

Securities Cases Update

AKA:

“The laws of a state change with the changing times” (Aeschylus – greek poet)

or do they?

LINDSAY KENNEY LLP
Barristers & Solicitors - Trademark Agents

'securities'

Securities Act, [RSBC 1996] Chapter 418

"security" includes:

(a) a document, instrument or writing commonly known as a security;

(b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person;

(c) a document evidencing an option, subscription or other interest in or to a security;

securities (cont'd)

(d) a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, pre-organization certificate or subscription other than:

(i) a contract of insurance issued by an insurer; and

(ii) an evidence of deposit issued by a savings institution,

securities (cont'd)

(e) an agreement under which the interest of the purchaser is valued, for the purposes of conversion or surrender, by reference to the value of a proportionate interest in a specified portfolio of assets, but does not include a contract issued by an insurer that provides for payment at maturity of an amount not less than 3/4 of the premiums paid by the purchaser for a benefit payable at maturity;

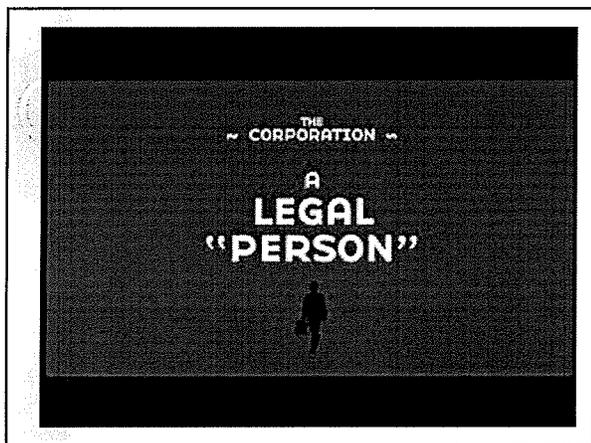
(f) an agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person;

securities (cont'd)

- (g) a profit sharing agreement or certificate;
- (h) a certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate;
- (i) an oil or natural gas royalty or lease or a fractional or other interest in either;
- (j) a collateral trust certificate;
- (k) an income or annuity contract, other than one made by an insurer;

securities (cont'd)

- (l) an investment contract;
 - (m) a document evidencing an interest in a scholarship or educational plan or trust;
 - (n) an instrument that is a futures contract or an option but is not an exchange contract; or
 - (o) a permit under the *Oil and Gas Activities Act*;
- whether or not any of the above relate to an issuer, but does not include an exchange contract.

**Business Judgment Rule**

- Supreme Court of Canada, 2008
 - The 'business judgment rule' accords deference to a business decision, so long as it lies within a range of reasonable alternative ...
 - The directors are responsible for the governance of the corporation. In the performance of this role, the directors are subject to two duties: a fiduciary duty to the corporation under s. 122(1)(a) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s. 122(1)(b)...

'fiduciary duties'

- the Court said the following regarding fiduciary duties of the directors:
 [37] The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear — it is to the corporation...

Madoff

- Former Chairman of the Nasdaq Exchange;
- Hedge Fund – allowed for a wider range of trading activities
- Historically not subject to the same restrictions

'red flags'

Flags:

- Math geek stuff: analysis of reported trades
- Could not identify anyone actually doing trades with the Madoff firm
- Who wasn't doing business with the legend
- Who is doing the due diligence work?

In B.C. / Canada

- Multiple Jurisdictions
- Multiple Investigative Agencies
 - RCMP
 - Securities Commission
 - IIROC – Investment Industry Regulatory Organization of Canada
 - US Agencies:
 - Securities and Exchange Commission
 - FBI
 - US Dept. of Justice

B.C.

- 2011 SEC Comm case: Frederick Nielsen (formerly Gilliland)
 - Current resident in B.C.
 - Interesting past as former US Resident:
 - In BC, 5 months later, Fred goes back to what he knows best

2011 BC SEC COMM - Nielsen

- contravened the BC Securities Act (s. 49) by having salespeople telephone residences on his behalf from within BC for the purpose of trading in securities; and
- contravened the Act (s. 34) by engaging in acts in furtherance of a trade in securities without being registered.

2011 BC SEC COMM - Nielsen

- Pursuant to a settlement agreement with the SEC COMM, it was ordered that:
 - He cease trading securities for 25 yrs;
 - He resign as a director /officer of any issuer as described under the Securities Act;
 - He is prohibited from becoming an investment fund manager or promoter or manager or consultant in the securities market or engaging in investor relations for 25 years;

3 Elements of Fraud

1. a prohibited act (deceit, falsehood, or some other fraudulent means),
2. deprivation caused by the prohibited act (actual loss or placing the victim's pecuniary interests at risk), and
3. subjective knowledge by the perpetrator of both the prohibited act and that it could result in deprivation of another.

Fraud Prohibition in Securities Act

Section 57:

A person ... must not, directly or indirectly, engage in or participate in a transaction or series of transactions relating to a trade in or acquisition of a security ... if the person knows, or ought reasonably to know that the transaction or series of transactions

...

(b) perpetrates a fraud on any person in British Columbia, or
(c) perpetrates a fraud on any person anywhere in connection with trading in or acquiring securities ... in British Columbia.

Walker v. B.C. (Securities Commission)

Background

- An Alberta corporation, Panterra Resource Corp., listed on the TSX Venture Exchange;
- Tamburrino was an Alberta resident and a director;
- Paulson, BC resident, was a director and vice-pres.;
- Walker, a BC resident, was a director and the Co's legal counsel;

Walker

2 Types of Transactions that were looked at:

- Share purchase with Company funds
- Finder Fees paid
- Issue: is s. 57 violated if shares were paid for

Walker (cont'd)

Court of Appeal:

- A person need not be a party to an agreement – it is enough if they participate directly and indirectly;
- The prohibition of s. 57 is not limited to a single transaction – there can be participation in a series of transactions;
- Securities don't need to be the subject matter of the transaction – is enough if the transactions "relate" to a trade or acquisition of a security;

Grmovsek (cont'd)

- Scam brings in \$10 million over yrs
- US Financial Industry Regulatory Authority (FINRA) computer info: notices Stan's trading patterns;
- Leads to law firm Cornblum worked at
- FINRA contacts SEC
- SEC brings in FBI
- SEC alerts OSC, RCMP and MRS (Market Regulation Services)

Grmovsek (cont'd)

- Cornblum takes a leap
- Stan pleads out:
 - 39 months in jail;
 - Disgorgement orders to SEC and OSC
 - costs