November 5, 2014

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: ARTHUR LEON SCHELLENBERG

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

Panel:

Panel Chair:	Mr. D.G. Murray
Member:	Mr. J.W. Hedley
Member:	Mr. B.P. Cyncora

Appearances:

S. Gingera	)	Counsel for Commission Staff
Dave Hill and Sherri Walsh	)	Counsel the Respondent

This matter was originally commenced by a Notice of Hearing and Statement of Allegations of Staff of The Manitoba Securities Commission each dated November 18, 2013. The first appearance took place in the present of counsel for staff and Arthur Leon Schellenberg ("Schellenberg") resulting in an adjournment to January 29, 2014. After a further adjournment, the hearing reconvened on March 5, 2014 and the panel was advised that legal counsel had been retained by Schellenberg. The matter was again adjourned to April 30, 2014 and the dates of June 23rd & 24th, 2014 were set aside at the request of Schellenberg's counsel for the determination of certain issues prior to any hearing on the merits of staff's Notice of Hearing.

The allegations included in the Statement of Allegations were that Schellenberg:

(a) traded in securities without having been registered under the The Securities Act (the "Act");

(b) acted as a securities adviser and/or adviser under the Act without being registered;

(c) acted in a manner contrary to the public interest;

and due to these allegations, it is in the public interest that Schellenberg not be entitled to access any of the exemptions in the Act and should not be entitled to participate in the exempt markets in the future.

Staffs further request an order that Schellenberg pay an administrative penalty pursuant to section 148.1 of the Act.

By Notice of Motion dated April 28, 2014, Schellenberg brought a motion for an Order staying these proceedings.

The grounds set out in his motion are as follows:

(a) The totality of the dealings by Commission Staff ("Staff") with Respondent from 2001 to 2013, demonstrates a violation of procedural fairness and constitutes an abuse of process. In particular:

(i) The activity which Staff alleges in these proceedings has contravened the Act, is activity which Staff previously advised the Respondent, did not contravene the Act – namely – the ability to hold Powers of Attorney for clients' investment accounts;

(ii) Notwithstanding repeated requests by the Respondent and/or his counsel to discuss and be provided with Staff's interpretation of the exemptions available to chartered accountants when advising clients regarding their investments, Staff failed to provide its interpretation, thereby depriving the Respondent of an ability to ensure compliance with Staff's interpretation of The Securities Act, Regulations and Rules;

(iii) Notwithstanding its knowledge by 2001, of the type of client related activity the Respondent was conducting, Staff allowed the

Respondent to continue with that activity for eleven years before issuing a formal Investigation Order and twelve years before commencing these proceedings;

(iv) Staff has intentionally interfered with Respondent's economic and professional interests during the conduct of the investigation which led to these proceedings;

(v) Staff issued and published a Notice of Hearing and Statement of Allegations recklessly and without conducting a thorough investigation; and

(vi) The delay in commencing these proceedings has prejudiced the Respondent by impeding his ability to respond to or defend the allegations made against him and therefore violates procedural fairness and constitutes an abuse of process.

This of course is a preliminary motion and no conclusion will be reached as to the merits of staff's allegations. The facts that pertain to this motion focus on a history of dealings between Schellenberg and staff which dates back to 2001. We have been presented with details regarding these dealings with the assistance of affidavit evidence and documents such as letters and emails. The facts referred to us by counsel for Schellenberg and staff are contained in no less than five affidavits and the transcript of an interview of Schellenberg conducted on May 28, 2014.

It is, of course, of critical importance to Schellenberg's motion that we direct our attention to, not only the significant passage of time between 2001 and 2014, but also as to the details of communications, or lack thereof, passing between the parties during that time.

From 2001 through 2003, Schellenberg and Commission staff did some communicating back and forth in various ways. The subject matter of most communications was the framework within which Schellenberg might be able either to assist his clients with their investments or avail himself of exemptions under the Act. If there is an impression which Schellenberg wishes this panel to have taken from evidence of "communications" from 2001 to 2003 it is of a very "honest and forthcoming" Schellenberg presenting himself to staff trying in vain to obtain clarification in respect of the aforementioned exemptions and framework within which his activities had to be confined.

The process began in May of 2001 subsequent to an interview between staff and Schellenberg. During the course of that interview Schellenberg advised staff that he had trading authority on a certain individual's account with TD Waterhouse. He indicated that he had power of attorney over another client's account with TD Waterhouse and wanted to make it clear that he wished to be educated as to what he might be able to do, specifically as a chartered accountant or otherwise, regarding trading authorities, and that he did not want to be "offside with The Manitoba Securities Commission".

