COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Khorchidian v. British Columbia (Securities Commission),* 2024 BCCA 232

Date: 20240621
Dockets: CA45292; CA45311; CA45477; CA45753; CA46002; CA46005

Dockets: CA45292; CA46002

Between:

Raffi Khorchidian

Appellant

And

British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission

Respondents

- and -

Dockets: CA45311; CA45753; CA46005

Between:

EuroHelvetia TrustCo. S.A. also known as EHT Corporate Services S.A. and David Craven

Appellants

And

British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission

Respondents

- and -

Docket: CA45477

Between:

Garo Aram Deyrmenjian

Appellant

And

British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission

Respondents

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: Decisions of the British Columbia Securities Commission, dated April 25, 2018 (*Re Deyrmenjian*, 2018 BCSECCOM 125) and November 2, 2018 and March 11, 2019 (*Re Deyrmenjian*, 2019 BCSECCOM 93).

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Place and Date of Hearing:	Vancouver, British Columbia April 24–25, 2024
Place and Date of Judgment:	Vancouver, British Columbia June 21, 2024

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

These are related appeals from two decisions of a panel established by the British Columbia Securities Commission. The first decision contained the panel's liability findings. The second addressed, in addition to sanctions, an application made pursuant to s. 171 of the Securities Act to revoke or vary certain of those findings. The case before the panel was an alleged market manipulation scheme involving shares of a British Columbia reporting issuer. Relying in large part on inferences drawn from the evidentiary record, the panel found that three of the appellants (Khorchidian, Deyrmenjian and EHT) contravened s. 57(a) of the Act. The fourth appellant (Craven, one of EHT's managing directors) was found to have authorized, permitted or acquiesced in EHT's contravention of s. 57(a). Therefore, Craven also contravened s. 57(a) by operation of s. 168.2 of the Act.

On appeal, all four appellants argue the panel erred in law by making impermissible inferences based on speculation and conjecture. EHT and Craven further contend the panel erred: (i) in concluding the Commission possessed territorial jurisdiction over them, and (ii) in its disposition of the s. 171 application.

Held: Appeals dismissed. The challenged inferences were available on the record. The panel therefore did not err in law in drawing them. Nor did the panel err in law in concluding that there was a "real and substantial" connection between EHT and Craven (on the one hand) and British Columbia (on the other) sufficient to ground the Commission's assertion of jurisdiction. Finally, the panel made no reversible error in refusing to revoke or vary its liability findings on the s. 171 application. It identified the appropriate test, applied that test correctly, and exercised its discretion reasonably in dismissing the application.

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Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] On April 25, 2018, a panel established by the British Columbia Securities Commission (the Panel and the Commission) found the appellants Garo Aram Deyrmenjian, Raffi Khorchidian and EuroHelvetia TrustCo S.A. also known as EHT Corporate Services S.A. (EHT) to have engaged in conduct that resulted in or contributed to an artificial price for the shares of Kunekt Corporation (Kunekt), contrary to s. 57(a) of the *Securities Act*, R.S.B.C. 1996, c. 418 [*Act*]. The Panel also found that the appellant David Craven, a managing director of EHT during the relevant period, authorized, permitted or acquiesced in EHT's contravention and that under s. 168.2 of the *Act* he had therefore also contravened s. 57(a).

[2] The Panel found it had jurisdiction to sanction EHT and Craven under ss. 161 and 162 of the *Act*, despite the fact neither was resident in or doing business in British Columbia. It concluded the conduct of EHT and Craven had a real and substantial connection to British Columbia. Together with Khorchidian and Deyrmenjian, two British Columbia residents, EHT and Craven were fundamental to implementing a campaign to artificially inflate the price of the shares of Kunekt, a reporting issuer in British Columbia. The Panel noted that manipulations of the type to which they were found to have contributed have significant and adverse impacts on the reputation of British Columbia's capital markets. The Panel's reasons on jurisdiction and liability are indexed at 2018 BCSECCOM 125.

[3] EHT and Craven subsequently applied under s. 171 of the *Act* to revoke or vary parts of the Panel's findings and to dismiss the allegations against them. The application was denied on November 2, 2018. Reasons which followed are indexed at 2019 BCSECCOM 93.

[4] With leave of the Court granted on November 14, 2019 (see 2019 BCCA 411), Deyrmenjian, Khorchidian, EHT and Craven now appeal the liability

findings. EHT and Craven also appeal the Panel's determination on jurisdiction, as well as its refusal to revoke or vary its findings on the s. 171 application.

Factual Background

[5] This section canvasses certain relevant findings of fact made by the Panel. Paragraph references are to the Panel's liability reasons: 2018 BCSECCOM 125. All dollar references are to United States dollars.

The relevant entities, individuals and accounts

[6] Deyrmenjian and Khorchidian, residents of Vancouver, had been friends and business associates for years prior to the relevant period and both have experience as directors and officers of public companies: at paras. 6–8.

[7] EHT was a Swiss wealth management firm of which Craven was a managing director during the relevant period: at para. 9. It is now insolvent.

[8] Kunekt is a Nevada company incorporated in 2007. Mark Bruk, a resident of Vancouver during the relevant period, was its founder, president, CEO and sole director. As of September 2010, Kunekt had no active business. Its shares were quoted on the Over the Counter Bulletin Board market in the United States under the symbol "KNKT". It was a reporting issuer in British Columbia during the relevant period: at paras. 11–13.

[9] Virtigo S.A. (Virtigo) was incorporated in the British Virgin Islands. Its sole director was a corporate entity, CMS Inc. The directors and officers of CMS Inc. were directors, officers and/or employees of EHT. Virtigo's beneficial owner was the Virtigo Trust, a trust based in Nevis. Khorchidian was the beneficial owner of the Virtigo Trust: at paras. 17, 20.

[10] In November 2007, EHT opened an account at CBH Compagnie Bancaire Helvetique S.A. (CBH), a bank in Geneva, in the name of Virtigo (the Virtigo account). The Virtigo Trust (and therefore, indirectly, Khorchidian) was the beneficial owner of assets in the account. The signing authorities on the account

were directors, officers and/or employees of EHT. All correspondence relating to the account was to be sent to EHT: at paras. 18–19.

[11] Next Generation Technology International Ltd. (Next Generation) was incorporated in the Marshall Islands. CMS Inc. was also its sole director. The sole shareholder of Next Generation was the Virtigo Trust, of which Khorchidian was the beneficial owner: at para. 24.

[12] In February 2011, EHT opened an account at CBH in the name of Next Generation (the Next Generation account). The Virtigo Trust (and therefore, indirectly, Khorchidian) was the beneficial owner of assets in the account. Those with signing authority were directors, officers and/or employees of EHT. All correspondence relating to the account was to be sent to EHT: at para. 25.

[13] Eden Ventures Inc. (Eden) was incorporated in the British Virgin Islands. CMS Inc. was also its sole director. Its beneficial owner was the Eden Trust, a trust based in Nevis. The beneficial owner of the Eden Trust was Deyrmenjian. The settlor of the Eden Trust was Khorchidian: at paras. 21, 23.

[14] In June 2008, EHT opened an investment advisory account at CBH in the name of Eden (the Eden account). Eden Trust (and therefore, indirectly, Deyrmenjian) was the beneficial owner of the assets in the account. The signing authorities were directors, officers and/or employees of EHT. All correspondence relating to the account was to be sent to EHT: at para. 22.

[15] Dryster Investments Inc. (Dryster) was incorporated in Panama. Its beneficial owner was Khorchidian. In February 2008, Dryster opened an account at Rahn+Bodmer Co., a Swiss bank (the Dryster account). Khorchidian was named as the beneficial owner of the assets in the account. Neither EHT nor any of its directors, officers or employees were referenced in the account documents: at paras. 26–27.

[16] Sandano Business Corp. (Sandano) was also incorporated in Panama. The beneficial owner of Sandano was Deyrmenjian. In August 2010, Sandano

opened an account at Bank Gutenberg AG, a Swiss bank (the Sandano account). Deyrmenjian was named as the beneficial owner of the assets in the account. Neither EHT nor any of its directors, officers or employees were referenced in the account documents: at paras. 28–29.

[17] Paramount Trading Company Inc. (Paramount) was incorporated in Nevis. The beneficial owner of Paramount was a director of EHT. In 1995, an account was opened with Mees Pierson (C.I.) Limited, a bank based in the Channel Islands, for Paramount (the Paramount account). The signing authorities on the account were directors, officers and/or employees of EHT. All correspondence relating to the account was to be sent to EHT. The nature of the business to be conducted in the account was stated as share trading/custody and investment: at paras. 30–31. Indeed, the Panel indicated that the account was used to hold EHT client funds and to hold and trade shares for a number of EHT's clients: at para. 113.

[18] The other account of relevance is an account at CBH opened in the name of EHT (the EHT account). This was not an account that EHT managed on behalf of its clients, it was EHT's own account at CBH: see para. 160.

The market manipulation scheme

The share accumulation

[19] In November 2010, trading in the shares of Kunekt resulted in the collective acquisition of 13.8 million shares, which represented 46% of Kunekt's then freely trading shares, by certain of the entities described above. Specifically, that month:

- 3 million shares were deposited into the Virtigo account (beneficially owned by Khorchidian, through the Virtigo Trust);
- 2.8 million shares were deposited into the Dryster account (beneficially owned by Khorchidian);

- 2.6 million shares were deposited into the Sandano account (beneficially owned by Deyrmenjian);

- 2.4 million shares were deposited into the Eden account (beneficially owned by Deyrmenjian, through the Eden Trust); and

- 3 million shares were deposited into the Paramount account (opened in the name of Paramount, which in turn was beneficially owned by a director of EHT).

