NOVA SCOTIA COURT OF APPEAL

Citation: ***Wadden v. Nova Scotia (Attorney General)***, 2011 NSCA 55

Date: 20110609
Docket: CA 332625
Registry: Halifax

Between:

Calvin Wadden, Kenneth MacLeod and Dan Potter

Appellants

v.

The Attorney General of Nova Scotia and the
Nova Scotia Securities Commission

Respondent

Judges: MacDonald, C.J.N.S.; Oland and Hamilton, JJ.A.

Appeal Heard: March 28, 2011, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Oland, J. A.; MacDonald, C.J.N.S. and Hamilton, J.A. concurring.

Counsel: W. Dale Dunlop and Sean D. MacDonald, for the appellants, Wadden and MacLeod
Dan Potter, appellant in person
Thomas P. Donovan, Q.C. and Andrew Sowerby, for the respondent, Nova Scotia Securities Commission
Heidi G. Schedler and (Vanessa Nicholson-Articled Clerk) for respondent, Staff of the Nova Scotia Securities Commission
Edward A. Gores, Q.C. for the respondent, Attorney General of Nova Scotia, not appearing

Reasons for judgment:

[1] Knowledge House Inc. ("KHI") was a publicly traded company, trading on the Toronto Stock Exchange. Daniel Potter was KHI's President and Chief Executive Officer. Calvin Wadden and Kenneth MacLeod were Directors of KHI and held management positions or were employees.

[2] In 2001 the price of KHI's shares collapsed and its shares were delisted. Litigation was initiated by the National Bank Financial Limited ("NBFL"). An investigation into alleged contraventions of securities legislation followed.

[3] This appeal arises from the proceedings before the Nova Scotia Securities Commission. The appellants, Messrs. Potter, Wadden and MacLeod, wanted certain motions heard in advance of the hearing of allegations of breaches of the *Securities Act*, R.S.N.S. 1989, c. 418. Staff of the Commission disagreed. In a decision dated June 18, 2010, Commissioner David W. Gruchy held that the motions and the allegations would be heard at the same hearing. The appellants appeal.

[4] At the outset of the hearing of this appeal on March 28, 2011, Mr. Potter advised that that very morning, criminal charges in relation to the collapse of the value of the shares of KHI had been laid against him and others. No such charges were laid against Messrs. Wadden and MacLeod. It then being unclear how this development would impact on the Commission's investigation of the appellants in relation to alleged breaches of the Act and whether a decision on the appeal would be required, the Court asked that it be kept advised. Last month, counsel for Staff provided a copy of a Notice of Discontinuance of that investigation as against Mr. Potter only. This court was subsequently advised that it was the view of all parties that, notwithstanding that discontinuance, a decision by this court of the appeal was required.

[5] For the reasons which follow, I would dismiss this appeal.

Background

[6] In the course of the civil litigation launched by NBFL, its lawyers took possession of a computer server that belonged to KHI. The server contained, among other things, the corporate e-mail accounts of some former KHI personnel, including those of the appellants.

[7] In 2003, pursuant to s. 27 of the *Securities Act*, the Commission authorized an investigation into the affairs of KHI and issued an investigation order which appointed investigators. The NBFL lawyers provided copies of the appellants' e-mail accounts to the securities regulators. Mr. Scott Peacock and other Commission staff accessed the information in those accounts as part of their investigation. Despite written demands by Mr. Potter to Mr. Peacock beginning in November 2003 protesting the wrongful taking of the e-mail accounts and advising the solicitor-client privileged nature of the documents, they were not returned.

[8] The KHI e-mail documents became an issue in the NBFL's litigation. Scanlan, J. of the Nova Scotia Supreme Court halted that proceeding to deal with issues relating to their taking and use by NBFL lawyers and, in particular, the claim of solicitor-client privilege. In *National Bank Financial Ltd. v. Potter*, 2005 NSSC 113, he held that the e-mails included many solicitor-client communications. To minimize the prejudice that may result from the breach of that privilege, he ordered that counsel for NBFL be removed from the file, and any reference to pleadings based on solicitor-client privilege be struck. Justice Scanlan refused to stay the proceedings.