In June of 2001 he met with staff to discuss interpretation of the exemption for Chartered Accountants under paragraph 18(b) of The Securities Act. He received a letter subsequent to that meeting dated June 19, 2001 over the signature of Glenn Lillies, then a Compliance Auditor with the Commission. The letter is attached as an Exhibit to Schellenberg's affidavit. In it Mr. Lillies stated to Schellenberg that: "Commission staff are of the view that, by having trading authority over these accounts, the advice only aspect of the exemption has been exceeded."

After receiving the letter, Schellenberg had a further conversation with staff on June 21, 2001. The conversation was with Mr. Lillies who prepared a memorandum in which Mr. Lillies himself stated that he had advised Schellenberg that "full power of attorney" would not raise a concern on the part of staff but that it was "trading authority granted on the brokerage accounts of his other clients that was the concern."

Mr. Schellenberg later contacted the Commission through Pitblado, Buchwald, Asper by a letter dated August 31st over the signature of Richmond Bayes. The letter expressed doubt as to whether Schellenberg would be required to register under the Act in light of the "accountant's exemption" described in the letter.

Schellenberg apparently had no further communications with staff until March 27, 2002, the date of a letter from the Commission, again from Mr. Lillies, reminding Schellenberg of staff's impression that he had planned to divest himself of trading authority on his client accounts at brokerage firms, requesting a reply by April 15, 2002. His response to that letter was a letter under his firm's letterhead dated April 18, 2002 in which he indicated that staff's impression was incorrect inasmuch as he had not stated that he would divest himself of trading authority but rather that he would be involved in trading only for accounts in which he had a financial interest or powers of attorney. In this letter, the first evidence of ill feeling between Schellenberg and staff comes to light in the form of Schellenberg's reference to "Gestapo tactics".

Mr. Lillies replied on August 24, 2002. The letter purported to have enclosed with it current requirements to become registered in Manitoba as "investment counsel". According to Schellenberg the two of them followed up Mr. Lillies' letter by telephone. As a result of the conversation, Schellenberg states that he made the following notation on his copy of the letter:

> "MSC
> Power of Attorney – Ok
> Trading Authority – No"

No further communication between Schellenberg and staff took place until early 2003. Schellenberg states that he became aware that staff had been contacting his clients. As a result, Schellenberg's lawyer, Tom Kormylo requested a meeting with staff by letter dated February 3, 2003: "I understand you have been contacting Mr. Schellenberg's clients and I would like to discuss that with you……."

The response to Mr. Kormylo's letter was a letter from staff dated February 11, 2003, from Lyle Martin, a staff investigator. Mr. Martin was critical of Schellenberg's activities, a criticism which he indicated had been conveyed to Schellenberg in

person in January, 2003, and suggested that a Cease Trade Order might be sought as a result of Schellenberg's continuing activities.

What ensued was a series of letters between Messrs. Kormylo and Martin in which were discussed a voluntary undertaking on Schellenberg's part to cease all trading activities, the only point of contention being the duration of Schellenberg's undertaking. Mr. Martin concluded his letter of February 24, 2003 by inviting Schellenberg to attend his office for a formal interview.

A more lengthy letter dated February 24, 2003 was then sent by Mr. Kormylo to Mr. Martin which resisted the concept of an indefinite period for his undertaking, requesting particulars of the complaints with which Mr. Martin was apparently dealing and indicating that both Messrs. Kormylo and Schellenberg are "fully prepared to attend at your offices to address the allegations."

At the end of February, the first of a series of three letters between Mr. Kormylo and Doug Brown, Director (Legal) was written. The last letter dated March 7, 2003 from Mr. Brown to Mr. Kormylo stated that "it is clearly premature to begin discussions with respect to the extent of the registration exemption……..as staff's investigation into this matter is ongoing." In the second of those three letters, Mr. Kormylo stated: "Mr. Schellenberg has never had any intention of knowingly breaching the Act, and certainly intends to comply with the requirements of the Act in the scope of the exemption. Your cooperation in facilitating that intention would be appreciated."

Again, Schellenberg portrays the foregoing facts as a series of frustrated attempts on his part to stay on side of the Act only to be turned back at every turn, and finally with some finality by staff who appeared to be unwilling to assist him in any way other than to indicate vaguely that he could continue to assist his clients over whom he had full power of attorney.

Unbeknownst to Schellenberg at the time, an Investigation Order had been issued by the Commission on January 15, 2003 ordering staff investigators "to investigate and enquire into all circumstances surrounding the apparent trading in securities" by Schellenberg or any company with which Schellenberg was affiliated or associated.