The CFM invoices and associated wire transfers

The first payment to CFM

[20] On January 9, 2011, Capital Finance Media (CFM), a Florida-based direct marketer and tout sheet publisher for small public companies, issued an invoice in the amount of $600,000 referencing a marketing program for “Kunect” consisting of approximately 6.5 million emails a week. Like the three other CFM invoices for Kunekt marketing efforts that followed (each discussed below), this invoice was addressed to Next Generation at an address in Mumbai, India, and was made to the attention of “AR”, EHT’s chief accountant during the relevant period: at para. 36.

[21] On January 20, 2011, Craven and “SD”, EHT’s other managing director, authorized a wire transfer of $600,000 to CFM from the EHT account. The transfer was described as being for investor relations and advertising expenses for “KNKT Marketing”: at para. 37.

The second payment to CFM

[22] On February 2, 2011, an email was sent from a Gmail account in the name of AR to BS, Brian Sodi, the principal of CFM, reading: “As per our discussion, please continue the marketing KNKT. I am wiring in $836,000 that will cover the next 2 weeks. I will be in touch further regarding a possible direct mail program and a continued email effort”: at para. 39.

[23] The same day, a message sent on SafeMessage, a confidential message system used by EHT, from a "BrianS1" to "David" and "Elvis" attached an invoice for $836,000 from CFM to Next Generation; the message read:

> Attached is the invoice2 for KNKT. It represents 2 weeks of email at a budget of $400,000 per week. The additional $36,000 is for the additional emails I have scheduled for the end of this week. Jack, please approve so wire can be sent out asap.

[24] This second invoice was described as being for "IR Email Marketing Services for Kunect" and referenced a "KNKT Marketing Campaign" consisting of approximately 6.5 million emails per week for two weeks.

[25] On February 8, 2011, Craven authorized a wire transfer of $836,000 to CFM from the EHT account. The transfer was described as being for investor relations and advertising expenses for "KNKT": at para. 40.

[26] On the same day the $836,000 invoice was paid through the wire transfer to CFM from the EHT account, a separate wire transfer of $840,000 was sent from the Virtigo account to the EHT account: at para. 41.

The third payment to CFM

[27] On February 15, 2011, an email was sent from the Gmail account in AR's name to Brian Sodi, reading: "I would like to continue the electronic marketing of KNKT for the following 2 weeks. I have initiated a wire for $800,000." The same day, a SafeMessage communication from "BrianS1" attached an invoice from CFM to Next Generation in the amount of $800,000. Another SafeMessage communication between the EHT recipients of the invoice read: "Please move $800k to Brian from V": at para. 42.

[28] As with the two prior invoices issued by CFM, this third invoice was said to be for "IR Email Marketing Services for Kunect" and referenced a "KNKT Marketing Program" consisting of approximately 6.5 million emails per week for two weeks.

[29] The same day, February 15, 2011, Craven authorized a wire transfer of $800,000 to CFM from the EHT account. The transfer was described as being for investor relations and advertising expenses for the “KNKT Campaign”: at para. 42. Also on the same day, a separate wire transfer of $810,000 was sent from the Virtigo account to the EHT account: at para. 43.

[30] A few days later, on February 18, 2011, $1 million was transferred from the Paramount account to the Virtigo account: at para. 44.

The fourth payment to CFM

[31] On March 2, 2011, an email was sent from the Gmail account in AR’s name to Brian Sodi, reading: “I would like to scale back our marketing efforts for “Kunnect”. I am initiating a wire to Capital Financial Media for $800,000. Please allocate these funds equally over the next 6 weeks for email and marketing for “Kunnect”.” That day, CFM issued an $800,000 invoice to Next Generation for “IR Email Marketing Services for Kunect” which described a “KNKT Marketing Program” to occur for six weeks starting March 7, 2011: at para. 45. This was the fourth and final invoice issued by CFM.

[32] On March 4, 2011, a wire transfer of $800,000 was sent from the Next Generation account to CFM: at para. 46. On that same day, a wire transfer of $850,000 was sent from the Eden account to the Next Generation account: at para. 47.

[33] On March 11, 2011, $3 million was transferred from the Paramount account to the Eden account. The Paramount account statement identified this transfer as “KNKT”: at para. 48.

The promotional campaign and trading in Kunekt shares

[34] Kunekt began its existence with the intention to enter the financial account card market. However, it encountered issues with patent applications and, as noted above, by September 2010 the company had no active business. That changed with two announcements made in December 2010. On December 2,

Kunekt announced a pivot into the smart phone business. And on December 8, it filed notice of a material event with U.S. regulators disclosing it had entered into a non-binding letter of intent to make a corporate acquisition in furtherance of that objective: see paras. 34–35.

[35] These announcements were met with little market reaction. After the December 2 announcement, trading volumes were low and the share closing price was $0.55 or less. Even after the proposed acquisition was announced on December 8, few shares traded and the closing share price remained below $0.60: at para. 50.

[36] However, Kunekt's share price and trading volume began to increase on December 27, 2010, which the Panel described as the start of the "relevant period", and this continued into January. There were no news releases to account for this change in price and volume.

[37] The promotional campaign conducted by CFM to tout Kunekt's shares, which involved CFM distributing "tout sheets" about Kunekt by way of mass email blasts, began on January 25, 2011 and continued until about April 15, 2011. The tout sheets were also leaked on the evening of January 23, 2011, in advance of the email campaign. The tout sheets, which are reproduced at para. 54 of the Panel's liability reasons, contained grossly promotional statements.

[38] The "grossly promotional" nature of the statements was made readily apparent by reference to a quarterly report Kunekt had filed with the U.S. Securities and Exchange Commission for the fiscal quarter ended January 31, 2011. That filing disclosed Kunekt had approximately $360,000 in assets and no proprietary technology. Also noted were significant accumulated losses, a negative working capital and a deficit in shareholders' equity. A "going concern" note on the financial statements included in the quarterly report indicated that Kunekt's working capital would be insufficient to meet its anticipated liabilities in the next 12 months: at para. 55.

[39] Kunekt's share price and trading volume spiked during the week of January 24, 2011. By the end of the week, the share price had climbed to $1.43 on a volume of over 3.6 million shares, up from a final closing price of $0.99 on a volume of 439,544 shares the week prior. On both February 24 and 25, 2011, Kunekt's trading volume broke the 8 million mark and its share price exceeded $2.00 for the first time. Kunekt's share price reached a high of $2.89 on February 28, 2011, on a volume of 16.4 million shares. The share price dropped more than a dollar the next day, closing at $1.83 on a trading volume of 17.2 million shares—the highest volume during the relevant period: at paras. 56–58.

[40] On April 27, 2011, which the Panel described as "the end of the relevant period", Kunekt's share price closed at $0.77 on a volume of 266,904 shares. The share price plummeted further to only $0.03 by the end of 2011: at paras. 60–61.

[41] During the relevant period (that is, December 27, 2010–April 27, 2011), net proceeds in the following amounts were generated from trades in Kunekt shares in the relevant accounts:

- $3.36 million in the Virtigo account (beneficially owned by Khorchidian, through the Virtigo Trust);
- $3.97 million in the Dryster account (beneficially owned by Khorchidian);
- $3.42 million in the Sandano account (beneficially owned by Deyrmenjian);
- $3.89 million in the Eden account (beneficially owned by Deyrmenjian, through the Eden Trust); and
- $5.08 million in the Paramount account (opened in the name of Paramount, which in turn was beneficially owned by a director of EHT).

[42] Of these net trading proceeds (which total nearly $20 million cumulatively), about $18.1 million were generated on or after January 25, 2011, the date the promotional campaign began: at para. 63.

[43] The net proceeds realized through the trading in Kunekt shares did not sit idle in each of these accounts. There was evidence that during and after the trading activity in Kunekt shares:

- a total of $6.841 million was transferred out of the Eden account. This sum includes the $850,000 transfer to the Next Generation account, as described above, as well as transfers to unidentified third parties; and

- a total of approximately $4.6 million was transferred out of the Virtigo account. This sum includes the $1.65 million in total which was transferred to the EHT account, as described above, as well as transfers to unidentified third parties.

[44] Moreover, and as noted above, $1 million was transferred from the Paramount account to the Virtigo account on February 18, 2011, and $3 million was transferred from the Paramount account to the Eden account on March 11, 2011, during and after the trading activity in Kunekt shares.

The Panel's Decisions

Inferences drawn by the Panel

[45] From its findings of fact, the Panel drew three critical inferences:

1. Deyrmenjian, Khorchidian, EHT and Craven concealed their role in the manipulation;

2. Khorchidian permitted transfers of funds beneficially owned by him from the Virtigo and Next Generation accounts to fund payment of three CFM invoices (being the second, third and final invoices); and

3. Deyrmenjian permitted funds that were beneficially owned by him to be transferred from the Eden account to fund the payment by Next Generation of CFM's final invoice.

