Securities Act amendments came into force, the Executive Director of the Commission appeared ex parte before the Commission to seek a preservation order under the new s. 164.04(4), for the purpose of freezing Mr. Pasquill's LIF accounts. The Commission granted the preservation order for brief reasons. After learning of the order, Mr. Pasquill applied to have it revoked. Written submissions were made by the parties, both of whom were represented, and final arguments were filed in July 2020.
- [9] On August 7, 2020, the Commission filed a petition in a separate proceeding in the Supreme Court, seeking an order that the funds in the appellant's LIF accounts be forfeited to the Commission under s. 164.12 of the Act. This procedure was also part of the amendments that came into force in March 2020.
- [10] On November 7, 2020, for reasons indexed as Re Pasquill 2020 BCSCCOM 457, the Commission dismissed Mr. Pasquill's application to have the preservation order revoked. He now appeals that dismissal.

The Commission's Reasons

- [11] The Commission began its reasons by setting forth the basic facts I have recited above. It noted at para. 21 that the "findings" (presumably, findings of fact) of the panel in the Liability Decision and Sanctions Decision were not at issue.
- [12] The Commission began its analysis with ss. 164.04-164.06 of the Securities Act, which deal with preservation orders, i.e., orders "restraining the disposition or transmission of "property or the whole or a portion of an interest in property" of a person described in s. 164.04(2). There is no question but that Mr. Pasquill comes within the scope of subpara. (c) thereof.
- [13] Where a preservation order is made ex parte, the Commission must notify the person "as soon as practicable" under s. 164.06(1). If the person requests an opportunity to be heard, the Commission may, after giving him or her that opportunity, revoke the preservation order in either of the circumstances set out in s. 164.07(1)(a) or (b). Another route to the revocation of a preservation order is provided by s. 171, which allows the Executive Director to vary or revoke such an order where he or she considers that to do so would not be prejudicial to the public interest. (The onus of so persuading the Commission is on the applicant.) It was s. 171 that Mr. Pasquill invoked when he applied for the revocation of the preservation order in this case.

The COEA Exemption

- [14] The Commission set out the relevant sections of the COEA at para. 29 of its reasons as follows:

Section 71.3 of the COEA deals with enforcement against registered plans:

- (1) In this section:

...

"enforcement process" means

- (a) attachment,
- (b) garnishment,
- (c) execution,
- (d) seizure, or
- (e) any other remedy or legal process to enforce payment of a debt;

....

- (2) Despite any other enactment, all property in a registered plan is exempt from any enforcement process.
- (3) Subsection (2) does not apply

....

- (e) to an enforcement process arising from an order made under the Securities Act.

....

- (5) Subject to subsection (6), if a provision of this section is inconsistent or in conflict with a provision of another Act, the provision of this section prevails unless the other Act expressly provides that it, or a provision of it, applies despite this section.
- (6) Nothing in this section makes any property in a registered plan subject to an enforcement process if that property would not, but for this section, be subject to an enforcement process. [Emphasis added.]

[15] The Commission then set out s. 70 of the PBSA, which it noted "prohibits the disposition or attachment of benefits, pension funds and money transferred under the PBSA except in certain circumstances". Section 70 provides in part:

70 (1) Subject to subsections (3) to (6), the following must not be assigned, charged, alienated or anticipated and are exempt from execution, seizure or attachment:

- (a) benefits;
- (b) all or any portion of the pension fund;
- (c) money transferred under [various sections of the PBSA]

...[Emphasis added.]

[16] Section 4 of Schedule 2 of the PBSR addresses life income funds in particular:

4 (1) Money in this life income fund, including investment earnings, is for use in the provision of retirement income.

(2) Despite subsection (1), money may be paid or transferred from this life income fund in the following circumstances:

- (a) by way of a transfer to another life income fund on the applicable conditions set out in this addendum;
- (b) by way of a transfer to a locked-in retirement account;
- (c) by way of a transfer to an insurance company to purchase an annuity in accordance with section 7;
- (d) by way of a transfer to a pension plan if the plan text document of the plan allows the transfer;
- (e) in accordance with Part 4 of this addendum.

(3) Without limiting subsections (1) and (2) of this section and in accordance with section 70 of the Act, money in this life income fund must not be assigned, charged, alienated or anticipated and is exempt from execution, seizure or attachment. [Emphasis added.]

[17] Mr. Pasquill argued that the funds in his LIF account were exempt from any "enforcement process" within the meaning of s. 71.3 of the COEA and that s. 70 of the PBSA and s. 4(3) of Schedule 2 to the Regulation also exempted LIFs from "execution, seizure or attachment". In his submission, the preservation order came within the phrase "enforcement process" in s. 71.3 of the COEA and constituted an "execution, seizure or attachment" under the PBS legislation. For both these reasons, he submitted, the preservation order was illegal. (At para. 33.)

Exempt under COEA?