[9] While the claim of solicitor client-privilege in the civil litigation was proceeding before Justice Scanlan, Mr. Potter brought a *certiorari* application in relation to the taking and use of the KHI e-mails by Mr. Peacock and other Commission staff. He subsequently applied for further production and discovery examination of Mr. Peacock. By an order dated December 5, 2005, Richards, J. stayed the Commission investigation into KHI and directed discovery of Mr. Peacock.

[10] In *Nova Scotia (Securities Commission)* v. *Potter*, 2006 NSCA 45, this court allowed the Commission's appeal of Justice Richards' decision. It held that Mr.

Potter's *certiorari* application was premature - his complaints about the investigation should first be heard by the Commission which has the discretion to grant the relief he sought. It ordered that the judicial review application be stayed until further order of the Supreme Court, and referred the matter back to an adjudication panel of the Commission.

[11] In the decision, after setting out the terms of the order, Cromwell, J.A. (as he then was), writing for the court, continued,:

> 52 The purpose of the stay of the judicial review application is to provide Mr. Potter an opportunity to raise the matters on which it is based with the Commission and for the Commission to address them. . . .
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> 53 I should also say, respectfully, that the Commission appears from the material before us to have been slow to recognize the seriousness of the implications of the allegations made by Mr. Potter in relation to the investigation. I say this without in any way pre-judging the ultimate merits of those allegations. It has been obvious for many months that there are serious claims of solicitor-client privilege in relation to material in the Commission's hands and yet, so far as we can tell, it has done virtually nothing to come to grips with the implications of those claims for the investigation it has authorized. The Commission has also had the benefit for many months of Scanlan, J.'s decision in *National Bank Financial Ltd. v. Potter* (2005), 233 N.S.R. (2d) 123; [2005] N.S.J. No. 186 (Q.L.) (S.C.) which held that the onus is not on the party claiming privilege to take steps to have the privilege issue determined: see para. 62. The judge also set out some very clear statements of what he understood to be the ethical obligations of lawyers who come into the possession of material for which privilege is claimed: see paras. 62-63. It cannot have been lost on the Commission, which we are advised had counsel on a watching brief throughout the proceedings before Scanlan, J., that these statements have serious implications for some or all of its investigators. The Commission, through counsel, claims to have the authority and the tools to address these issues. This decision gives it the opportunity to put those submissions into action.
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> 54 In short, while I prefer to extend considerable judicial deference to the Commission in the discharge of its regulatory responsibilities in the public interest, that deference is neither absolute nor open-ended. It is, in my view, essential that the Commission take serious and immediate steps to come to grips with the obvious issues which have arisen in the course of the investigation which it has ordered.

[12] On May 19, 2006 the Commission issued a Notice of Hearing to which was attached its staff's Statement of Allegations ("Staff Allegations"). That document claimed that the appellants and one Raymond Courtney had contravened several provisions of the *Securities Act*. It was not directed to the resolution of the solicitor-client privilege issue.

[13] On June 30, 2006, Mr. Potter and KHI filed a motion ("Potter Motion") before the Commission seeking, among other things, an order revoking or varying the investigation order and named investigators and a return of all CDs containing the KHI e-mail documents. The Potter Motion alleged improprieties on the part of Commission staff and other investigators in taking possession and reviewing the KHI e-mail documents without consent or warrant. That same month Mr. Potter applied on his, and KHI's behalf, for an order, among other things, quashing, revoking or varying the Staff Allegations. His essential allegations were that Commission staff and other investigators, had exceeded the jurisdiction under the *Securities Act*, violated ss. 7 and 8 of the *Charter*, breached solicitor-client privilege, and committed trespass, theft or conversion.

[14] On July 6, 2006, Messrs. Wadden and MacLeod filed a Notice of Motion (the "Wadden Motion") seeking an order revoking or varying the investigation, removing named investigators, and prohibiting the use of the fruits of the investigation. They alleged that Commission staff and other investigators exceeded their jurisdiction and breached ss. 7 and 8 of the *Charter*. As well, they alleged violation of s. 29F of the *Securities Act* dealing with solicitor-client privilege and refusal to follow an order of the Nova Scotia Court of Appeal. These appellants also sought an order providing for protection of solicitor-client privilege in the KHI e-mail documents in the possession of Commission staff.