[46] With respect to concealment, the Panel referred, at para. 85, to certain pieces of evidence: the use of SafeMessage for communications relating to the delivery and payment of CFM invoices; the use of an Indian address and AR's name as contact person for Next Generation on the CFM invoices; the payment by EHT of the second and third invoices followed by same day transfers of funds from the Virtigo account; and, the payment by Next Generation of the final CFM invoice after receiving funds transferred from the Eden account. The Panel concluded:

> [86] It is reasonable and logical to infer from these facts that efforts were made to conceal the identity of the participants in, and sources of funding for, the Kunekt tout sheet marketing campaign. The use of multiple offshore accounts to both funnel funding for the campaign and distribute the proceeds realized, as well as the use of a confidential message system for instructions regarding payment of invoices relating to the promotion, are devices which obscure the identity of the persons behind the campaign. EHT and Craven set up the accounts and authorized many of the payments and transfers of funds.

[47] With respect to the funding of the payment of CFM invoices by Khorchidian, the Panel held:

> [102] In the circumstances, it is reasonable and logical to infer that Khorchidian, as the beneficial owner of the assets in the Virtigo S.A. and Next Generation accounts, at a minimum, permitted transfers of a total of $2.45 million of funds that were beneficially owned by him from those accounts to fund payment of three CFM invoices for the Kunekt tout sheet marketing campaign.

[48] With respect to the funding of the payment of the final CFM invoice by Deyrmenjian, the Panel held:

> [111] In the circumstances, it is reasonable and logical to infer that Deyrmenjian, at a minimum, permitted funds that were beneficially owned by him to be transferred from the Eden Ventures account to fund payment by Next Generation to CFM of its final invoice for the Kunekt tout sheet marketing campaign.

Inferences the Panel refused to draw

[49] The Panel declined to draw the following inferences the executive director of the Commission (the Executive Director) had invited it to make on the basis that such inferences could not be reasonably and logically drawn from facts established by clear, convincing and cogent evidence, the standard described by the Panel:

1. the appellants worked together to manipulate Kunekt's share price;
2. Craven concealed his role in the manipulation by using AR's name;
3. Craven determined the nature, timing and length of CFM's promotional campaign;
4. transactions in the offshore accounts owned by Deyrmenjian and Khorchidian were carried out on their instructions; and
5. Paramount's Kunekt trading was carried out on behalf of Deyrmenjian and Khorchidian as EHT clients.

The Panel's conclusions on liability

[50] The Panel explained, at para. 133, that four elements must be established in order to prove a contravention of s. 57(a) of the *Act*: (1) the conduct of the respondent related to "securities" or "exchange contracts"; (2) there was either (or both) a misleading appearance of trading activity in, or an artificial price for, that security or exchange contract (referred to as the "form of manipulation"); (3) there was the requisite "causal connection" between the respondent's conduct and the form of manipulation—i.e., that the respondent, directly or indirectly, engaged in conduct that resulted in or contributed to that form of manipulation; and (4) the respondent had the requisite mental state for the contravention—i.e., that the respondent knew, or ought reasonably to have known, that their conduct had the requisite causal connection to the form of manipulation.

[51] It was clear to the Panel that the Kunekt shares were “securities” under the *Act*, and that they traded at an artificial price as a result of the CFM tout sheet campaign, which it considered to have been “grossly promotional”. There was no apparent basis for the statements made about Kunekt’s prospects in the tout sheets and there was no rational basis for the exponential rise in its trading price or volume during the relevant period. In other words, the artificial price for Kunekt shares was created by the tout sheet marketing campaign. The Panel concluded the artificial price existed from January 25, 2011, until at least April 19, 2011, two trading days after the completion of the campaign: at paras. 135, 143–148.

[52] Having found the existence of an artificial price for Kunekt shares created by the promotional campaign, the Panel turned to the “causal connection” element: whether the respondents (the appellants on appeal), directly or indirectly, engaged in conduct that resulted in or contributed to that artificial price.

[53] Khorchidian was found to have engaged in conduct that resulted in or contributed to the artificial price for Kunekt shares by permitting the transfers totaling $2.45 million from the Virtigo and Next Generation accounts which funded payments of three CFM invoices relating to the tout sheet marketing campaign: at para. 155.

[54] Similarly, Deyrmenjian was found to have engaged in conduct that resulted in or contributed to the artificial price for Kunekt shares by permitting the transfer of $850,000 from the Eden account to the Next Generation account, which funded the payment of CFM’s final invoice for services relating to the tout sheet marketing campaign: at para. 158.

[55] EHT was found to have engaged in conduct that resulted in or contributed to the artificial price for the Kunekt shares by paying CFM’s first invoice for services relating to the tout sheet marketing campaign with funds from its own CBH account, the EHT account: at para. 165. In paying the first invoice with funds from the EHT account, EHT funded the campaign. That was conduct which directly resulted in or contributed to the artificial price: at para. 161. In so

concluding, the Panel rejected EHT's submission that the payment of this invoice and the source of funds was not any different from payment of the other three CFM invoices, which were funded by Virtigo and Eden. The Panel noted, at para. 163, that there was "direct evidence the invoice was paid by EHT from its own account", and "no evidence that any third party funded the payment".

[56] The Panel held:

> [164] … As this account was EHT's own CBH account, any transactions within the account must have been carried out with the knowledge of EHT and Craven, a managing director and signatory to the account. If there existed further records identifying the source of those funds, they would be in the possession and control of EHT or its trustee in bankruptcy. EHT chose not to enter any further records, and it is not for them, at this point, to ask us to speculate as to reimbursement.

[57] The Panel held that Craven, as one of the parties who authorized the wire transfer payment of the first CFM invoice on behalf of EHT (which, as has been noted, he did in his capacity as managing director), authorized, permitted or acquiesced in EHT's conduct which resulted in or contributed to the artificial price of the Kunekt shares: at para. 166.The Panel imposed sanctions for reasons indexed as *Re Deyrmenjian*, 2019 BCSECCOM 93. Leave to appeal the sanctions was granted, but only to assert that the sanctions should be set aside if the other appeals are allowed. For that reason, it is unnecessary for us to address a distinct argument with respect to the sanctions.

The Panel's conclusions on jurisdiction

[58] In response to EHT's submissions that: Craven is not a resident of British Columbia; EHT is a company subject to and regulated by the laws of Switzerland with no legal presence in British Columbia; the tout sheets at issue were not authored or disseminated in British Columbia; and, invoices related to the promotion were produced in Florida and sent to India, and paid by way of wire transfer from Switzerland, the Panel held:

> [192] The Commission has long been concerned about abusive trading schemes in US over-the-counter markets that are contemporaneous with suspicious spam campaigns (see, for example, *Re Hypo Alpe-Adria-Bank*

> *(Liechtenstein*) *AG* 2008 BCSECCOM 257). The reputation of the British Columbia capital markets is negatively impacted by market participants who engage in questionable activities using shell companies with strong connections in British Columbia. To address these issues, the Commission implemented BC Instrument 51-509, *Issuers quoted in the US Over-the-Counter Markets*, and more recently, Multilateral Instrument 51-105, *Issuers Quoted in the U.S. Over-the-Counter Markets*.
>
> [193] The matter before us involves a significant, and sophisticated, market manipulation. The payments for the tout sheet campaign were disguised through multiple levels of corporate and trust accounts at EHT, and invoices were produced and routed through multiple jurisdictions. EHT and Craven argue that these facts prevent the Commission from having jurisdiction over their conduct.
>
> [194] The payments for this market manipulation were structured through a complex web of layered accounts and multiple jurisdictions, but the conduct of the respondents as a whole demonstrates that EHT and Craven, as well as two British Columbia residents, Khorchidian and Deyrmenjian, were fundamental to implementing a grossly promotional tout sheet campaign to artificially inflate the price of Kunekt shares, a reporting issuer in British Columbia. Manipulations of this nature have significant and adverse impacts on the reputation of British Columbia's capital markets. We find that the conduct of EHT and Craven had a real and substantial connection to British Columbia, and that we have jurisdiction to make orders in the public interest under sections 161 and 162 of the Act.

The s. 171 application

[59] EHT and Craven applied under s. 171 of the *Act* to revoke or vary parts of the Panel's findings and to dismiss the allegations against them. That provision reads, in part, as follows:

> 171 If the commission … considers that to do so would not be prejudicial to the public interest, the commission … may make an order revoking in whole or in part or varying a decision the commission … has made under this Act, … whether or not the decision has been filed under section 163.

[60] In considering the application, the Panel referred to s. 8.10(a) of *BC Policy 15-601 – Hearings* for guidance. That provision states, in part:

> … Before the Commission changes a decision, it must consider that it would not be prejudicial to the public interest. This usually means that the party must show the Commission new evidence or a significant change in the circumstances.

[61] The Panel noted the "threshold" referred to in s. 8.10(a) has been consistently applied, referring to *Re Pyper*, 2004 BCSECCOM 238; *Re Steinhoff*, 2014 BCSECCOM 211; and *Foresight Capital Corporation*, 2006 BCSECCOM 529 and 2006 BCSECCOM 531. In *Re Pyper*, the Commission panel stated:

> For an application under Section 171 to succeed, the applicant must show us new and compelling evidence or a significant change in circumstances, such that, had we known them when we issued our sanctions decision, we would have made a different decision.