In the meantime, there were some further attempts by Schellenberg to contact staff by telephone and request a meeting which requests were apparently refused. Thus began the period of time spanning to 2012 during which, according to Schellenberg's Appeal Brief, he "received no further contact from staff about these or related matters until February 2012".

In 2013, the investigation, at least as it appeared to Schellenberg, resumed and Schellenberg was clearly irritated over the affects which staff's investigations prior to 2013 and moving forward were having on his business, on his clients and on his reputation. He had a conversation with Chris Besko, a staff lawyer and left a telephone message with Doug Brown expressing dismay over the investigation activities of staff. As stated in Schellenberg's Motion Brief, "several of Schellenberg's clients have expressed concerns to him about the manner in which staff has dealt with them during your investigation in 2012 and 2013." It even reached the point at which staff allegedly told a client of Schellenberg's that he ought to stop using Schellenberg as his accountant.

Generally, these facts, in Schellenberg's submission, have amounted to an unfair process and that administrative bodies such as the Commission have "an obligation to ensure that their proceedings are fair and they do not bring the administration of justice into disrepute". Regarding these facts, there is no dispute over the passage of time between 2001 when Schellenberg was first contacted by Commission staff and 2013 when the Notice of Hearing finally issued. Staff do not deny speaking to many of Schellenberg's clients, some of whom had made formal complaints, nor do staff deny speaking to individuals in the securities business in furtherance of its investigations.

Schellenberg's counsel refers us to the aforementioned Investigation Order January 15, 2003 and the Statement of Allegations before us now and points out that Schellenberg has, in effect, been under investigation concerning the same allegations for over 10 years. We are invited to conclude that the lack of action, not to mention the apparent resistance by staff of Schellenberg's attempts to cooperate, is not only difficult to comprehend, but more to the point, constitutes a violation of procedural fairness and amounts to an abuse of process to the extent that proceedings against Schellenberg must be stayed.

Schellenberg argues as well that real prejudice to him arises out of the inevitable disappearance of written material which could serve to support his defence to staff's charges. He states that he was not aware of any Investigation Order of the Commission until 2013. In one of his affidavits, he states: "I have a very large accounting practice. It is my habit each year in the early spring after the tax season to purge documents that I have no obligation to retain. I annually burn, for example, any documents which are 6 years old. In the early spring of 2013, therefore, that purge would have included communications from 2006 and early 2007, that I may have had with clients, financial institutions or brokerage houses referenced in the Statement of Allegations."

There are seven clients of Schellenberg named in staff's Statement of Allegations who are referred to in the Statement and these Reasons as P.I., G.W. and B.W., B.K., R.D., A.D. and M.L. Of these clients, P.I. R.D., A.D. and M.L. have made claims against Schellenberg for compensation for financial loss. These individuals are named in accounts with various investment firms and staff has of course alleged that Schellenberg's involvement with these accounts and firms on his clients' behalf contravened the Act.

Schellenberg's involvement in an investment capacity began no more recently than 2005 for most of the aforementioned persons and for G.W. and B.W. it began in 2001.

Schellenberg argues that the length of delay in the case of G.W. of 13 or 14 years is not only inappropriate but also submits, as we have mentioned, that documents relating to G.W. have been destroyed in the interim. He stresses that staff knew about Schellenberg's account activity for G.W. in 2001 and did nothing to curtail or question it until 2013. Staff argues in response that G.W.'s account activity

represented a “continuing offence” over which staff had the discretion of whether or when to prosecute.

In 2005 staff received information from TDWaterhouse with a list of names, including P.I., named in the Statement of Allegations. As to the question as to why proceedings on this information are only now being taken, staff submits that there was no “active investigation” until much later because no complaints had been received from any of the persons listed in the Statement. Schellenberg argues that this amounts to no explanation at all for the delay, that staff had knowledge of allegedly improper account activity involving P.I. in 2005 and did nothing with it until P.I. filed a complaint in 2012. He cites P.I. as a “classic example” of the unexplained and indefensible delay with accompanying prejudice to his ability to defend himself before the Commission.

Schellenberg’s position essentially is that this panel must not only stand on guard of the Commission's role of administering justice in a fair way but also is the last resort for litigants because courts are inclined to defer to the actions of administrative bodies such as this Commission. Counsel cites cases which express the general principles of the doctrine of abuse of process which we will review further.

Those cases are cited as templates as to ways in which abuse of process can be found in the evidence to which we have referred.

First and foremost, the most obvious possible abuse, on the facts, is the matter of the long delay in proceeding with its allegations, the same allegations which surfaced in a formal way in 2003.

Further, an abuse of process may also arise where a party, such as Schellenberg, has relied upon representations to him concerning the framework within which he may operate, as we have previously described.