[18] Turning first to the COEA, the Commission addressed the question of whether a preservation order under the Act is an "enforcement process" as defined by s. 71.3. The Commission referred to dictionary definitions of the first four terms in subs. (1), noting that each of them constituted "an action taken for the purpose of realizing on a judgment or similar instrument". From this, the Commission found, each involved an action or step "beyond the maintenance of the status quo" and provided for "outcomes that are substantially different from a preservation order under the Act, which is intended specifically to preserve the existing state of affairs." The panel continued:

We find that the Preservation Order in and of itself does not constitute an "enforcement process" as contemplated by section 71.3(1) of the COEA. It merely restrains "dispositions or transmissions from the [LIF] Accounts or from any other accounts" held in the name of the Applicant at the Applicant's Wealth Management Firm. The accounts remain the same. The beneficiaries remain the same, and the property held in the accounts remains the same. The Preservation Order does

not purport to take any enforcement steps, but rather preserves assets for future legitimate claimants. As a result, section 71.3(2) of the COEA, which would prohibit an enforcement process taken against property in a registered plan, is not engaged. [At para. 39; emphasis added.]

- [19] The next question was whether, if the preservation order did constitute an "enforcement process" and was therefore subject to the exclusion in s. 71.3(2), it was nevertheless "saved" by the exception in s. 71.3(3) of the COEA. A plain reading of the statute, together with the "context and circumstances" of the recent amendments to it, led the Commission to conclude that any enforcement processes taken by it were exempted from the general prohibition in subs. (2) regarding registered plans. (At para. 41.)
- [20] As for s. 71.3(5), the Commission reasoned that since there was no reference in the PBSA or PBSR to that subsection, the COEA prevails "as intended by the legislature" and that if one applies the interpretive rule that the specific overrides the general, s. 71.3(3) of the COEA should prevail since "it speaks specifically to enforcement processes arising from an order made under the [Securities] Act." (At paras. 45-6.)
- [21] Finally, the Commission rejected the appellant's interpretation that s. 71.3(6) of the COEA 'negated' the powers given to the Commission by subs. (3)(e). The panel reasoned that it would not make sense that the Legislature would generally prohibit enforcement processes against registered accounts by subs. (2) only to exempt the Commission from that prohibition in subs. (3), and then negate the latter powers by way of subs. (6). Rather, the Commission agreed with the Executive Director that subs. (6) "simply ensures that nothing in s. 71.3 'creates' an enforcement process where none would otherwise exist." (At para. 48.)
- [22] In the result, the Commission ruled that the preservation order was not an "enforcement process", and that even if it was, such enforcement was expressly permitted by s. 71.3(3) of the COEA, which was more specific and therefore overrode the relevant provisions of the PBSA and PBSR.

Exemption Under PBSA and PBSR?

- [23] With respect to the applicability of s. 70 of the PBSA and s. 4 of Schedule 2 to the Regulation, the Commission again applied its view that the words "execution", "seizure" and "attachment" all suggested "an action that is of a nature different from the maintenance of the property in situ." The appellant relied on the dicta of Lord Denning in *Re Overseas Aviation Engineering (G.B.) Ltd.* [1962] 3 All E.R. 12 (C.A.) to the effect that "execution" refers simply to the process for enforcing or giving effect to the judgment of a court and is 'completed' when the judgment creditor "gets the money ... awarded to him by the judgment". However, the Commission found no support for the suggestion that a preservation order is an "execution". It also rejected the notion that a preservation order was akin to a Mareva injunction, given that the latter is a pre-judgment process in a civil action, while the preservation order in question here was made after a full hearing.

[24] Finally, I note that the Commission rejected an argument that it had not had the "jurisdiction" to issue a preservation order after it had filed its petition in the Supreme Court of British Columbia seeking forfeiture of Mr. Pasquill's LIF. On this point the Commission relied primarily on s. 164.03 of the Act, which provides:

A remedy exercised under this Part does not limit any remedy otherwise available to the commission by law.

[25] If followed that in the Commission's view, the preservation order was not "barred" by the exemption in the PBSA or PBSR. (At para. 56.) The Commission went on to deal with other issues raised by the appellant, but I need not recount them here. The preservation order was affirmed.

On Appeal

[26] Mr. Pasquill sought leave to appeal pursuant to s. 167 of the Act and was granted leave on three issues, namely:

- a) the nature of the Preservation Order, with respect to whether it amounts to "execution, seizure or attachment";
- b) whether or not the provisions of the COEA conflict with and take precedence over the PBSA and PBSR; and
- c) whether the registration of the judgment precludes the later making of a preservation order by the Commission.

[27] Since this is a statutory appeal and the grounds of appeal are all issues of statutory interpretation, the parties are in agreement that the applicable standard of review is one of correctness: see *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65 at para. 37.

Does a Preservation Order Amount to "Execution, Seizure or Attachment" Under Pension Benefits Standards Legislation?

[28] This issue is relevant not only to the PBSA and PBSR (collectively referred to as the "PBS legislation") but also to s. 71.3 of the COE. All these provisions refer to execution, seizure or attachment, and s. 71.3 defines all three (plus garnishment and "any other remedy or legal process to enforce payment of a debt") as constituting "enforcement process". Neither party contended that these words when used in the COEA should have a different meaning from the same words when used in the PBS legislation.