[62] The Panel here concluded that for the s. 171 application to succeed, EHT and Craven had to establish:

1. the additional evidence they sought to adduce on the application:

    a) was relevant to the allegations;

    b) was "new" in that it was not reasonably available for use by EHT and Craven at the time of the liability hearing;

    c) was "compelling" in that if the Panel had been provided with the additional evidence at the time of the liability hearing, it would have decided differently with respect to EHT and Craven's liability; and

2. it would not be prejudicial to the public interest to revoke the liability findings.

[63] EHT and Craven sought to adduce the following affidavit evidence, arguing that it undermined the Panel's critical finding that EHT funded the first phase of the Kunekt tout sheet marketing campaign:

- The affidavit of Roger Hunziker, principal of EHT's liquidator in Geneva, to which was attached a copy of a redacted bank statement for the EHT account for the period January 3, 2011, to May 19, 2015. That statement showed two deposits of $300,040 to the account on January 20, 2011 (the date of the first payment to CFM), immediately followed by the transfer out of $600,042.60;

- The affidavit of Alexandre Richa, a Swiss lawyer, describing restrictions imposed by Swiss law on the production of banking records and the legality under Swiss law of the disclosure of information regarding beneficial owners and/or clients in connection with the proceedings before the Panel; and

- A second affidavit executed by Mr. Hunziker citing the client confidentiality provision in the mandates signed by EHT clients in force in 2016, and deposing that:

    a) to the best of his information and belief neither of the two depositors that made the $300,040 deposits into the EHT account had agreed to waive the confidentiality provision or to consent to the disclosure of their names;

    b) according to the administrative mandates associated with the depositors' accounts neither EHT nor Craven was the beneficial owner (directly or indirectly) of the depositors; and

    c) as liquidator of EHT, he was aware of the entities that formed part of "the EHT group" (including Paramount) and neither of the depositors is part of "the EHT group".

[64] EHT and Craven did not deny that the redacted bank statement was in their possession at the time of the liability hearing but asserted their decision to withhold the document was based on an assessment of the risk to them of disclosing the statement at the time of the hearing.

[65] Voluntary disclosure of the statement, they argued, would have posed a high risk of breaching Swiss banking privacy laws, as well as certain of EHT's contractual commitments. They contended that disclosure of a redacted version of the statement would have mitigated that risk, but would have exposed the depositors to the risk of regulatory enforcement action in Canada because the limitation period with respect to these proceedings had not yet expired. Enforcement proceedings against the depositors in British Columbia would have,

in turn, increased the risk to EHT of a complaint being made by the depositors to Swiss authorities. Thus, they submitted, disclosure of even the redacted bank statement at the time of the liability hearing would have exposed them to a high risk of criminal and civil sanction in Switzerland and, therefore, the statement was not "reasonably available" to them for use at the liability hearing.

[66] On the s. 171 application, EHT and Craven acknowledged the legal restrictions on EHT's ability to produce and rely upon the redacted bank statement had not changed since the liability hearing. They contended, however, that the *risk* created by disclosure had shifted. First, the Canadian regulatory enforcement risk to EHT and Craven had increased substantially now that substantial penalties were being sought against them as a consequence of the liability findings. Second, the risk faced by EHT and Craven under Swiss law had abated as a consequence of the fact that the risk of Canadian regulatory proceedings being commenced against the unidentified third-party depositors had diminished. This latter point was so because the limitation period under the *Act* with respect to the depositors' conduct (the six-year period running from "the date of the events that give rise to the proceedings" set out in s. 159 of the *Act*) had expired by September 2018.

[67] It was common ground that the affidavits were relevant to the allegations made against EHT and Craven in the notice of hearing, but the Panel held that the affidavits did not contain compelling evidence. It found the only conclusion that could be drawn from the redacted bank statement was that two deposits of $300,040 were entered in the EHT account on January 20, 2011, followed by a transfer out of $600,042.60 on the same date. The evidence did not disclose the balance in the account before the two deposits were made and the Panel could not say whether the deposits were necessarily used to pay the CFM invoice. The depositors were not identified and the Panel could not say, as they could with the later CFM payments funded by Deyrmenjian and Khorchidian, that the depositors

had any relationship with Kunekt. The affidavit evidence was of "two coincidental deposits". The Panel concluded:

> [45] Without information regarding the balance in the account prior to the deposits and the identity of the depositors and their relationship, if any, to Kunekt, this coincidence fell short of constituting clear, convincing and cogent evidence from which we could make a reasonable inference that someone other than [EHT or Craven] or the EHT group funded payment of the first CFM invoice.

[68] While it was therefore unnecessary to address the other issues for consideration on a s. 171 application, the Panel went on to conclude that the evidence was not "new" because it was reasonably available for use by EHT and Craven at the time of the liability hearing. In so concluding, it reasoned:

> [48] [EHT and Craven] did not dispute the Redacted Bank Statement was available to them at the time of the liability hearing. It was clear from the applicants' submissions that a strategic decision was made to deliberately withhold the document during the liability hearing based on their assessment of the risks involved in making the disclosure.

[69] The Panel determined that obligations under Swiss law could not be relied upon to justify the strategic decision to withhold the additional evidence now sought to be admitted. Swiss law was considered irrelevant to the exercise of the Commission's public interest jurisdiction. In this regard the Panel cited *Re Hypo Alpe-Adria-Bank (Lichtenstein) AG*, 2007 BCSECCOM 622 and *Exchange Bank & Trust Inc v. British Columbia Securities Commission*, 2000 BCCA 389.

[70] While in some circumstances the Commission has granted a s. 171 application to revoke or vary liability findings on the basis of evidence that is not new, it has done so only where the evidence is compelling and has not been intentionally withheld as a matter of litigation strategy (see *Re Wong*, 2017 BCSECCOM 57). That was not the case here.

[71] The Panel concluded it would be prejudicial to the public interest to vary or revoke the liability findings against EHT and Craven.

Grounds of Appeal

[72] All of the appellants say the Panel erred in law by making impermissible inferences based on speculation and conjecture.

[73] EHT and Craven contend the Panel erred in concluding that the Commission possessed territorial jurisdiction over them.

[74] Further, EHT and Craven say the Panel erred in its disposition of the s. 171 application.

Standard of Review of the Liability Findings

[75] All four appellants say the Panel erred in basing its liability finding against them on speculation. In particular, the appellants challenge the sufficiency of the evidence relied upon to support the critical inferences to which I have referred.

[76] Where, as here, the legislature has provided for an appeal from an administrative decision to a court, a court hearing the appeal is to apply appellate standards of review to the decision: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 36–37; *Party A v. British Columbia (Securities Commission)*, 2021 BCCA 358 at paras. 108–114 [*Party A*].

[77] The appellants EHT and Craven start from the proposition that it is an error of law to make a finding of fact for which there is no supporting evidence. This has long been recognized: see *R. v. J.M.H.,* 2011 SCC 45 at para. 25.

[78] Khorchidian says the Panel may consider circumstantial evidence in determining whether the Executive Director has proven the allegations, but may only draw inferences “that are reasonably and logically drawn from the facts established by the evidence”. Such inferences must be established on the basis of clear, cogent and compelling evidence and must be more than mere conjecture or speculation: see *Re Suman*, 2012 LNONOSC 176 at paras. 293–295, 306.

[79] As the Panel itself noted, and as previous Commission panels have recognized, supposition or conjecture is no substitute for evidence and cannot be

relied upon as the basis for a reasonably drawn inference: see *R. v. Munoz* (2006), 86 O.R. (3d) 134, 2006 CanLII 3269 (S.C.J.) at para. 31; *Re Lim*, 2017 BCSECCOM 196, at para. 85; *Re Weicker*, 2015 BCSECCOM 19, at para. 80. Importantly, Khorchidian notes, "proof of opportunity or motive is of limited value in drawing inferences." *Alberta Union of Provincial Employees v. Alberta*, 2010 ABCA 216 ("Alberta") at paras. 37–38.

[80] The Panel's findings of fact are not challenged. There is no suggestion the underlying factual findings summarized above were affected by palpable error. The legal question before us, as I see it, is whether those findings of fact were a sufficient basis upon which to draw the disputed inferences. The question is not whether we would draw the impugned inferences but, rather, whether there was an evidentiary basis upon which the inferences might reasonably and logically have been drawn.

[81] In short, we must decide whether the disputed inferences were available to the Panel. If they were, deference should be afforded: see, for example, *ICBC v. Atwal*, 2012 BCCA 12 at para. 42.

The Khorchidian Appeal

Khorchidian's submissions

[82] Khorchidian contends the inference that he permitted transfers from the offshore accounts (being the Virtigo and Next Generation accounts) to fund the marketing campaign was based on the fact he was listed as the beneficiary of those accounts (described as a "coincidence") and therefore must have at least acquiesced to these transfers. He says that inference is unwarranted in light of the significant direct evidence that EHT, and Craven in particular, controlled the trading of shares and the transfer of funds out of the accounts, and orchestrated the CFM marketing campaign.

[83] Control of assets may be imputed to their beneficial owner even when the asset are in the hands of another. But here Khorchidian says he had no legal or

actual control of the assets in the accounts. Finding otherwise would be impermissible conjecture. He says the inference he knew what was happening in his accounts was inconsistent with the reasoning which resulted in the Panel's refusal to draw certain other inferences.