The summary of the issues with which Schellenberg wishes us to deal is contained in his Motion Brief and quoted as follows:

> 44. The totality of the dealings by The Manitoba Securities Commission staff with Schellenberg from 2001 to 2013, demonstrates a violation of procedural fairness and constitutes an abuse of process.
>
> 45. The Manitoba Securities Commission’s delay in commencing these proceedings has prejudiced Schellenberg by impeding his ability to respond to or defend the allegations made against him and therefore violates procedural fairness and constitutes an abuse of process.

Schellenberg cites many reasons why the lengthy delay between 2001 and 2013 would be prejudicial to him. Under the heading of “Prejudice”, Schellenberg’s Motion’s Brief contains the following analysis:

> Schellenberg has been prejudiced by staff’s abuse of process. This prejudice includes the prejudice of having complaints now that would have been avoided, had staff taken action when it learned of Schellenberg’s actions based on information it gathered or could have

> gathered between 2001 and 2012, or at the very least provided Schellenberg with clarification of staff's interpretation as to the scope of the exemptions from registration. It also includes actual prejudice to the fair process of the hearing because memories have faded and many documents are no longer available, due to the long delay.

There is also the conduct, termed as "egregious", of staff when they made statements to Schellenberg's clients or business contacts – an interference with his economic relations and this conduct in and of itself it is alleged, demonstrated a lack of fair play. These are characterized again as actions which might bring the administration of justice into disrepute. An example cited is that of R.D. who terminated a 30 year professional relationship with Schellenberg as a result of comments made to him by Commission investigatory staff.

Schellenberg's position, in summary, is that he was misled by Commission staff, lulled into thinking he was acting lawfully while staff, in the meantime, mishandled its investigation into his actions over the course of many years. He was honest and forthright from the start, only to be treated so unfairly that it would clearly be wrong for the prosecution arising from staff's investigations to proceed.

Our view is that a reasonable person would consider the delay between 2001 and 2013 to be lengthy and might well question the fairness of staff's dealings with Schellenberg. However, while the facts as presented to us do not reflect well on the investigative arm of the Commission, there is a test, or actually a number of tests, which must be applied in order for this panel to reach the conclusion Schellenberg urges us to reach. Counsel for Schellenberg and staff have referred to us a number of cases which can be summarized as follows:

Respondent's Authorities

Blencoe v. British Columbia (Human Rights Commission)

The Blencoe case is a Supreme Court of Canada case heard in January, 2000. The Petitioner (Blencoe, a high ranking politician) was successful in obtaining a stay of proceedings by the British Columbia Human Rights Commission based on undue delay and prejudice, but the Supreme Court reversed that decision on appeal. The Court held that, although unacceptable delay may amount to an abuse of process in certain circumstances, the delay in that case was not one which would "offend the community's sense of decency and fairness and did not amount to an abuse of process." (headnote)

The Court held that, in order to find an abuse of process, they must be satisfied that "the damage to the public interest in the fairness of the administrative process should the proceedings go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted". (at paragraph 120).

This case has been cited in a number of other decisions, cited by both Schellenberg and staff, for example Wachtler, discussed, below.

- Wachtler v. College of Physicians & Surgeons (Alberta)

This is an Alberta Court of Appeal case. A doctor was charged with unbecoming conduct. The College of Physicians and Surgeons didn't begin investigation of complaints until 21 months after receiving the complaint.

In this case it was concluded "that although Dr. Wachtler is able to show some prejudice, he is unable to demonstrate that the prejudice reaches the high level required to justify a stay of proceedings based on the hearing itself being unfair".

This case examines Blencoe which is referred to as the "leading case in the context of procedural fairness and abuse of process". The Court sets out the principles emerging from Blencoe at paragraph 23:

i) The administrative process must be conducted in a manner entirely consistent with the principles of natural justice and procedural fairness;
ii) Unreasonable delay is a possible basis on which to raise questions of natural justice, procedural fairness, abuse of process and abuse of discretion;
iii) Delay, without more, will not warrant a stay of proceedings as an abuse of process;
iv) Administrative delay may impugn the validity of the proceedings where it impairs a party's ability to answer the complaint against him or her – where memories have faded, essential witnesses are unavailable, or evidence has been lost;
v) Where the fairness of a hearing has not been compromised, delay may nevertheless amount to an abuse of process, but few lengthy delays will meet this threshold. It must be unacceptable to the point of being so oppressive as to taint the proceedings. The Court must be satisfied that "the damage to the public interest in the enforcement of its legislation should the proceedings go ahead would exceed the harm to the public interest if the proceedings were halted". This will depend on: the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances;
vi) If the delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the administrative system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process;
vii) Determination of whether the delay is unreasonable is, in part, a relative exercise in which one compares the length of delay in the case at bar with the length of time normally taken for processing in the same jurisdiction and in other jurisdictions in Canada.