[29] The appellant advanced two arguments under this rubric. The first focussed on the public policy or policies underlying the PBSA and its exemption provisions, which the appellant says prevail over s. 71.3 of the COEA and other amendments introduced in 2019 in order to (in the Commission's words) "strengthen the Commission's powers" under the Securities Act. (At para. 42.) The appellant noted the function of LIFs as intended to provide for pensioners'

income and to protect against "execution, seizure or attachment" by creditors as part of a general 'locking-in' mechanism. Virtually all the provinces of Canada have adopted an exemption like that in s. 70(1) of the PBSA, and LIFs are specifically defined in the legislation and given particular protection by s. 4 of Schedule 2 to the Regulation. Subsections 4(1) and (3) thereof state:

4 (1) Money in this life income fund, including investment earnings, is for use in the provision of retirement income.

(3) Without limiting subsections (1) and (2) of this section and in accordance with section 70 of the Act, money in this life income fund must not be assigned, charged, alienated or anticipated and is exempt from execution, seizure or attachment. [Emphasis added.]

[30] Counsel referred us to a decision of the Manitoba Court of Appeal in *Telecommunication Employees Association of Manitoba Inc. v. Manitoba Telecom Services Inc.* 2007 MBCA 85, where the Court said this in connection with the pension plan assets of a Crown corporation that was being privatized by special Act:

This beneficial reason for sec. 15 cannot be disregarded. There are a legion of authorities dealing with the statutory or contractual interpretation of pensions which have emphasized the overriding importance of protecting employees' pension benefits. As an example, see *Sneddon v. British Columbia (Hydro and Power Authority)*, 2004 BCCA 292, [2004] B.C.J. No. 1046 (QL).

The sacrosanct nature of pensions has often been discussed in terms of "public policy legislation." The decision in *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), illustrates this point, describing the Ontario Pension Benefits Act as legislation "intended to benefit and protect the interests of members and former members of pension plans" (at p. 503). [At paras. 93-4; emphasis added.]

[31] As well, the appellant noted a statement from *GenCorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998) 158 D.L.R. (4th) 497 (Ont. C.A.), which was quoted with approval by the Supreme Court of Canada in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* 2004 SCC 54:

[T]he Pension Benefits Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures" . . . [At para. 13.]

[32] In this "carefully calibrated legislative and regulatory scheme", LIFs are a subset of RRIFs. The appellant correctly describes LIFs in his factum as follows:

LIFs are addressed in Part 9, Division 3 of the PBSR and in Schedule 2 to the PBSR. Under the regulations, only "locked-in money transferred from a pension plan" may be deposited into a LIF. LIF issuers are heavily regulated and must ensure that the LIF is administered in compliance

with the PBSA, PBSR and the ITA [Income Tax Act]. In each calendar year, there is both a minimum and a maximum amount that must be paid out from the LIF. The minimum is set according to the ITA minimum payment requirements. The maximum is set according to several factors, including investment returns and an actuarial calculation (the "withdrawal factor") based upon a 90-year life expectancy

See also Ari Kaplan and M. Frazer, *Pension Law* (3rd ed.) at 232.

[33] Unlike a regular RRIF, then, the assets in an LIF must be derived from a registered pension plan (as is the case in this instance) and are subject to both an annual minimum withdrawal obligation and a maximum withdrawal limit: see s. 123 of the Regulation. There are detailed rules respecting liabilities for inappropriate payments or transfers from LIFs (s. 124), the disposition of funds in an LIF where the owner dies or has a shortened life expectancy (ss. 125-7), and conditions under which withdrawals may be made for financial hardship (s. 129). Overall, the appellant contends, the intention of the LIF provisions in the PBS legislation is to "ensure that no one other than employees, pensioners, or beneficiaries receive[s] the proceeds of a pension and to constrain intended recipients from voluntarily diverting pension monies to another person in satisfaction of an external obligation." (Kaplan and Frazer at 247.)

[34] In terms of case law, the appellant referred us to the comments of Master Horn in *K.(C.M.) v. Young* (1996) 26 B.C.L.R. (3d) 92 concerning (then) s. 63 of the Pension Benefits Standards Act, S.B.C. 1991, c. 15, the wording of which was similar, though not identical, to s. 70 of the (present) PBSA. The Master inferred that the Legislature intended that "a pension benefit should not be diverted either by the voluntary act of the pensioner or by the coercive acts of the pensioner's creditors." He went on to observe that "execution, seizure or attachment" are "very wide words and I cannot discern in the statute any policy reason why they should be given a narrow meaning." (At para. 18.)

[35] Both parties referred to and relied on the "modern rule" of statutory interpretation as formulated by Professor Sullivan in *Sullivan on the Construction of Statutes* (6th ed., 2014):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament ... [At 7.]

Professor Sullivan went on to state:

Even if the ordinary meaning is plain, courts must also take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.

and added that:

Most often ... ordinary meaning refers to the reader's first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context -- in the words of Gonthier J., 'the natural meaning which appears when the provision is simply read through'. [At 28, 30.]

[36] In its reasons, the Commission referred at paras. 37, 38 and 41 to the "ordinary" and "grammatical and ordinary" sense of the words being considered, concluding that because each of "execution", "seizure", "attachment", and "garnishment" referred to actions beyond the maintenance of the status quo, the phrase "enforcement process" was not intended to include a preservation order. It will be recalled that in the Commission's analysis, such an order was intended simply to preserve "the existing state of affairs." (At para. 38.) As well, the Commission reasoned that the ordinary sense of the words "enforcement process" made it clear that any such order was specifically exempted from the protection accorded by s. 71.3(2) for "registered plans" by the new exception at s. 71.3(3) of the COEA. (At para. 41.)