[84] He notes Craven used the identity of others, false names and encryption technology to conceal his orchestration of the marketing campaign. Invoices for the tout sheet campaign were addressed to the attention of Craven and he, not Khorchidian, authorized the payment of CFM's tout sheet invoices. All correspondence about the invoices was to and from EHT. No invoices were sent to Khorchidian.

[85] He says there was no evidence he exercised control over any of the offshore accounts or the trades and transactions in them; that he was aware of the CFM invoices or involved in their payment; that he was aware of the promotional campaign; that he ever owned any Kunekt shares; or that he gave instructions to make the trades in the Dryster account.

[86] He says "it is more, or at least equally, likely that Craven and other EHT representatives concealed their identity; orchestrated the marketing campaign using offshore accounts under their control that identified EHT clients as beneficiaries; caused the transactions to be carried out in those accounts; and benefited from the campaign". It is, in his submission, "pure conjecture" to find that the mere "coincidence" of his being named as a beneficiary on the offshore accounts demonstrated that he permitted the impugned transactions from those accounts.

[87] He contends the fact that proceeds from the sale of Kunekt were realized in the Dryster account "is not logically linked to Khorchidian's subjective knowledge that he had permitted transfers from the offshore accounts to fund the promotional campaign".

[88] He submits further that during the relevant period, nearly $5 million was transferred out of the Virtigo account to EHT and third parties, not to Khorchidian. There was no evidence he was aware of the share trades [in his accounts]; no evidence he knew he owned the shares or that they were sold; and no evidence the proceeds realized from the trading in Kunekt shares in the Virtigo and Next Generation accounts went to him (though there is evidence he benefited from trading the increased price of Kunekt shares in that substantial proceeds from doing so were realized in the Dryster account, an account of which he is the beneficial owner). He says the movement of money through certain of his accounts is insufficient to support the inference he permitted the transfers to be made in the other accounts.

The Executive Director's response to Khorchidian

[89] The Executive Director says the Panel drew the inference that Khorchidian, at a minimum, permitted transfers totaling $2.45 million of funds that were beneficially owned by him from his Virtigo and Next Generation accounts to fund payment of three CFM invoices for the Kunekt tout sheet marketing campaign, by reference to proven facts:

- EHT opened the Virtigo account in November 2007 for the stated purpose of the facilitation of ongoing investor relations operations, and the destination of outgoing payments from the account was stated to include "promotion payments";

- The Next Generation account was opened on February 11, 2011, after the first two CFM invoices had been issued. It had the same stated purpose as the Virtigo account. When EHT opened the Next Generation account, it provided a copy of Khorchidian's then-current passport to the bank;

- Payments of three CFM invoices were funneled through one of two accounts beneficially owned by Khorchidian, being the Virtigo and Next Generation accounts;

- The size of the amounts transferred from these accounts was large ($840,000 and $810,000 from Virtigo; $800,000 from Next Generation); and

- Khorchidian, through his Dryster account, profited $3.97 million in net proceeds from trading in Kunekt shares at the same time that Virtigo and Next Generation were funding the tout sheet campaign.

[90] The Executive Director adds that, in its sanction decision, the Panel found that Khorchidian also benefited from the $3.36 million generated in his Virtigo account from trading Kunekt shares during the tout sheet campaign.

[91] The Executive Director emphasizes that the Panel held that it was not credible that Khorchidian would permit transfers totaling $2,450,000 which funded payments to CFM (several times more than the assets held by Kunekt) to promote such a company unless he was aware of the true nature of the promotional campaign. Nor was it coincidental that accounts of which he was the ultimate beneficial owner traded significantly into the rising Kunekt share price during the tout sheet marketing campaign, resulting in substantial trading gains. The Executive Director asks us to bear in mind that both Khorchidian and Deyrmenjian had two accounts that traded in Kunekt shares.

[92] The Executive Director contends that addressing Khorchidian's alternate theory of liability—that Craven secretly used his and Deyrmenjian's accounts to effect the tout sheet marketing campaign—requires a reweighing of the evidence before the Panel, which is impermissible on appeal.

[93] In addition, that theory, the Executive Director argues, makes no sense. The selection of Khorchidian and Deyrmenjian, rather than unrelated or fictional third parties, as the two clients of whom Craven would secretly take advantage of to carry out the market manipulation would increase the risk Craven's misconduct would be detected. It was the contrary inference, that Khorchidian knowingly

permitted the transfers from his offshore accounts which funded the tout sheet marketing campaign, that was more consistent with the circumstantial evidence:

- both Khorchidian and Deyrmenjian were residents of Vancouver;
- they had been friends and business associates for many years;
- they were both knowledgeable about how public companies work;
- Khorchidian introduced Deyrmenjian to EHT;
- they both learned of a pending change in the business of Kunekt from Mark Bruk, the company's sole director, and/or his brother;
- Deyrmenjian discussed Kunekt with Khorchidian;
- Bruk and his brother were both clients of Deyrmenjian's jewelry business; and
- Craven was also a jewelry client of Deyrmenjian and continued to communicate with him about potential jewelry purchases long after the relevant period.

[94] The Executive Director adds that Khorchidian's alternative theory is "missing a key piece of the puzzle". The evidence, the Executive Director says, illustrates that in November 2010, Khorchidian and Deyrmenjian caused millions of Kunekt shares to be deposited into their non-EHT offshore accounts because they were "armed with non-public information about a pending change in Kunekt's business"—the very change which became the foundation for the promotional statements made in the tout sheets. By contrast, there was no evidence that Craven or anyone else at EHT was aware of the pending change in Kunekt's business at that time. In those circumstances, the Executive Director submits, there was no reason for EHT to secretly deposit millions of Kunekt shares in Khorchidian's and Deyrmenjian's EHT accounts in November 2010 without their knowledge.

[95] To similar effect, the suggestion that Craven took advantage of Khorchidian and Deyrmenjian by using their EHT offshore accounts to fund the tout sheet campaign without their knowledge is hard to reconcile, the Executive Director contends, with the fact they netted almost $4 million each trading Kunekt shares independently, in their non-EHT offshore accounts (the Dryster and Sandano accounts).

[96] The Commission says the whole of the evidence supported the Panel's conclusion that Khorchidian and Deyrmenjian had the "benefit" of the trading proceeds deposited into the Virtigo and Eden accounts. In the sanctions decision the Panel observed:

> [141] We agree with the executive director that, for the purposes of a section 161(1)(g) analysis, Khorchidian and Deyrmenjian, as beneficial owners, had the "benefit" of the trading proceeds deposited into the Virtigo S.A. and Eden Ventures accounts. Fundamentally, in the absence of any evidence to the contrary, it would be nonsensical to make a finding that the beneficial owners of an account do not receive the benefit of proceeds deposited into that account, as they have rights to the property on deposit.

[97] While assets were withdrawn from those accounts and the evidence does not disclose who ultimately received the proceeds generated from the trading in Kunekt shares during the relevant period, the Executive Director submits that it clearly cannot be said that none of EHT, Craven, Khorchidian or Deyrmenjian benefitted from the market manipulation scheme.

The Deyrmenjian Appeal

Deyrmenjian's submissions

[98] Deyrmenjian submits the inference drawn by the Panel that he permitted the transfer of funds from the Eden account which funded payment of the final CFM invoice was not reasonably supported by the evidence.

[99] Like Khorchidian, he says there is no indication he was aware of the promotional campaign. And, he argues, the evidence—particularly that in relation to the communications with CFM, including on SafeMessage, CFM's sending of

the invoices on SafeMessage, and the payment of those invoices by EHT or EHT controlled accounts—points to EHT, Craven, and AR as the parties who meaningfully participated in the campaign.

[100] He says other evidence in the record demonstrates he had little connection with the Eden account: Eden's sole director was CMS Inc., a company controlled by EHT; the signatories on the Eden account were directors of EHT; and all correspondence in relation to the account was to be directed to EHT. It was EHT that caused the 2.4 million Kunekt shares to be deposited into the Eden account in November 2010, and there is general evidence of concealment or fraud on the part of EHT.

[101] Another, and distinct, argument is laid out in Deyrmenjian's factum: that the finding he enabled the funding of the tout sheet marketing campaign was an inference based only on statements contained in a letter from FINMA, the Swiss Financial Market Supervisory Authority, to the Commission. In that letter, FINMA advised that EHT's lawyer had confirmed to it that EHT would not have transferred, from the Eden account, the funds used to pay CFM's final invoice without having first received instructions from Deyrmenjian.

[102] Deyrmenjian's counsel says it is not clear what use the Panel made of the FINMA letter but asserts that it was given some weight. He says the Panel must have accepted the FINMA letter and relied upon it to conclude that $850,000 could not have been transferred out of the Eden account without the acquiescence of the beneficial owner. Deyrmenjian contends there was nothing to tie him to the payment by Next Generation to CFM of its final invoice for the Kunekt tout sheet marketing campaign or the transfer out of funds from the Eden account to Next Generation, which was apparently used to fund that payment. In his submission, EHT and Craven controlled the Eden account. Moreover, there was no evidence he had any form of communication with CFM.

[103] Finally, Deyrmenjian argues the Panel found he had the requisite mental knowledge merely because it would not be credible for him to permit the transfer

of hundreds of thousands of dollars out of the Eden account to promote Kunekt unless he was aware of the promotional campaign. He says there is no evidence in the record other than the FINMA letter suggesting he was aware the funds were delivered from the Eden account for the purposes of paying for the CFM campaign, nor evidence as to who gave instructions or authorized any transfers from the Eden account. In short, like Khorchidian, he says there is no evidence that connects him to the CFM campaign (or its funding) at all.

