Court of Appeal finds the British Columbia Securities Commission treated the appellants unfairly: No sheltering behind deference

November 27, 2024

On November 15, 2024, in *Morabito v. British Columbia (Securities Commission)*, the Court of Appeal for British Columbia allowed the appeals from a decision of the British Columbia Securities Commission because the procedure adopted by the Commission panel hearing the appellants' abuse of process applications denied the appellants a fair hearing. The Court's decision confirmed that while deference is generally owed to administrative tribunals such as the Securities Commission, the courts must and will step in when the Commission uses its powers unfairly. BLG represented Mark Morabito in this matter.

What you need to know

- The Commission is empowered to create a procedure to best determine the applications before it; however, the deference owed to tribunals such as the Commission will give way when those powers are used unfairly.
- Where there are credible allegations of investigative misconduct, the evidentiary burden shifts to the Executive Director to respond in a meaningful way, including by being required to call the involved investigators and others who were involved to answer the allegations in cross-examination.

Background: The subject of the Commission's investigation and the abuse of process applications.

The proceedings underlying this appeal have been protracted.

In February 2018, Mr. Morabito, then the chairperson of Global Crossing Airlines Group Inc., formerly known as Canada Jetlines Ltd. (Jetlines), a planned low-cost airline trading on the TSX Venture Exchange, transferred Jetlines shares to his spouse. Mr. Morabito, as an insider, properly reported the trade.

In August 2018, the Commission issued an investigation order to investigate allegations of insider trading against Mr. Morabito, his wife and Jetlines. The investigation that ensued was slow to advance.

In January 2021, the Morabitos sought to revoke the investigation order. The application was dismissed by the Commission. The Morabitos brought an appeal from that order to the Court of Appeal. The appeal was dismissed, but the Court said that the Morabitos' allegations concerning the investigation – "that it was proceeding at a 'glacial pace'; that the director's tactics, if not abusive, were heavy-handed and unprofessional; and that if the director had in fact wished to 'get to the truth', he should have spoken to the Morabitos' investment advisor" – were "not without some justification".

In October 2021, the Commission issued a Notice of Hearing naming Mr. Morabito and Jetlines as respondents. Through protracted document production applications, the appellants were able to establish that the Executive Director knew several months before issuing the notice of hearing that the former CEO of Jetlines, a material witness, was terminally ill, yet never told the appellants, despite the fact that proceedings to set aside the investigation order were ongoing. The notice of hearing was only issued after the CEO died.

In March 2023, Mr. Morabito and Jetlines each brought applications before the Commission alleging the Commission proceedings were an abuse of process and seeking to stay the proceedings. The conduct of the hearing of the abuse applications and the Commission's decision dismissing the abuse applications were the subject of the appeal.

Blended hearing endorsed by the panel was "fundamentally flawed" and "violated rules of procedural fairness"

The Court agreed with the appellants that the process established by the panel hearing the abuse applications was flawed and violated basic rules of procedural fairness. The Executive Director requested and the panel endorsed a "blended hearing" that permitted the Executive Director to call his case on liability together with his response to the abuse applications.

The Court found that while the panel may control its own process and is empowered to create a procedure that it considers best enables it to determine the abuse applications, it also has a duty to create a fair procedure that allows targets like the appellants in this case to fully advance their claims, including allegations of abusive conduct. That is especially the case where, as the Court found here, "there is a credible basis supporting allegations of state misconduct".

Three examples of procedural unfairness that resulted in a "manifestly unfair hearing"

The Court gave three examples of how the process imposed by the Commission panel resulted in a manifestly unfair hearing:

1. The sole witness called by the Executive Director was assigned to the matter after the notice of hearing had been issued and had no first-hand knowledge of the investigation nor the steps that were taken. The Court found that the Executive Director had shielded the Commission investigators and others from answering the allegations made by the appellants that required the Executive Director to respond in a meaningful way.
2. The Court found that the appellants' ability to cross-examine the single witness called by the Executive Director was stymied by objections launched by the Executive Director and sustained by the panel to questions that were relevant to the abuse allegations. The appellants were prevented from advancing their abuse of process claims and exploring legitimate avenues of cross-examination relevant to the allegations they raised. The Court agreed with the appellants that the problem presented by the blended hearing was exacerbated by the panel "filling in" the evidentiary gaps left by the Executive Director who did not tender any evidence to counter the abuse allegations. For example, the Court found that the panel had impermissibly speculated about the reason behind the Executive Director's non-disclosure of the terminal illness and subsequent death of the CEO, a material witness, and otherwise sought to excuse the Executive Director's approach with reasons that were not supported in the evidence.
3. The scope of the abuse applications was impermissibly narrowed such that the conduct of the investigators was shielded from scrutiny. The Court found that there were a number of issues that constituted the basis for the abuse applications, including the undisclosed terminal illness of a potentially material witness, complaints about disclosure failures, and alleged misconduct during the investigation – all of which required answers from the Executive Director.

Conclusion: The Commissions unfair procedures require a remedy

The Court ultimately found that the appellants were placed in an impossible position and never got the hearing to which they were entitled with respect to the abuse applications. The appellants requested that the Court find an abuse of process on the record before it and stay the Commission proceedings permanently. Instead, the Court ordered that:

- the panel's decision be set aside;
- the appellants be entitled to start their abuse of applications afresh; and
- the matter be remitted to a newly-constituted panel of the Commission to proceed with a hearing to determine the abuse of process applications in accordance with the Court's reasons, including that the appropriate witnesses be made available for cross-examination by the Executive Director.

The BLG team representing Mr. Morabito in this matter included Robert J.C. Deane and Paige Burnham.

By

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