[37] On this point, the Commission cited a portion of Hansard (British Columbia Legislative Assembly, Fourth Session, 41st Leg. 4th Sess. (28 October 2019)), where one government member told the Assembly:

Just to have a look again at what some of the new measures are, there's that enhanced ability to freeze and seize assets that fraudsters have tried to shield in the past by giving them to friends or family below market rate; seizing registered retirement plans; adding an ability to order administrative monetary penalties without a hearing for lesser contraventions; expanding access to funds to improve collections; directing ICBC to refuse to renew a driver's licence, for example, if a fraudster doesn't pay their fine; and giving, as I said, the BCSC priority over other claims from creditors.

There are a lot of tools here that we're going to be able to use to actually tackle the overall system, where there are lots of risks and loopholes that, again, affect all British Columbians, because of undermining trust in the system and taking away that financial security, taking away people's ability to rely on their own investments that they've spent their working lives building up and making sure they're looking after their own futures in retirement, for example.

and another stated:

Today's amendments will give the Securities Commission the most powerful tools. This will include the ability to freeze property if it was transferred to another person for less than fair value by a fraudster. The Securities Commission will then be able to follow the money and freeze property transferred to family members at any point. It will prevent the renewal or issuance of a person's driver's licence if their Securities Commission penalties have not been paid. It will give them priority over other claims from other creditors. Finally, it will allow seizing of registered retirement plans from fraudsters who have not paid their Securities Commission fines. [At pp. 259, 262; emphasis added.]

This policy was seen by the panel as informing the phrase "enforcement process" and supporting the conclusion at para. 45 of the reasons that because s. 71.3 of the COEA made no reference to the PBS legislation, the COEA was intended to prevail.

- [38] In this court, the Commission submitted that while the PBSA reflects a broad policy that pension funds should be protected to ensure income stability for pensioners, pension funds are "not sacrosanct" and that s. 70 of the PBSA and s. 4 of Schedule 2 to the Regulation should not be read expansively as though they were. Counsel noted that both the PBSA and Regulation expressly exempt certain family maintenance payments from the general protection given to pension funds. In the Commission's submission, its power to make a preservation order under the Securities Act constitutes a similar exclusion, "based on policy aimed at addressing the wrongs caused by persons who contravene the Securities Act."
- [39] Finally, the Commission submits that if the purpose of the exemptions in the PBS legislation is, in the words of Kaplan and Frazer, to "ensure that no one other than employees, pensioners or beneficiaries receive the proceeds of a pension", the preservation order does not offend that purpose because it does not disburse LIF funds to the Commission. Rather, the Commission says, the purpose of preservation orders is, like that of freeze orders before them, to maintain the status quo and ensure that the frozen property is not dissipated or destroyed "before the Commission is in a position to determine what, if any, further steps or orders in the public interest should be made under the [Securities] Act." (Quoting from the Commission's decision in *Re Amswiss Scientific Inc.* [1992] 7 BCSC Weekly Summary 12 at 21-2; see also *Exchange Bank & Trust Inc. v. British Columbia (Securities Commission)* 2000 BCCA 389 at para. 12.) In the words of the Commission's *factum* at para. 30, a preservation order simply gives it "the power to preserve and manage property that will be subject to some further action or step contemplated under the Securities Act." (My emphasis.)
- [40] This brings us back to the meaning of "execution, seizure and or attachment" in the PBS legislation, which words are defined collectively in the COEA as constituting an "enforcement process". The appellant submits that although the funds in Mr. Pasquill's LIF remain "in situ" at present, they have been frozen for the purpose of execution, as reflected in the fact that the Commission is now seeking their forfeiture. Obviously, to the extent they are frozen, they are no longer available for the purpose stated in s. 4(1) of Schedule 2 to the Regulation -- i.e., "for use in the provision of retirement income". Indeed, the preservation order makes it impossible for administration expenses and the minimum pension payment to be paid this year and presumably in future years, without the consent of the Commission. To this extent, the order is in direct conflict with the PBS legislation, as well as the Income Tax Act, which also requires minimum annual withdrawals from RRIFs.
- [41] I agree with the appellant that it is not correct to say the preservation order preserves the status quo and "does not purport to take any enforcement steps". Indeed, once a final sanction has been imposed, the preservation order is the first step in its enforcement. Under s. 164.10 of the Securities Act, the next step is for the Commission to seek a forfeiture order. According to s. 164.12, the Court must, subject to s. 164.13, make an order forfeiting to the

Commission "the whole or the portion of an interest in property that the court finds is property of the person."