[104] Deyrmenjian also contends the Panel placed inappropriate weight upon the fact he knew Khorchidian and that they had done business together. Those facts, he says, had no probative value.

[105] He notes there is no evidence as to who gave instructions with regard to the trades in the offshore accounts, and emphasizes the Panel expressly stated that there was insufficient evidence on which to make a reasonable and logical inference that trades in the offshore accounts were carried out on the instructions of Deyrmenjian and Khorchidian.

[106] He argues the Panel should have made findings with respect to the parties to the SafeMessage communications in evidence. He says the February 2, 2011, message from “BrianS1” to “David” and “Elvis” with respect to the payment of the second CFM invoice is clearly a message from Brian Sodi, the principal of CFM to David Craven. He says the February 15, 2011, message from “Elvis” to “David” and “Kented” with respect to the movement of $800,000 to “Brian” from “V” clearly references the payment of CFM (i.e., Brian Sodi) from the Virtigo account, without any reference to Khorchidian or Deyrmenjian. The inference that should have been drawn from this record is that EHT and Craven were in control of the Eden and Virtigo accounts. He notes EHT set up those accounts and that its directors and officers were authorized as signatories on them. Craven was a managing director of EHT.

The Executive Director's response to Deyrmenjian

[107] The Executive Director's position is that the Panel's inference implicating Deyrmenjian in the Kunekt tout sheet marketing campaign was based on proven facts and was, therefore, available to the Panel.

[108] The Executive Director emphasizes that the Panel found efforts had been made to conceal the identity of the participants in, and sources of funding for, the tout sheet marketing campaign. The Panel had observed that prior to the campaign, large positions in Kunekt shares were accumulated in accounts beneficially owned by Deyrmenjian at a time when Kunekt had limited assets and a "going concern" note on its financial statements. At this juncture, Kunekt had not yet closed agreements to acquire a new business in furtherance of its apparently intended pivot into the smart phone industry.

[109] The Executive Director says Deyrmenjian misapprehends how the Panel treated the FINMA letter. Deyrmenjian erroneously argues that the Panel's factual conclusion that he permitted the $850,000 transfer was based on the FINMA letter and there was no other evidence in the record to prove a causal connection. In fact, the Executive Director contends, the Panel's findings are clear that they considered the FINMA letter and gave it little weight.

[110] The Executive Director says that, rather than relying on the FINMA letter, the Panel referred to the following proven facts when it drew the key factual conclusion that Deyrmenjian permitted the transfer which funded the payment of the final CFM invoice:

- the transfer of $850,000 from his Eden account to the Next Generation account coincided with the payment by Next Generation of CFM's $800,000 invoice;

- there were no funds in the Next Generation account before the transfer;

- the significant size of the amount ($850,000) transferred from his Eden account to the Next Generation account;
- Deyrmenjian was a long-time friend and business associate of Khorchidian;
- Deyrmenjian had discussed the pending change in Kunekt's business with Khorchidian; and
- Deyrmenjian, through his Sandano account, profited $3.42 million in net proceeds from trading in Kunekt shares during the Kunekt tout sheet marketing campaign.

[111] The Executive Director emphasizes the Panel's conclusion that it was not credible that Deyrmenjian would permit an $850,000 transfer, which funded a payment to CFM of hundreds of thousands of dollars more than the assets held by Kunekt, to promote such a company unless he was aware of the true nature of the promotional campaign. Nor was it coincidental, the Panel reasoned, that his accounts traded significantly into the rising share price during the tout sheet promotional campaign, resulting in substantial trading gains.

[112] The Executive Director says the reason Deyrmenjian can make the argument that he had little connection to his Eden account is because he made it appear that way. He gave evidence at his investigative interview that he only dealt with his offshore accounts in person, even though he resided in Vancouver and his offshore accounts were in Switzerland. He stated that he did not ask for or receive account statements from EHT. This unusual behaviour, the Executive Director argues, is indicative of someone who wanted to conceal his connection to any trading or transactions in his offshore accounts and is supportive of the inference drawn by the Panel.

[113] The Executive Director further notes that at the sanctions hearing, Deyrmenjian led no evidence of his trading profits not being what the Executive Director suggested they were.

EHT and Craven Liability Appeal

EHT and Craven's submissions

[114] EHT and Craven say they were "drawn into" a market manipulation scheme, as a panel of the Commission found EHT had been drawn into the scheme considered in *Re Lim*, a case involving somewhat similar facts.

[115] *Re Lim* involved a tout sheet-based market manipulation scheme which resulted in the creation of an artificial price for the shares of another British Columbia reporting issuer, "Urban Barns". In that case, as here, there was no evidence EHT or Craven owned any of the manipulated shares, or that they had received proceeds of the sale of such shares. Nonetheless, it was alleged that EHT's conduct as an escrow agent resulted in or contributed to an artificial share price for the shares of Urban Barns.

[116] The panel there determined that EHT had an administrative role in transactions which led to the artificial price for the shares of Urban Barns. That role aided in hiding the individuals responsible for the manipulation. However, those administrative actions (without more evidence linking them to the artificial price) were "too tangential to the key elements of the manipulation" to ground a finding that EHT's conduct resulted in or contributed to the artificial price. In other words, there was insufficient clear, convincing and cogent evidence for the panel to find that EHT's conduct contributed to the market manipulation at issue in *Re Lim*: see paras. 143–151.

[117] Drawing on *Re Lim*, EHT and Craven say the Commission has therefore previously accepted that, without more, no liability under s. 57(a) of the *Act* can attach to an offshore trustee who plays an administrative role in transactions that lead to an artificial share price, even if doing so aids in hiding the individuals responsible for the manipulation.

[118] They contend the Panel's conclusion at para. 194, in particular the passage I emphasize below, was unsupported by the evidence:

> [194] The payments for this market manipulation were structured through a complex web of layered accounts and multiple jurisdictions, but the conduct of the respondents as a whole demonstrates that EHT and Craven, as well as two British Columbia residents, Khorchidian and Deyrmenjian, were fundamental to implementing a grossly promotional tout sheet campaign to artificially inflate the price of Kunekt shares, a reporting issuer in British Columbia. [Emphasis added.]

[119] Further, they say the only conduct giving rise to Mr. Craven's liability was his authorization of the wire transfer payment of the first CFM invoice on behalf of EHT. That was considered by the Panel to amount to authorizing, permitting, or acquiescing in EHT's conduct that resulted in or contributed to the artificial price of the Kunekt shares. The Panel's conclusion that EHT engaged in conduct that contributed to the artificial price was based upon a single finding: that EHT paid the first CFM invoice from its own money. But, EHT and Craven submit, no clear, convincing, and cogent evidence established that EHT in fact used its own funds to pay the first CFM invoice. That finding lacks an air of reality given "the dearth of evidence that EHT saw any of the beneficial net proceeds of sale of the Kunekt stock". Why, they ask, would EHT pay $600,000 of its own money to promote a stock in which it had no interest?

[120] EHT and Craven compare their roles in this scheme to the conduct of those charged in *Re Cerisse*, 2017 BCSECCOM 27. In that case a panel made the following comments with respect to the "causal connection" requirement under s. 57(a) of the *Act*:

> [142] There is a spectrum of conduct that is tangential to the core trading and promotional efforts associated with a market manipulation. Where various conduct fits within this spectrum will be highly factual and context specific. Generally, where the conduct is further removed from the actual improper trading or specific improper promotional activities, it will be more difficult to establish that that conduct "results in" or "contributes to" a misleading appearance of trading activity or an artificial price for a security. Examples of conduct on this end of the spectrum would include efforts to establish a general business website for an issuer, maintenance of an issuer's securities regulatory filings, instructing escrow agents or transfer

> agents and the mere assisting in the opening of brokerage accounts on behalf of others.

[121] The panel in *Re Cerisse* held there was no evidence that either of two parties "played any role in the promotional side" of the company whose shares had been manipulated in the market. It described the case against them as follows:

> [144] The essential allegation is that by agreeing to sell their … shares to the buyers, they knew or ought to have known that the buyers were going to use the … shares to engage in a market manipulation. The secondary allegation is that by providing instructions to the escrow agent, aiding in reregistering and depositing securities and keeping … securities regulatory filings up to date, they were creating the environment for the market manipulation to occur.
>
> [145] The conduct of [the respondents] that is alleged to have contravened section 57(a) of the Act all fits within the end of the spectrum of conduct that is too tangential to the improper promotional and trading activity that actually constituted the market manipulation of [the] shares to find that they contravened section 57(a) themselves. As to the first allegation, it is not enough to have been the vendor of the shares … to the buyers in this case. … There is no evidence [the respondents] were aware of … an e-mail spam campaign or any possibility of improper trading activity prior to entering into the [critical] escrow agreement. As to the secondary allegation, we do not have sufficient evidence to find that this conduct directly or indirectly resulted in or contributed to a misleading appearance of trading activity or an artificial price for the … shares.

[122] Similarly, EHT and Craven deny any "specific involvement" in promotional activities. They say EHT's role was administrative only: its conduct consisted of administrative actions undertaken in the normal course of acting as agent and taking instructions from its clients. It simply acted as a wealth management firm and its role was "too tangential" to the market manipulation for liability to be imposed under s. 57(a) of the *Act*.