In this case the delay from complaint to hearing totaled 53 months. Dr. Wachtler was responsible for six to seven months of the delay and there was no excuse for the initial delay of 21 months. The application for a stay was allowed.

- Toronto (City) v. The C.U.P.E., Local 79

> This is a Supreme Court of Canada case which cites R v. Power on the subject of oppressive treatment and R v. Conway; "the doctrine" (abuse of process) evokes as well the public interest in a fair and just trial process and the proper administration of justice."

The application for a stay in this case was allowed, although we note that there were distinguishable facts in this case – this was a "re-litigation of an employee's criminal conviction".

- Gabelli et al v The Securities & Exchange Commission

This is a U.S. Supreme Court case in which an application for a stay was allowed. However, it dealt with a statutory limitation period; the decision was not to extend the five year limitation period mainly on the basis that the SEC action was a "penalty action" as opposed to a civil action where the "discovery rule" for civil action would otherwise have allowed the extension of the limitation period beyond five years.

- Ontario Securities Commission v. Biscotti

This was an Ontario Supreme Court (High Court of Justice) case. It was a charter case on the right against self-incrimination and the threat by the Securities Commission to suspend Biscotti despite his constitutional right.

The court mentioned that the threat (at page 17) was "unwarranted in the circumstances……a form of pressure to submit (to a demand for attendance to make statement) to seek to apply indirect pressure was not appropriate."

In this case, the Commission was criticized but no "declaration" was made by the court because it would serve no useful purposes.

- Bennett v. British Columbia (Securities Commission)

This is a case from the British Columbia Supreme Court. The court deals with the principles of abuse of process (page 46) and at page 47 lists the factors which need to be taken into account in considering whether the length of delay of a trial has been unreasonable:

> -The length of the delay
> -Explanation for the delay
> -Whether the accused has waived his rights by consenting to or concurring in a delay
> -Prejudice to the accused.

A notable quote appears at paragraph 152 of Bennett:

> "……I must have in mind the balance between the interest of the petitioners, and indeed the community at large, in the speedy resolution of such processes, and the interest of the community in being assured that the trading of securities is carried out with the propriety which they have a right to expect under The Securities Act. Having regard to this balance in light of the "fundamental principles of justice which underly the community's sense of fair play and decency" it is my judgment that, given the context of the specific regulatory nature of the proposed hearing, and even given the length of the delay and all of the other circumstances alleged by the Petitioners, it would not be an abuse of process for the hearing to be held. To the extent that I must reflect in my judgment the community's sense of fair play and decency, I would think that the community would say to the Commission: "Get on with your hearing and give us your decision." It is my judgment that to do so will allow essential justice to be done in all of these circumstances.

- Misra v. College of Physicians & Surgeons (Saskatchewan)

This is a Saskatchewan Court of Appeal case, quoted in Blencoe.

The Appellant was an MD charged in 1982 and convicted in 1984 under The Criminal Code. His convictions were overturned on appeal in 1986; but he was again charged criminally.

He was suspended by the College of Physicians & Surgeons. The court quoted the following:

> "The basic tenet of natural justice is that if one's rights are affected by the action of an administrative tribunal, one is entitled to a fair hearing."

This case is about bias but also about the delay in bringing the disciplinary proceeding. The College waited for the conclusion of a criminal proceeding.

The court further quotes R v. Young:

> "I am satisfied on the basis of the authorities…..that there is a residual discretion in a trial court judge to stay proceedings where compelling the accused to stand trial would violate those fundamental principles of justice which underly the communities sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases."

Further at page 16:

> "The ……..authorities have raised the following terms: natural justice", "procedural fairness", "abuse of discretion" and "abuse of process". There are two common denominators in each of the terms. The first is the impossibility of precise definition because of their breadth and the wide array of

> circumstances which may bring them into play. The other is the concept of "fairness" or "fair play". They clearly overlap. Unreasonable delay is a possible basis upon which to raise any of them.
>
> The concept of natural justice or procedural fairness as outlined by Dickson J. in Martineau is broad enough to encompass principles which, in other contexts, have been termed abuse of discretion or abuse of process because of delay and related matters."
>
> The conclusion in this case includes an appearance of bias and:
>
> "These things taken together……..delay…….previous suspension for five years, reasonable apprehension of bias" were found to constitute a denial of natural justice.

- Libbey Canada Inc. v. Ontario (Ministry of Labour)

Libbey is an Ontario Court of Appeal case dealing with a reliance on representations by an employment standards officer of the Ministry's policy regarding liability for unpaid vacation pay for employees. The appellant relied on the representations in connection with a purchase of a business.