[42] It follows, in my view, that a preservation order is part of the "execution process" referred to in s. 71.3 of the COEA and effectively amounts to a "seizure," and perhaps "attachment" and "execution," within the meaning of the PBS legislation. On the latter point, I note the reasoning of the Supreme Court of Canada in *Quebec (Attorney General) v. Larocche* 2002 SCC 72, which concerned the nature of special warrants of seizure under Part XII.2 of the Criminal Code. Sections 462.32 and 462.33 permitted police to impound property and prevent an owner from dealing with it, even before charges were laid, and to do so without prior notice to the owner. However, the owner could challenge the seizure before a judge, at which time the onus was on him or her to show that the warrant should not have been issued or that the property would no longer be required for any purpose relating to the criminal proceeding. Speaking for the majority, LeBel J. said this about the nature of such warrants:

... when the objectives of a restraint order are considered, there is no doubt that it may be characterized as a seizure within the meaning of s. 8. The name given to that order perhaps too easily invites a comparison to a mere restriction on the exercise [of] property rights. The conservatory nature of the order reinforces such an inclination. However, given that a restraint order is intended to supplement seizures that are taking place contemporaneously, and that they place property under the control of the justice system that might otherwise have eluded it, ... such an order must be characterized as a seizure within the meaning of s. 8 of the Charter.

First, a restraint order freezes the property. As provided in s. 462.33(3)(a) (now s. 462.33(3)), it prohibits disposing of or dealing with the property in question otherwise than as specified by the court. The person in possession of the property is then reduced to the status of caretaker or administrator of his or her own property, and must even obtain judicial permission to receive income or resources from it. As we saw earlier, that person must bring an application in order to be able to do so, under s. 462.34(4) Cr. C. As well, under s. 462.33(3)(b) (now s. 462.33(1)), a judge may order that the management of the property be transferred to a person appointed by the judge. In that case, the decision involves a straightforward change in possession away from the person in possession of the property. In both cases, the property is placed under the legal and actual control of the criminal justice system. Moreover, the objectives of this measure for exercising control are twofold. First, Parliament intended to facilitate criminal investigations, by enacting procedural provisions that make property, and information about it, more readily accessible to the police and the Crown. Second, the purpose of those procedures is to prevent the disappearance or wasting of the property. Doing this makes it possible to punish the crimes in question more effectively, and facilitates the enforcement of the orders of forfeiture that may be made in future. We can conclude from those characteristics, and the context and objectives, that a restraint order must be regarded as a seizure within the meaning of s. 8 of the Charter. [At paras. 54-5; emphasis added.]

Similar reasoning applies, in my opinion, to preservation or freeze orders under the Act.

- [43] The Commission itself has acknowledged that a freeze order has "serious and immediate consequences" both to the owner of the property involved and possibly to third parties: see *Exchange Bank & Trust* at para. 12. Indeed, this court recently described a freeze order (made in the investigation stage) as "so intrusive that it has been described by some courts as draconian": see *Party A v. British Columbia* 2021 BCCA 328 at para. 269. Although we are here concerned with a preservation order made at a later stage, its consequences are no less serious.
- [44] Given the foregoing, I am of the view that the Commission erred in law in finding that a preservation order does not come within the scope of "enforcement process". In my opinion, a preservation order is part of the "enforcement process" available to the Commission under the Act, and as such falls within the ambit of s. 71.3 of the COEA. It would therefore normally fall within the exclusion in s. 71.3(2) for property in registered plans and within the exception to that exclusion in s. 71.3(3) for an enforcement proceeding arising from an order made under the Securities Act. I also find that a preservation order constitutes at least a "seizure" for purposes of s. 70(1) of the PBSA and s. 4(3) of Schedule 2 to the PBSR. It is not necessary to decide whether it qualifies as "attachment" or "execution" as well.

Conflict and Precedence

- [45] The second issue on which leave was granted is the more difficult question of whether s. 71.3 of the COEA conflicts with and takes precedence over s. 70 of the PBSA and s. 4 of Schedule 2 to the PBSR. The central part of the Commission's reasoning on the 'conflict' point is found at paras. 45 and 46 of its decision, which I reproduce here for convenience:

The Applicant submits that the provisions of the PBSA and the PBSR that prohibit execution, seizure or attachment of registered plans stand apart from the COEA, but section 73.1(5) of the COEA provides that, subject to subsection (6), section 71.3 prevails if it is inconsistent with another act, unless that other act expressly provides that it applies despite section 71.3. There is no reference to section 71.3 of the COEA in the provisions of the PBSA or PBSR cited by the Applicant. Accordingly, we find that the COEA prevails as intended by the legislature.

The Applicant also argues that, in the case of conflict between the COEA and the PBSA, we should resort to the specific provision over the general. We agree. We find that section 71.3(3) of the COEA is the more specific provision, in that it speaks specifically to enforcement processes arising from an order made under the Act. [At paras. 45-6; emphasis added.]

- [46] The appellant contends first that the addition of s. 71.3(3)(e) of the COEA has the effect -- and only the effect -- of denying him the ability to rely on the exemption in s. 71.3(2) for property in a registered plan. He acknowledges that as of March 27, 2020, he may not rely on the general exemption in s. 71.3(2) for "all property in a registered plan". However, subs. (3) is not, like subs. (2), stated to apply "despite any other enactment". As a result, the appellant says, it is open to him to rely on other applicable exemptions in other legislation -- here, the

PBS legislation. Thus in relying on s. 71.3(3)(e) to make Mr. Pasquill's LIFs subject to an "enforcement process", the appellant submits the Commission is "inverting" the purpose of subs. 5 and 6 of s. 71.3. Section 71.3(5) is "subject to" s. 71.3(6), which states that nothing in s. 71.3 makes any property in a registered plan subject to enforcement process "if that property would not, but for this section, be subject to an enforcement process".