[15] The Commissioner who was seized with the matter at the time presided over a hearing on July 25, 2006 to address two Motions. He directed disclosure of documents and discovery examinations, with the determination of the claims of solicitor-client privilege to follow. In January 2008, the original Commissioner recused himself and, a year later, David W. Gruchy was appointed Commissioner.

[16] In view of the Supreme Court of Canada decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, Commissioner Gruchy referred the issue of solicitor-client privilege in the KHI e-mails to the

Nova Scotia Supreme Court. That issue was determined by a January 14, 2011 Consent Order by Staff, Potter and Commission counsel. Ultimately, Justice Scanlan's determinations of privilege in the NBFL civil litigation were adopted with some clarifications and additional determinations.

[17] However, although five years have passed since this court's decision remitting the matter back to the Commission and there have been some two dozen appearances before the Commission during that time, the Motions which also claimed breaches of *Charter* rights, trespass, conversion, and actions taken improperly or without jurisdiction have not yet been decided.

[18] On June 18, 2010, Commissioner Gruchy filed his decision which is the subject of this appeal. His order issued September 9, 2010. In his decision, he considered whether the Motions should be heard in advance of the Staff Allegations; that is, whether the hearing of those Motions and the Staff Allegations ought to be bifurcated. For reasons which I will elaborate later, he decided against bifurcation. The appellants appeal.

Issues

[19] The appellants restated the issues on appeal as follows:

> (i) Did the Commissioner err by deciding not to hear the complaints about the investigation contained in the Appellants' motions in advance of any hearing on the allegations of Staff of the Commission?
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> (ii) If the Commissioner did err in deciding not to hear the Appellants' motions in advance of any hearing on Staff's allegations, in the circumstances, should the proceedings before the Commission be stayed?

Analysis

[20] It is useful to begin by examining the Commissioner's decision and, in doing so, raising the appellants' arguments.

[21] In his decision, the Commissioner reviewed the Motions. He observed that, among other things, they claimed breaches of the s. 8 *Charter* right to be secure

against unreasonable search and seizure, and breaches of solicitor-client privilege. For the purposes of his decision, he assumed a *Charter* violation.

[22] In the course of his decision, the Commissioner stated:

> The thrust of the respondents' position is, in my view, that the evidence of Staff was obtained in a manner that infringed or denied their right or freedoms guaranteed by the *Charter*. It is irrelevant whether such infringement occurred in a civil, criminal or administrative milieu. If the motions are successful a possible result would be that all evidence obtained directly from the alleged *Charter* violations would become inadmissible, together with any derivative evidence. Indeed, the respondents have submitted that the actions of the investigators were so egregious that the entire proceedings should be quashed. [Emphasis added]

[23] After reviewing the approach in *R. v. Grant*, [2009] 2 S.C.R. 353 regarding s. 24(2) of the *Charter*, the Commissioner continued:

> The issue before me is centred largely around the admissibility of the KHI e-mail evidence. I have not had access to that evidence, but I have been informed by Counsel that it consists of hundreds of thousands of items of correspondence by KHI employees and others, some of which would presumably be relevant to this proceedings *(sic)*. Subject to possible privilege claims that correspondence may well form part of the circumstances to be considered in the hearing of these motions. [Emphasis added]

[24] The appellants say that this and other passages demonstrate that the Commissioner mischaracterized the heart of their Motions. They submit that he focussed on the admissibility of the evidence obtained by the investigators, rather than the integrity of the investigation.

[25] The Commissioner continued:

> Having considered the jurisprudence drawn to my attention by the parties, and in considering the overall effect of R. v. Grant, and Re. A. it is my conclusion that a decision to allow the bifurcation of the impingement evidence must be based on a full examination of the merits of the case. The evidence I have before me is limited to the affidavits of Staff's enforcement officer, Scott Peacock, and Dan Potter. I have considered these, together with a copy of the affidavit of Potter filed with the Supreme Court of Nova Scotia. I have also considered the various decisions of the Courts which, strictly speaking, are not evidence but which I certainly consider carefully. But none of the evidence has been subjected to the

> adversarial process of examination and cross-examination. More importantly, they do not deal with many of the factors set forth in such cases as Re. A and R. v. Grant.