The case is an example of the doctrine of reasonable expectations:

> "In Canada, the legitimate expectations doctrine has been regarded as an aspect of procedural due process and not a source of substantive rights. Where applicable, it gives a party a right to certain procedural protections governing the manner in which a public authority renders a decision affecting a party."

At paragraph 61:

> "…founded on notions of fairness. Broadly speaking, those who deal with government bodies and agencies entrusted with the authority to wield power for the public good should be able to rely on representations made to them by those bodies and agencies and to govern their affairs accordingly. In some circumstances, the court will intervene by way of judicial review where a public authority attempts to resile from a representation to the detriment of someone who has relied on that representation."

We note that the three elements of the doctrine of legitimate expectations (at paragraph 62) are stated to be:

1. Full disclosure by the party seeking the representation;
2. Clear and unequivocal representation; and
3. Detrimental reliance on that representation.

The court concluded that Libbey had not been treated fairly. Libbey had received a representation that pay to employees would be $27,000.00. The Ministry later assessed that liability at $1.3 million – a pronounced detriment and prejudice.

- British Columbia (Director of Civil Forfeiture) v Property Owners

This is a case from the British Columbia Supreme Court which lists six general principles of the doctrine of abuse of process:

1. The common law doctrine could be applied in narrow circumstances "where compelling an accused to stand trial would violate those fundamental principles of justice which underly the community's sense of fair play and decency and to prevent the abuse of the courts process through oppressive or vexatious proceedings".

2. Circumstances involving state conduct touching upon both "the integrity of the judicial system and the fairness of the individual accused's trial"……..conduct that "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

3. Achieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process.

4. An act tending to undermine society's expectations of fairness in the administration of justice.

5. A stay of proceedings will only be appropriate when:

    a) When the prejudice caused by the abuse in questions will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

    b) No other remedy is reasonably capable of removing that prejudice.

6. Was the Crown's…..conduct so unfair or oppressive….or so tainted by bad faith or improper motive, that to allow the Crown to now proceed…would tarnish the integrity of the judicial system.

In this case the application for denial of civil forfeiture of real property was denied. The court did not characterize police conduct as "flagrant", "egregious", "unfair", "unreasonable", "oppressive", "irrational" or "vexatious".

This was a grow op case. The criminal prosecution of the applicant had failed because of an illegal search but the property was seized and forfeited.

- Sangale v Abdalla

This case contains the following quotation on the subject of the definition of abuse of process:

> "It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy……the doctrine of abuse of

> process engages the inherent power of the court to prevent the misuse of its procedures, in a way that would be manifestly unfair to a party to the litigation or would in some way bring the administration of justice into disrepute…. The doctrine of abuse of process concentrates on the integrity of the adjudicative process."

We have also noted the Manitoba case of Anhang v. Law Society of Manitoba. This is a Court of Queen's Bench Manitoba case which cites Blencoe. Regarding inordinate delay, the Law Society of Manitoba had submitted that the applicants had not established that they would be prejudiced if certain individuals did not give evidence. The applicants had claimed that the witnesses couldn't appear because of the delay.

The court referred to Blencoe:

> "Not based on the length of the delay alone but on contextual factors, including the nature of the case and its complexity, the purpose and nature of the proceedings and whether the respondent had contributed to, or waived, the delay."

At paragraph 44:

> "The nature of this case is not particularly complex; the delay remains largely unexplained. I have therefore concluded that the delay of 16 months from the date of receipt of the first complaint to the date the first citations were issued is inordinate and unreasonable."

However, at paragraph 55:

> "The applicants have not established based on the evidence submitted that relevant evidence is now unavailable. The evidence does not support the applicant's position that the delay has prejudiced them and would result in a breach of the principles of fundamental justice and procedural fairness if the hearing was allowed to proceed".

This Queen's Bench case was upheld on appeal.

Staff's Authorities:

- Re: Henning

This is an Alberta Securities Commission case on an application to "dismiss or perpetually stay" a hearing into allegations made by Commission staff. The application was denied on the basis that there were: "no reasonable apprehension of bias, no lack of procedural fairness and no deprivation of rights under the Charter or Bill of Rights."

The issues were twofold:

i) Reasonable apprehension of institutional bias attributable to the Commission's multi-functional structure; and
ii) Conduct of the hearing "including interim cease trade orders and freeze orders have denied the respondent a fair hearing.

The Commission states, although denying the application that:

> "It is well established that respondents to proceedings under the Act are entitled to a fair hearing."

This case examines the functions carried out by the Commission, from the "executive end of the spectrum" to the "judicial end of the spectrum".