- [47] The Commission responds that this interpretation of s. 71.3 does not give effect to the principle of statutory coherence and if correct, would render s. 71.3(5) of the COEA "meaningless". In the Commission's argument, if the COEA provisions were in fact a "stand-alone scheme" such that they deal only with matters within that statute, the COEA would not have included a provision to the effect that the COEA 'scheme' takes priority "over any other provision with which it comes into conflict." The Commission says that that is effectively what s. 71.3(5) says.
- [48] A quick reading of the section might suggest that the Commission is correct. On closer examination, however, the fact remains that s. 71.3(6) is restricted to anything "in this section". As the appellant contends, s. 71.3(3)(e) must therefore be read as creating an exception only to the prohibition against enforcement contained in s. 71.3(2). The exception does not extend to prohibitions against enforcement contained in the PBS legislation, which is therefore not affected by the addition of s. 71.3(3)(e) to the COEA. If this is correct (as I believe it is), there is no genuine conflict between anything contained in s. 71.3 of the COEA and the subject provisions in the PBS legislation.
- [49] Even if this were not correct, it seems to me that the Commission erred in law in characterizing s. 71.3(3) of the COEA as more specific than the relevant exemptions in the PBS legislation. Professor Sullivan, *supra*, describes the rule known as *generalia specialibus non derogant* as follows:

When two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be resolved by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first. In the absence of conflict, a specific provision prevails over a general one only if applying the general provision would render the specific one superfluous.

This strategy for the resolution of conflict is usually referred to by the Latin name *generalia specialibus non derogant*. The English term "implied exception" is adopted here because, in effect, the specific provision implicitly carves out an exception to the general one. [At 363-4.]

The author goes on to observe that where one of the conflicting provisions is specifically addressed to the matter in question and deals with it in a detailed or comprehensive way while the other is broader or operates at a more general level, the question is usually easy to answer. (Citing *R. v. Canadian Broadcasting Corp.* [1992] 72 C.C.C. (3d) 545 (Ont. Gen. Div.) *aff'd* (1993) 84 C.C.C. (3d) 574 (Ont. C.A.).

[50] In the case of s. 70 of the PBSA, the exemption is restricted to the disposition or attachment of "benefits, pension funds and money transferred under the PBSA" and in s. 4 of Schedule 2 of the Regulation, it is restricted even further to LIFs. In my respectful view, these have a much narrower focus than anything in s. 71.3 of the COEA. As the appellant contends in his factum:

The PBSA is the specific enactment. As outlined at para. 36, above, the PBSA and PBSR are "a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans", which minimum standards including "locking-in" requirements and mechanisms: Sneddon, para. 103. The PBSA is a 133-clause statute dealing exclusively with pension benefits. The PBSR is a 143-clause regulation dealing exclusively with pension benefits. It is thus obvious that the legislature has chosen to legislate and regulate pension benefits through the 276 pension-specific provisions of the PBSA and PBSR, and not the COEA, which does not contain a single reference to pensions, or pension benefits. The reasoning employed by the Commission at para. 46 of the Appealed Decision [A.R. p. 92] ignores this fact and is Securities Act-centric. [Emphasis added.]

I also fail to see the logic of the notion that because the PBS legislation was not mentioned in the COEA, the Legislature must have intended that the latter would prevail.

[51] It would have been an easy matter for the Legislature to except debts arising under the Securities Act among the exceptions that exist in the PBS legislation, as it did with respect to orders under the Family Maintenance Enforcement Act. Having failed to do so, the legislation must in my opinion be taken as meaning that the Commission does not have the authority to enforce judgments against plans that are derived from pension funds. These of course engage important public policy objectives and, again as the appellant notes, pension funds, like LIFs, are unlikely to be derived from participation in capital markets or breaches of the Securities Act. I do not suggest that these policy considerations are more important or pressing than the objectives underlying preservation orders under the Securities Act; but I do find that, construing the statutes in accordance modern interpretative rules, the PBS legislation prevails over the amended COEA. In this way, any conflict is resolved.

Disposition

[52] In the result, I would allow the appeal and set aside the preservation order as falling outside the Commission's statutory authority.

[53] I leave for another day the third ground of appeal concerning whether the Commission's filing of the Sanction Decision in the Supreme Court of British Columbia precluded it from making the preservation order.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Fisher"

I agree:

"The Honourable Mr. Justice Butler"

Schedule of Legislation

Securities Act, R.S.B.C. 1996, c. 418

164.04 (1) In the circumstances set out in subsection (2) or (3), the commission may make one or more orders under subsection (4) in relation to