[123] The Panel found that by paying the second and third CFM invoices from the EHT account, while receiving same-day transfers from the Virtigo account, EHT assisted in the concealment of the true source of funding for the promotional campaign: at para. 177. This "subterfuge", as the Panel described it, was

considered to be further evidence that EHT was aware of the true nature of the promotional campaign: at para. 178.

[124] EHT and Craven submit that no inferences about their role in the market manipulation should have been drawn from the fact that funds used to pay CFM flowed through EHT's hands. The fact that the first invoice was paid through the EHT account was "at most a neutral consideration", as the second and third CFM invoices were also paid through the EHT account. They say there was:

> … no compelling and reliable evidence that EHT directly participated in or was even aware of the scheme alleged. Or that EHT had any facts before it from which it reasonably out to have known that the transfers it was asked to execute were associated with a market manipulation. Or who the beneficial owners were of the Kunekt shares that were sold. Or that EHT owned any of those shares or received any of the proceeds of sale of those shares.

[125] EHT and Craven note there is evidence that each of the first three CFM invoices were paid by wire transfers authorized by Craven, and that each of these wires were paid through EHT's own account. But the Panel found that the second and third invoices were paid using third-party funds which had been deposited into the EHT account, not with EHT's own funds. There was no clear, convincing, and cogent evidence, EHT and Craven submit, to support a finding that the first invoice was any different, in that it was *not* paid through the EHT account for a client. The only distinguishing factor on the first transfer, they say, was that there was no evidence as to whether there had been a contemporaneous offsetting deposit in the EHT account. EHT and Craven contend that this "evidentiary gap" or "vacuum" should not have led to the inference drawn by the Panel, which they contend constituted impermissible speculation.

The Executive Director's response to EHT and Craven

[126] The Executive Director's position is that EHT's conduct in this case was not "tangential" to the promotional activity which created the artificial price for the Kunekt shares. To the contrary, there is direct evidence implicating EHT and Craven in the market manipulation scheme, and the promotional efforts in particular.

[127] In this regard, the Executive Director emphasizes the Panel's finding that EHT made the first payment for the market manipulation campaign, CFM's January 9, 2011 invoice, with funds from its own CBH account, not from an account that it managed on behalf of its clients. The payment was authorized by EHT's managing directors, one of whom was Craven. The invoices made it clear, on their face, that they were for the Kunekt campaign. It was this specific conduct, the Panel found, that satisfied the requisite connection aspect of the s. 57(a) liability analysis: see paras. 161, 165.

[128] The Executive Director further notes that EHT and Craven were involved in efforts to conceal the identity of the participants in, and sources of funding for, the campaign. Those efforts included the use of multiple offshore accounts, as well as the use of a confidential message system (SafeMessage) for instructions regarding payment of invoices relating to the promotion. The Panel found EHT and Craven set up the accounts and authorized many of the payments of invoices and associated transfers of funds. It also expressly found that by paying the second and third invoice, EHT assisted in the concealment of the true source of funding for the promotional campaign: see paras. 86, 177.

[129] Finally, the Executive Director seeks to distinguish *Re Lim*, submitting that EHT's role in this case is not, as it was there, "tangential" to the market manipulation. It highlights the panel's findings in *Re Lim*, which emphasize, it says, the more limited nature of EHT's role in the scheme there considered:

> [145] EHT's conduct, that the executive director alleges resulted in or contributed to the artificial price for the Urban Barns shares, is conduct that relates to its services as an offshore trustee. EHT acted as a conduit for the Urban Barns shares on their route to the four North American brokerage accounts of CBH. EHT also assisted Concerto in opening a Swiss bank account and provided instructions on various payments out of that account to CFM, among others.
>
> [146] There is no doubt the hiding of the identity of the individuals behind the manipulation of the Urban Barns shares was aided substantially by the use of an offshore intermediary like EHT. However, that is not one and the same as a finding that the conduct of EHT resulted in or contributed to the manipulation. Hiding the identity of the individuals responsible for a manipulation can assist the manipulators, but in this case it was not essential to the manipulation itself.

> ...
>
> [148] There is no evidence that EHT had any role in the tout sheet campaign other than its role with respect to the Concerto account payments. EHT was not the beneficiary of that account. The executive director does not allege that EHT was the architect of that promotional campaign nor, in any other manner, contributed to its contents.
>
> ...
>
> [150] In summary, EHT did have an administrative role in the transactions that led to the artificial price for the shares of Urban Barns. EHT's role did aid in hiding the individual's responsible for the manipulation. However, those administrative actions (without more evidence linking those administrative actions to the artificial price for a security), in the words of *Cerisse*, were too tangential to the key elements of the manipulation for us to find that EHT's conduct resulted in or contributed to the artificial price for the Urban Barns shares during the relevant period.
>
> [Emphasis added.]

[130] The Executive Director says two findings of facts made by the Panel distinguish EHT's conduct in this case. First, there was a direct payment of the first invoice CFM from the EHT account. Second, there was evidence of significant direct contact between CFM and EHT.

Analysis of the Liability Appeals

[131] The evidentiary record clearly established that funds were transferred from Khorchidian's Virtigo and Next Generation accounts to fund the payment of invoices for the tout sheet marketing campaign. The record also established that $850,000 was transferred from Deyrmenjian's Eden account to fund the payment of CFM's final invoice for the campaign. The evidence also established that EHT paid CFM's first invoice for the tout sheet marketing campaign with funds from its own account at CBH.

[132] In my opinion, it was open to the Panel to infer from the evidence that: (1) Khorchidian permitted the transfers of a total of $2.45 million of funds that were beneficially owned by him from the Virtigo and Next Generation accounts; (2) Deyrmenjian permitted the transfer of $850,000 of funds that were beneficially owned by him from the Eden account; and (3) EHT funded the payment of the first

invoice. These inferences were reasonably and logically drawn from proven facts which had been established by clear, convincing and cogent evidence.

[133] Having drawn those inferences, and having concluded that it was the promotional campaign which created the artificial prices for the Kunekt shares during the relevant period, it was open to the Panel to find that:

- by permitting the transfers from the Virtigo and Next Generation accounts which funded payments of three CFM invoices, Khorchidian engaged in conduct that resulted in or contributed to the artificial price for Kunekt shares;

- by permitting the transfer from the Eden account which funded the payment of CFM's final invoice, Deyrmenjian engaged in conduct that resulted in or contributed to the artificial price for Kunekt shares; and

- by paying the first CFM invoice with funds from its own CBH account, EHT engaged in conduct that resulted in or contributed to the artificial price for the Kunekt shares.

[134] It was also open to the Panel to find that each knew or ought reasonably to have known that their conduct would result in or contribute to an artificial price for the Kunekt shares, given the grossly promotional nature of the campaign being funded.

[135] Given the Panel's finding that EHT paid the first CFM invoice with funds from its own account, it was further open to it to conclude that Craven, as managing director of EHT and one of the parties who authorized that payment, authorized, permitted or acquiesced in EHT's contravening conduct, and that he had knowledge of EHT's contravention and the ability to influence the actions of EHT in connection therewith.

[136] In sum, inferences available to the Panel on the record were drawn, and those inferences enabled the Panel to make the findings necessary to impose

liability on each of the appellants under the *Act*. The decision to draw such inferences should be afforded deference.

[137] I would not accede to EHT's argument that the Panel's conclusion that EHT played a fundamental part in the tout sheet marketing campaign was inconsistent with the Panel's inability to draw the inference that the parties worked together to manipulate Kunekt's share price or that Craven determined the nature, timing and length of CFM's promotional campaign. The fact that the evidence only clearly supported the limited inferences drawn by the Panel leads me to conclude the Panel was careful not to draw unsupported inferences. It does not undermine those drawn.

[138] The evidence was sufficient to permit the Panel to conclude the involvement of EHT in the manipulation in this case was not "too tangential". It was appropriate, in my view, to place some weight upon the fact that one of the CFM invoices was paid directly by EHT and the fact that there was significant and clear communication between persons at EHT and CFM with respect to the nature and extent of the services being provided by CFM, being the SafeMessage communications described above which discussed the CFM campaign and the payment of the CFM invoices. The decision in *Re Lim* was appropriately distinguished. EHT's conduct was of a different character in this case.

[139] The Panel's starting proposition was that the beneficial owners of the accounts from which monies were drawn to fund payment of the invoices had the benefit of payments made into, and trading proceeds realized in, those accounts. There was no evidence to the contrary. There was evidence that net profits generated from trading in Kunekt shares were paid out of the Virtigo and Next Generation accounts, as described above, but no evidence identifying the beneficial owners of the accounts into which these funds were deposited.

[140] Certain accounts beneficially owned by Khorchidian and Deyrmenjian, in which net proceeds were realized from trades in Kunekt shares during the relevant period, the Dryster (Khorchidian) and the Sandano (Deyrmenjian)

accounts, were not managed by EHT. And as the Panel noted, neither EHT nor any of its directors, officers or employees were referenced in the account documents for either of these accounts.

[141] On the other hand, the Paramount account, within which net proceeds were realized from trades in Kunekt shares during the relevant period, was beneficially owned by a director of EHT, not by Khorchidian or Deyrmenjian.