[26] The Commissioner then proceeded to ask and respond to the three questions set out in *Re A* (2007), 30 O.S.C.B. 6921, a decision of the Ontario Securities Commission which considered the matter of a hearing separate from and in advance of the hearing on the merits. He first determined that a bifurcated inquiry into the subject matter of the motions could not be properly resolved without the presentation of evidence on the merits of the entire matter. The Commissioner then decided that it was not necessary for a fair hearing that the relief sought in the motions be granted prior to the proceeding on the merits, stating:

> The motions can be heard fairly during the proceedings on the merits. Indeed, it is my opinion that the opposite may be true: it is necessary to hear the motions when the entire case is considered. The segregation of the impugned evidence from the facts of the entire matter, in my opinion, would bring the administration of justice into disrepute. [Emphasis added]

Finally, he stated that the resolution of "the issues raised in the motions will not materially advance the resolution of the matters raised" by the Staff Allegations.

[27] In appealing the Commission's decision, the appellants argue that the events relating to their claims of a flawed investigation and those which are the subject of the Staff Allegations took place in separate time frames. They point out that when this court rendered its decision, the Commission had not issued formal allegations of breaches of securities legislation against them. According to the appellants, after the Staff Allegations were filed, there was no indication of any intention to bring an application to deal with the privilege and other issues, and the appellants were forced to file their Motions in order to have the matter heard.

[28] The appellants also submit that since this court remitted the matter back to the Commission in 2006 and commented that it should take "serious and immediate steps to come to grips with the obvious issues" which had arisen during its investigation, the Commission has demonstrated a singular lack of initiative, a failure to recognize the importance of the issues raised by their Motions, and undue and extensive delay and confusion. Its shortcomings, they say, are particularly evident in comparison with Justice Scanlan's recognition of the critical

significance of the claim of privilege and his rapid disposition of that aspect of the civil litigation.

[29] The appellants argue that the actions or omissions of the Commission which have resulted in there still being no findings about the integrity of the investigation, aspects of which were first raised in 2003, amounts to an abuse of process. The main remedy they seek is a stay of its proceedings against them.

[30] Whether the Motions are heard before or at the same hearing as the Staff Allegations is a procedural question. Section 150(aat) of the *Act* provides the Commission with the power to prescribe procedures or practices to be followed in matters before it. Its Rule 15-501 General Rules of Practice and Procedure states:

> 18.1 The Commission may exercise any of its powers under the Rules on its own initiative or at the request of a Party.
>
> 18.2 The Commission may issue general or specific procedural directions at any time, including before or during any Hearing.

[31] While they acknowledge that the Commission is the "master of its procedure," the appellants argue that a fair hearing on the merits of the Staff Allegations is impossible as long as serious prejudice arising from alleged improper actions taken by the investigators is allowed to continue. As an example, they say that Mr. Peacock and other investigators who have had the KHI e-mails will be called as witnesses at any hearing of the merits of the Staff Allegations, it would be difficult if not impossible for them to erase the contents of privileged documents accessed by them from their minds, and it would be unjust if these same investigators and the legal counsel they instruct are permitted to pursue the Staff Allegations.

[32] According to the appellants, in his decision the Commissioner foreclosed any possibility that he would hear and determine the complaints in their Motions in advance of any hearing of the Staff Allegations. This, they say, amounts to an error warranting appellate intervention and a stay of the proceedings before the Commission.

[33] With respect, after carefully examining the record and the decision under appeal, I cannot accept the appellants' argument.

[34] As is evident from the record, already the process before the Commission in relation to its investigation of the appellants has been unusually lengthy. The causes for this include the seriousness of the charges, the extensive number of pre-hearing conferences and hearings, unforeseen events such as the recusal of the original Commissioner, the voluminous documentation, the frequent lack of consensus, and the multiplicity of parties, issues, and proceedings. All of this has been stressful and costly for the appellants, who have been concerned about solicitor-client privilege in the KHI e-mails and the integrity of the investigation for many years. Their submissions to this court, including those regarding the impact of this lengthy securities proceeding upon them, were articulate and passionate. That the appellants feel hard done by and frustrated is apparent and not surprising.