- (a) the whole or a portion of the interest in property of a person referred to in subsection (2),
 - (b) the property in which the whole or a portion of the interest in property of a person referred to in subsection (2) is held,
 - (c) the whole or a portion of the interest in claimable property of a family member or third-party recipient, or
 - (d) the property in which the whole or a portion of the interest in claimable property of a family member or third-party recipient is held.
- (2) The commission may make an order under subsection (4) in respect of a person if any of the following apply:
- (a) the commission proposes to order an investigation under section 142 in respect of the person;
 - (b) an investigation under section 142 or 147 has been ordered in respect of the person;
 - (c) the commission or the executive director proposes to make or has made an order under section 161, 162 or 162.04 in respect of the person;
 - (d) the executive director has given a notice under section 162.01 to the person;
 - (e) criminal proceedings or proceedings in respect of a contravention of this Act or the regulations are about to be or have been commenced against the person, and the commission considers the proceedings to relate to a security or derivative or a matter relating to trading in securities or derivatives, or to relate to any business conducted by the person relating to securities or derivatives;
 - (f) the person fails or neglects to comply with financial conditions applicable to the person under this Act;
 - (g) the commission proposes to apply or has applied to the court for an order under section 157 in respect of the person, or the court has made an order under section 155.1 or 157 in respect of the person.

- (3) The commission may make an order under subsection (4) in respect of a family member or third-party recipient that received claimable property from a person if any of the following apply:
 - (a) the commission proposes to order an investigation under section 142 in respect of the person;
 - (b) an investigation under section 142 or 147 has been ordered in respect of the person;
 - (c) the commission or the executive director proposes to make or has made an order under 161 (1) (g) in respect of the person;
 - (d) the commission proposes to apply or has applied to the court for an order under section 157 in respect of the person, or the court has made an order under section 155.1 or 157 in respect of the person.
- (4) In the circumstances set out in subsection (2) or (3), the commission may make one or more of the following orders relating to the preservation, management or disposition of property or the whole or a portion of an interest in property:
 - (a) an order restraining the disposition or transmission of the property or the whole or the portion of the interest in property;
 - (b) an order for the possession, delivery to the commission or safekeeping of the property;
 - (c) an order for the disposition of the property or the whole or the portion of the interest in property in order to better preserve the value of the property or the whole or the portion of the interest in property;
 - (d) an order directing that money arising from a disposition of property or the whole or the portion of the interest in property under paragraph (c) be paid to the commission pending the conclusion of any matter or proceeding;
 - (e) an order the commission considers appropriate to prevent the property from being removed from British Columbia;
 - (f) an order the commission considers appropriate for the preservation of
 - (i) the property or the whole or the portion of the interest in property, or
 - (ii) the value of the property or of the whole or the portion of the interest in property.
- (5) In an order under this section in respect of property of a third-party recipient, with respect to the conduct or omission that is the subject of the proposed investigation, investigation or proceeding, the commission must specify,
 - (a) in the case of conduct, the date the conduct first occurred or is suspected to have first occurred, or

- (b) in the case of an omission, the date the person failed to act or is suspected to have failed to act.
- (6) An order of the commission under subsection (4) does not apply to funds, securities, derivatives or other property in a clearing agency or to securities in process of transfer by a transfer agent unless the order expressly states otherwise.

164.12 Subject to section 164.13,

- (a) if proceedings are commenced under section 164.10 (1), the court must make an order forfeiting to the commission the whole or the portion of an interest in property that the court finds is property of the person, or
- (b) if proceedings are commenced under section 164.10 (2), the court must make an order forfeiting to the commission the whole or the portion of an interest in property that the court finds is claimable property.

171 If the commission, the executive director or a designated organization considers that to do so would not be prejudicial to the public interest, the commission, executive director or designated organization, as the case may be, may make an order revoking in whole or in part or varying a decision the commission, the executive director or the designated organization, as the case may be, has made under this Act, another enactment or a former enactment, whether or not the decision has been filed under section 163.

Court Order Enforcement Act, R.S.B.C. 1996, c. 78

71.3 (1) In this section:

"DPSP" means a deferred profit sharing plan as defined in section 147 of the federal Act;

"enforcement process" means

- (a) attachment,
- (b) garnishment,
- (c) execution,
- (d) seizure, or
- (e) any other remedy or legal process to enforce payment of a debt;

"federal Act" means the Income Tax Act (Canada);

"planholder" means

- (a) with respect to a DPSP, a beneficiary under the plan,
- (b) with respect to an RRIF, an annuitant as defined in paragraph (a) of the definition of "annuitant" in section 146.3 (1) of the federal Act, and

- (c) with respect to an RRSP, an annuitant as defined in paragraph (a) of the definition of "annuitant" in section 146 (1) of the federal Act;

"registered plan" means a DPSP, an RRIF or an RRSP, whether registered before, on or after November 1, 2008;

"RRIF" means a registered retirement income fund as defined in section 146.3 of the federal Act;

"RRSP" means a registered retirement savings plan as defined in section 146 of the federal Act.

- (2) Despite any other enactment, all property in a registered plan is exempt from any enforcement process.

- (3) Subsection (2) does not apply

- (a) to property contributed to a registered plan after or within 12 months before the date on which the debt being enforced came due,

- (b) to property that has been or is being paid out of a registered plan,

- (c) to an enforcement process that is being effected in support of the enforcement of a maintenance order as defined in the Family Maintenance Enforcement Act,

- (d) to an enforcement process initiated against a registered plan before November 1, 2008, or

- (e) to an enforcement process arising from an order made under the Securities Act.