- Re: Conrad Black, John Boultbee and Peter Atkinson (Ontario Securities Commission)

This is an Ontario Securities Commission case from 2014, involving a motion by the applicants for, in part, an order staying the OSC proceeding versus Black on condition that an undertaking he had entered into would remain in effect. There was a parallel criminal proceeding involving similar allegations in the United States, including various appeals between 2005 and 2012. There was also a SEC action in 2008, together with appeals, resulting in an order for disgorgement. The applicants stated that the action by the OSC was disproportionate and would serve no useful purpose.

The Commission examined a number of cases including R v. Reagan, R v. Power and Blencoe.

At paragraph 17, the Commission states as follows:

> "As noted…., Black alleges in his Notice of Motion, an allegation …..that ……."the continuation of the proceeding against Black is entirely unnecessary so as to be unfair and vexatious, and to constitute an abuse of process." The foregoing allegation quite clearly does not satisfy the requirements for a determination that there has been an abuse of process articulated in Reagan and Power. Moreover, there would, in our view, be a public expectation that the Commission will finally address and make a determination with respect to the allegations against Black in Ontario that have been outstanding for more than nine years (since the initial OSC proceeding commenced) and the Commission's failure to make such a determination would bring its regulatory role into disrepute and would likely be viewed as a means by which Black would avoid any finding against him in Ontario."

His application was denied.

- Nisbett v. Manitoba (Human Rights Commission)

This is a 1993 Manitoba Court of Appeal case involving an allegation of workplace harassment and discrimination on the part of a Dr. Nisbett.

The reasons were delivered by Chief Justice Scott and the Court examined:

(a) Martineau v. Matsqui (Disciplinary Board) regarding a prejudice significantly impairing the ability of a party to receive a fair hearing; and
(b) Misra regarding delay.

The Court found that "the Commission did not proceed with due diligence respecting the complaints…….the delay was not satisfactorily explained."

Further, the Charter (section 7) does not apply but principles of natural justice and the duty of fairness…..include the right to a fair hearing. However, at page 9:

> "there was no evidence before the trial judge as to actual prejudice other than a vague assertion"….As there is not satisfactory evidence of prejudice, there can be no denial of nature justice or abuse of process."

- Mercury Partners & Company Inc.

This was a case before the British Columbia Securities Commission which examined Re: Ironside (Alberta Securities Commission) dealing with the nature of "decisions" as defined in the Act and the nature of staff's enforcement obligations:

> "The decision whether to issue a notice of hearing is functionally indistinguishable from a decision whether to interview a certain person or review certain documents, or a myriad of other choices made during the course of an investigation."
>
> "The decision is not final because the Executive Director can change his mind. We take notice of the fact that it is not uncommon for staff to abandon enforcement proceedings after a notice of hearing has been issued and a hearing has been scheduled……."

The British Columbia Securities Commission regarded Ironside as analogous and describes the function of staff in the investigative process.

Our conclusions on this matter having considered the facts and evidence and the state of applicable law can be stated as follows.

A delay in bringing a prosecution forward in matters such as allegations under securities legislation can cause undue prejudice to the person who has been accused. Staffs of Securities Commissions have a duty to conduct their investigations in a manner which is consistent, first and foremost, with the protection of the public. However, investigators also have a duty, in order to preserve public confidence and comply with the tenets of natural justice, to be fair during this process

to all who are involved in it whether they be potential witnesses, alleged victims or the subject of the proceeding.

We recognize that Staff's function in the investigatory stages of Commission proceedings is separate from the function of this panel. Staff must be allowed ample discretion in this process. However, Staff's conduct in this matter is far from above criticism. A claim of prosecutorial discretion cannot serve as full answer to a claim of abuse of discretion or abuse of process.

The beginnings of the investigation of Schellenberg, leading to the institution of formal proceedings in 2013, took place in 2001. In 2001, a reasonably benign series of communications began, characterized by enquiries from Schellenberg or his representatives as to the breadth of exemptions available to him in connection with the investment or trading activity of his clients together with responses from staff with the apparent intent of giving Schellenberg some of the guidance which he sought from staff.

The relationship between Schellenberg and staff visibly began to deteriorate during the period of 2001 to 2003 to a point where staff effectively shut down the process of responding to Schellenberg's enquiries or commenting on his opinions relative to exemptions available to him. In 2003, the "relationship" took on the character of a prosecution including a questioning of potential witnesses and alleged victims.

This prosecutorial process had the potential to cause damage to Schellenberg's reputation and to his business.