[35] However, after reviewing the many hearings before the original and present Commissioner, I accept that each of them was focussed on driving the matter forward. This is not to say that there were no occasions when things might have unfolded or been resolved more quickly. But overall, I do not see that either Commissioner was at all lax in his diligence, or that the Commission or its staff either deliberately, or without reasonable excuse, caused undue delay.

[36] From his own summary of the Motions, it is clear that the Commissioner appreciated the scope of the allegations contained in the Motions. He referred to the “subject matter of the motions,” “the impugned evidence,” and the “resolution of the issues raised in the motions.” He spoke of the admissibility of evidence Commission staff had allegedly obtained in violation of the *Charter*. He referred to the decisions of Justice Scanlan in regard to the facts giving rise to alleged violations in regard to KHI e-mails. In short, it is apparent that the Commissioner is aware of and understands the seriousness of the claims made in the Motions.

[37] Nothing in his decision persuades me that, at the hearing of the Motions and the Staff Allegations, the Commissioner will disregard the issues surrounding the integrity of the investigation. There is not the slightest indication that that is considered of minor importance only, will be swept aside, or given anything other than the full consideration it warrants.

[38] I do not accept that the Commissioner has clearly and already decided that, at the hearing, the subject matter of the Motions will not be determined in advance of the Staff Allegations. In my view, his statement that "The motions can be heard fairly during the proceedings on the merits" does not stipulate when the Motions will be argued and determined at the hearing. I observe that in several places in the record, the Commissioner indicated that the Motions might come by way of a *voir dire* type of proceeding at the beginning of the main hearing or be considered first. See, for example, the transcripts of the September 9, 2008 proceeding at Appeal Book pp. 935 to 937, the January 30, 2009 proceeding at Appeal Book p. 1051, and the March 9, 2009 hearing at Appeal Book, p. 1062. Further, the Commissioner's statement that "The resolution of the issues raised in the motions will not materially advance the resolution of the matters raised by the allegations filed by the Commission Staff" is more directed to the Staff Allegations than any indication of the procedure at the single hearing.

[39] It is apparent from his decision that the Commissioner's concerns related to the extent of the evidence then available to him and the fact that none of it had been tested by cross examination. Just how the Commissioner wishes to have the hearing proceed when the Motions and the Staff Allegations are presented and argued is a matter of procedure, and therefore within his discretion. If he chooses, he can call pre-hearing or management conferences where matters such as the procedure to be followed at the single hearing can be discussed and decided.

[40] In summary, while the time taken to get to this point of the investigation is most regrettable, the appellants have not lost the opportunity to argue before the Commissioner that he should decide their Motions before the Staff Allegations, and that a stay is warranted. Indeed, if the Commissioner should accept their submission to this court that prejudice has existed for some time and continued to their detriment every day that those issues remained undetermined, the delay in having their Motions heard may work to their favour. The appellants have also not been precluded from seeking any remedy set out in their Motions, including revocation or variation of the investigation.

[41] Furthermore, after the Commissioner has ruled on the substance of the Motions and/or the Staff Allegations, the appellants have the right to appeal that decision. Any such appeal on the merits would avoid any argument that their appeal was premature because the decision under appeal was only procedural or

interlocutory. See Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham: LexisNexis, 2006) at pages 230 - 231, *Workum v. Alberta Securities Commission*, 2006 ABCA 181, *Thachuk v. British Columbia Securities Commission*, [1996] B.C.J. No. 1639 (C.A.), and *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* 2008 NSCA 108.

[42] I have determined that the Commissioner's decision does not support the appellants' interpretation that he has decided not to hear the complaints in their Motions in advance of the merits of the Staff Allegations. In addition, as referred to in ¶ 29 above, the *Act* makes it clear that the Commission is the master of its procedure. Accordingly, I would dismiss the appeal but, in the circumstances, without costs.

Oland, J. A.

Concurred:

MacDonald, C.J.N.S.
Hamilton, J.A.