- (4) For the purposes of subsection (3) (b),

- (a) a transfer of property from a registered plan of the planholder

- (i) to another registered plan of the planholder, or

- (ii) after the death of the planholder, to the planholder's spouse or common-law partner as defined in section 248 of the federal Act who, under the terms of the registered plan, is entitled to receive that property on the planholder's death,

does not constitute a payment of that property out of a registered plan, and

- (b) if an enforcement process is pursued against property being paid out of a registered plan of a planholder, that property is deemed, for the purposes of that enforcement process and Part 1 of this Act, to be a debt due to the planholder for or with respect to the salary or wages of the planholder.

- (5) Subject to subsection (6), if a provision of this section is inconsistent or in conflict with a provision of another Act, the provision of this section prevails unless the other Act expressly provides that it, or a provision of it, applies despite this section.

- (6) Nothing in this section makes any property in a registered plan subject to an enforcement process if that property would not, but for this section, be subject to an enforcement process

Pension Benefits Standards Act ("PBSA"), S.B.C. 2012, c. 30

70 (1) Subject to subsections (3) to (6), the following must not be assigned, charged, alienated or anticipated and are exempt from execution, seizure or attachment:

- (a) benefits;
- (b) all or any portion of the pension fund;
- (c) money transferred under
 - (i) section 57 (4) (b), (c) or (d), 79 (1) (a) (i) or (3) or 89.1,
 - (ii) Division 7 of this Part, or
 - (iii) Part 9.
- (2) A transaction purporting to assign, charge, alienate or anticipate benefits or other assets referred to in subsection (1) is void.
- (3) Subsections (1) and (2) do not apply to
 - (a) additional voluntary contributions,
 - (b) optional ancillary contributions, or
 - (c) an agreement or court order providing for a transfer of entitlement between a member and a spouse or former spouse because of a breakdown of their relationship.
- (4) Despite subsection (1), the following may be attached by a notice of attachment under section 15 of the Family Maintenance Enforcement Act, an order of garnishment under section 18 (2) of that Act or an attachment order under section 24 of that Act:
 - (a) any payment in the series of payments that constitutes a pension;
 - (b) any payment under section 76;
 - (c) any payment that forms part of a phased retirement benefit within the meaning of section 83 (1);
 - (d) a payment under section 57 (4) (a) or (6) (b);
 - (e) a return of a contribution under section 59;
 - (f) a withdrawal, a payment or any payments in a series of payments under section 69 (1), (2), (3) or (4).
- (5) Despite subsection (3) (a) and (b) of this section, additional voluntary contributions and optional ancillary contributions made before, on or after November 1, 2008 are exempt from execution, seizure or attachment unless

- (a) the additional voluntary contributions or optional ancillary contributions were made after, on or within 12 months before the date on which a debt came due and the execution, seizure or attachment is to enforce payment of that debt,
- (b) the additional voluntary contributions or optional ancillary contributions have been or are being withdrawn from a pension plan,
- (c) the execution, seizure or attachment is by
 - (i) a notice of attachment, order of garnishment or attachment order referred to in subsection (4), or
 - (ii) any other process to enforce a maintenance order as defined in the Family Maintenance Enforcement Act, or
- (d) the execution, seizure or attachment was initiated against the additional voluntary contributions or optional ancillary contributions before November 1, 2008.
- (6) For the purposes of subsection (5) (b),
 - (a) if additional voluntary contributions or optional ancillary contributions are transferred by a person to any of that person's registered plans, within the meaning of section 71.3 of the Court Order Enforcement Act, that transfer does not constitute a withdrawal of those additional voluntary contributions or optional ancillary contributions from a pension plan, and
 - (b) if execution, seizure or attachment is pursued against additional voluntary contributions or optional ancillary contributions being withdrawn from a pension plan by a member, those additional voluntary contributions or optional ancillary contributions are deemed, for the purposes of that execution, seizure or attachment and Part 1 of the Court Order Enforcement Act, to be a debt due to the member for or with respect to the member's salary or wages.
- (7) A transaction purporting to effect a withdrawal, surrender or commutation referred to in section 68 (1) (a) or (b) is void.
- (8) If this Act requires an amount to be withheld, deducted, paid or credited, an agreement or arrangement not to withhold, deduct, pay or credit that amount, made by the person on whom the requirement is imposed, is void.

Pension Benefits Standards Regulation ("PBSR")

Schedule 2

Pension Benefits Standards Regulation Life Income Fund Addendum

4 (1) Money in this life income fund, including investment earnings, is for use in the provision of retirement income.

- (2) Despite subsection (1), money may be paid or transferred from this life income fund in the following circumstances:
- (a) by way of a transfer to another life income fund on the applicable conditions set out in this addendum;
 - (b) by way of a transfer to a locked-in retirement account;
 - (c) by way of a transfer to an insurance company to purchase an annuity in accordance with section 7;
 - (d) by way of a transfer to a pension plan if the plan text document of the plan allows the transfer;
 - (e) in accordance with Part 4 of this addendum.
- (3) Without limiting subsections (1) and (2) of this section and in accordance with section 70 of the Act, money in this life income fund must not be assigned, charged, alienated or anticipated and is exempt from execution, seizure or attachment.
- (4) The life income fund issuer must comply with any applicable requirements of the Act and the Regulation before allowing a payment or transfer of any of the money in this life income fund.
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