Staff is not constrained by any statutory requirement to bring a prosecution forward within any defined length of time and enjoys reasonable latitudes of prosecutorial discretion. However, 10 years is not a reasonable length of time for a prosecution to develop. Here, we recognize that formal complaints may not have been made until late in the process and certain alleged victims did not have any involvement until well after 2001. It is also acknowledged that staff likely had knowledge, or ought to have had knowledge, of the potential complaint of at least one alleged victim in 2005 and contacted him seven years later.

In any event, Schellenberg's ability to defend himself could dissipate over time and any wrongdoing of which he is accused should properly be resolved, one way or another, within a reasonable period of time.

We agree with staff that mere delay is not sufficient to support a motion for a stay of proceedings unless the affected party can demonstrate the real likelihood of prejudice arising out of the delay. Moreover, the fact that Schellenberg received advice from Commission staff regarding exemptions or permitted trading activity is relevant only if Schellenberg acted upon that advice and did so to his detriment.

We note as well that, along with advice from Commission staff, he had the benefit of experienced and independent legal advice from his own legal counsel on the subject of exemptions available to him as well presumably as to the nature and effect of the powers of attorney we have mentioned.

The onus remains on Schellenberg to establish the prejudice caused by delay and/or receipt of any such advice.

One must also consider the issue of whether Schellenberg's motion for a stay is premature, as we are urged by staff to find. There have been previous instances in which an accused has raised the matter of representations received from staff as a defense during a hearing or trial. One might also speculate that, if Schellenberg can establish that evidence is unavailable because of the passage of time and that his defense is impaired by that reason, remedies will become available to him during a trial on the merits.

The powers of attorney issue serves as a good example in our opinion of how the path best taken must be considered. Schellenberg points to advice he received from staff regarding the use of powers of attorney to avoid the necessity of registration with the Commission. He implies that he complied with what he understood to be what that advice entailed. Yet, there was debate before us on the mere existence of powers of attorney granted to Schellenberg by his clients. Certainly there was no consensus as to whether any powers of attorney in existence meet regulatory standards. It seems to us that the only method available to us of settling the issue of whether Schellenberg legitimately acted within the exemptions set out in the Act or otherwise can use powers of attorney in his defence is to see them in evidence and examine them in the course of a hearing on the merits of this matter.

The primary objective of securities legislation is public interest. Public interest includes confidence in the quasi- judicial functioning of the Commission.
The remedy of staying proceedings is indeed a step to be taken at last resort. In order for this panel to stay proceedings against Schellenberg it must be clear to us that our not doing so would cause damage to the reputation of the Commission beyond the damage to such reputation caused by not proceeding. A stay would have to be in the public interest. This requires this panel to weigh what appear to be competing rights – that is Schellenberg's rights as an individual versus the public's right to protection. The final weighting must be determined by what the public is entitled to expect from its administrative institutions.

We refer to the previously quoted excerpt from Black:

> (T)here would, in our view, be a public expectation that the Commission will finally address and make a determination with respect to the allegations against Black in Ontario that have been outstanding for more than nine years (since the initial OSC proceeding commenced) and the Commission's failure to make such a determination would bring its regulatory role into disrepute and would likely be viewed as a means by which Black would avoid any finding against him in Ontario.

That quotation reflects the rather complex question of what the public might deem to be disreputable. The public of course has an interest in actions such as the present matter involving Schellenberg in the context of bringing the Commission into disrepute. The Blencoe case further reflects the essence of what the final analysis must be: "the damage to the public interest in the fairness of the administrative process should the proceedings go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted".

This is an administrative process, not a criminal process and we do not believe that criminal precedents on abuse of process adapt well to regulatory or administrative law cases. It is simply reality that a person engaged in services on behalf or for the investing public must submit to regulation. That person does not enjoy the same rights as individuals facing punitive measures in criminal proceedings. In other words, there is a fundamental difference between being subjected to regulation and being subjected to criminal punishment. This does not eliminate the requirement for a fair administrative process but it does affect the balance which must be assessed regarding the interests of the individual versus the interests of the public.

In the final analysis, we find that Schellenberg has not met the high standard required for a stay of proceedings. He has, firstly, not convinced us that actual prejudice to his ability to defend himself has occurred or will occur in the future, or, secondly, that the public interest is better served by terminating proceedings against him or, thirdly, that failing to terminate these proceedings would damage the public's confidence in the administration of justice by this Commission. This is not to absolve staff of their obligations toward Schellenberg or persons placed in his position. Those issues may well arise again during the course of a hearing on the merits. However, we have determined that a hearing on the merits is clearly the preferred course of action to take.

"D.G. Murray"
D.G. Murray
Chair

"J.W. Hedley"
J.W. Hedley
Member

"B.P. Cyncora"
B.P. Cyncora
Member