[142] While there was evidence before the Panel that funds flowed out of each of the Virtigo, Eden and Paramount accounts after proceeds had been realized from trading in Kunekt shares, there is no reason to conclude the funds were not dealt with at the direction of the beneficial owners of those accounts.

[143] I would not accede to the argument that the Panel erred in drawing what EHT referred to as “a remarkable conclusion: that EHT used its own money to promote a stock it did not hold”. EHT was found to have made efforts to conceal the identity of the participants in the tout sheet marketing campaign and while the proceeds realized from the trading could not be traced, and there was no evidence of “specific enrichment of EHT”, at least some of the proceeds flowed through the account of a director of EHT.

[144] Nor would I accede to Deyrmenjian’s argument that, when the Executive Director asked the Panel to infer that Deyrmenjian funded the payment of the final CFM invoice through the Eden account, he relied upon two facts:

- there were no funds in the Next Generation account to pay CFM’s final invoice before a transfer from the Eden account of $850,000 on the same day (establishing that the funds used to pay that invoice came from Eden); and

- EHT had advised FINMA that Deyrmenjian gave instructions regarding the $850,000 transfer (the statement in the FINMA letter).

[145] The Panel found (at para. 105) that the only direct evidence the payment from the Eden account to the Next Generation account was made on the

instructions of Deyrmenjian were the hearsay statements made by EHT's lawyer to FINMA and recorded in the FINMA letter. It noted that there was conflicting evidence from Deyrmenjian who, in his sworn interview, had said he was not previously aware of the $850,000 transfer. The Panel wrote, evidently referring to both the EHT statement in the FINMA letter and Deyrmenjian's sworn interview: "We give little weight to these self-serving statements": at para. 106.

[146] The subsequent description of the circumstantial case in the Panel's findings demonstrates that the Panel did not, as Deyrmenjian now contends, rely upon the FINMA letter to draw the critical inference which led to the finding that he contravened s. 57(a) of the *Act*.

[147] The Panel weighed evidence that there was market manipulation in the form of a deceptive and grossly promotional marketing campaign; that EHT and Craven specifically were involved in the facilitation and execution of that campaign; that the campaign was paid for with funds drawn from accounts beneficially owned by each of Khorchidian, Deyrmenjian and EHT; and that Khorchidian, Deyrmenjian and a director of EHT apparently benefitted from the manipulation. The facts were consistent, in my view, with only three possible conclusions:

- All parties were aware of and facilitated the manipulation;
- EHT was not involved in the scheme but simply followed the directions of Khorchidian and Deyrmenjian (it is EHT's submission that it was asked by Khorchidian and Deyrmenjian, the beneficial owners of the Kunekt shares, to execute transfers associated with the market manipulation); or
- EHT and Craven alone were responsible for the manipulation scheme and used EHT's authority and control of the Khorchidian and Deyrmenjian accounts to carry out the plan (it is Khorchidian's submission that this "is more, or at least equally, likely, than the inference that they were the directing minds).

[148] In my view, it is noteworthy that Khorchidian and Deyrmenjian say the evidence supports the inference that EHT paid for and directed the tout sheet marketing campaign and that EHT, for its part, says it acted as simply an administrative agent for Khorchidian and Deyrmenjian. In the circumstances, it is difficult to see how it can be said there was no evidence to support the inferences that led the Panel to conclude all parties were involved in the tout sheet marketing campaign.

[149] The inferences the Panel drew, that, in essence, each of Khorchidian, Deyrmenjian and EHT were aware of and facilitated the manipulation through their respective conduct, were supported by evidence. The Panel was entitled to conclude that the proposition that EHT deceived and manipulated Khorchidian and Deyrmenjian was inconsistent with the establishment of the accounts, the size of the payments, and the profit earned by Khorchidian and Deyrmenjian in accounts that were not controlled by EHT. As counsel for the Executive Director submitted in this Court, there was no logical reason for EHT to have used the accounts of Khorchidian and Deyrmenjian to effect market manipulation behind their backs.

[150] I cannot say the Panel erred in concluding that Khorchidian engaged in conduct that contributed to the artificial price for Kunekt shares by permitting the transfers from the Virtigo and Next Generation accounts which funded payments of invoices for the tout sheet marketing campaign, or that Deyrmenjian engaged in conduct that resulted in or contributed to the artificial price for Kunekt shares by permitting the transfer of $850,000 from the Eden account which funded the payment of CFM’s final invoice for the tout sheet marketing campaign. Nor did the Panel err in concluding that EHT engaged in conduct that contributed to the artificial price for Kunekt shares by paying CFM’s first invoice with funds from its own CBH account, or that Craven authorized, permitted or acquiesced in such conduct by his authorization of that payment in his capacity as EHT’s managing director.

EHT and Craven Jurisdiction Appeal

Standard of review

[151] EHT and Craven contend the Panel erred in concluding that the Commission possessed territorial jurisdiction over them. Because this issue was raised during the hearing, there is no dispute that jurisdiction must be grounded on proven facts. They say there was insufficient evidentiary support for the conclusion that, together with two British Columbia residents, EHT and Craven were fundamental to implementing a campaign to artificially inflate the price of Kunekt shares, a reporting issuer in British Columbia. This is essentially a challenge to the Panel's liability findings against them. If successful, there is no need to challenge the Commission's jurisdiction, the liability findings will fall.

[152] In part, however, EHT and Craven contest the Commission's jurisdiction over them, even in the event the challenge to the liability findings fails. They contend the Panel's conclusion that it has jurisdiction over out-of-province entities raises a constitutional question going to the territorial reach of provincial legislation that is reviewable on a standard of correctness: see *Sharp v. Autorité des marchés financiers,* 2023 SCC 29 at paras. 36–39.

[153] There is no dispute that, absent challenges to any underlying factual findings, the Panel's conclusion that it possessed jurisdiction to sanction EHT and Craven is reviewable on a correctness standard.

EHT and Craven's submissions

[154] EHT and Craven contend they are "strangers to British Columbia", and that the Executive Director failed to establish a real and substantial connection between them and this province.

[155] They say there was no evidence Craven carried on business in British Columbia. The tout sheets were not created here nor paid for here. They were disseminated outside of British Columbia and there was no evidence before the Commission that anyone in this province read the tout sheets or invested in

Kunekt shares as a result. The invoices, they argue, were issued from CFM's office in Florida to an address in India, and were paid for by wire transfers initiated in Switzerland.

[156] There is no dispute that there must be a "real and substantial connection" between the appellants' conduct and British Columbia for the Commission to assert jurisdiction over them. In *Sharp*, the Supreme Court of Canada recently confirmed that the territorial reach of provincial legislation is to be interpreted in accordance with its decision in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 [*Unifund*]. In *Unifund*, as described by the majority in *Sharp*:

> [104] … Binnie J. accepted that a provincial legislative scheme can constitutionally apply to an out-of-province defendant without offending the restriction on extraterritorial legislation, provided that there is a "real and substantial connection" or "sufficient connection" — terms he used interchangeably — between the legislative scheme and the out-of-province defendant. He formulated the following test for when provincial legislation applies to an out-of-province individual or entity:
>
> > Consideration of constitutional *applicability* can conveniently be organized around the following propositions:
> >
> > 1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
> >
> > 2. What constitutes a "sufficient" connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
> >
> > 3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;
> >
> > 4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation. [Emphasis in original; para. 56.]

[157] As the majority noted in *Sharp*, at para. 108, the "real and substantial connection" test described in *Unifund* has been applied by this Court to determine whether the Commission had jurisdiction over out-of-province respondents who allegedly breached the *Act*: see *McCabe v. British Columbia (Securities*

Commission), 2016 BCCA 7; *Torudag v. British Columbia (Securities Commission)*, 2011 BCCA 458.

[158] EHT and Craven emphasize that "the import of the requirement for a 'real and substantial' connection should not be glossed over". To this end, they rely upon the decision of Strathy J. (as he then was) in *Unity Life of Canada v. Worthington Emond Beaudin Services Financières Inc.* (2009), 96 O.R. (3d) 769, 2009 CanLII 28232 (S.C.J.) [*Unity Life*], and the summary of the leading cases in that judgment, including: *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, 213 D.L.R. (4th) 577 (C.A.); *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022; and *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

[159] In *Unity Life*, Strathy J. noted that these cases emphasize the requirement to base jurisdiction on a real and substantial connection and the need for "order, fairness and jurisdictional restraint" when addressing jurisdictional competence. He cited (at para. 15) and applied Justice Sharpe's description of the test in *Muscutt*:

> [36] The language that the Supreme Court has used to describe the real and substantial connection test is deliberately general to allow for flexibility in the application of the test. In *Morguard*, at pp. 1104-1109 S.C.R., the court variously described a real and substantial connection as a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the forum province", "with the transaction or the parties", and "with the action" (emphasis added). In *Tolofson*, at p. 1049 S.C.R., the court described a real and substantial connection as "a term not yet fully defined".

[160] Justice Strathy observed:

> [16] The test has more to do with order and fairness than with "a mechanical counting of contacts or connections": *Hunt*, at p. 326 S.C.R.

[161] When describing the factors that should be considered in taking jurisdiction in *Muscutt*, a tort claim with interprovincial elements, Sharpe J.A. identified the following factors:

a) the connection between the jurisdiction and the plaintiff's claim;

b) the connection between the jurisdiction and the defendants;

c) unfairness to the defendant in assuming jurisdiction;

d) unfairness to the plaintiff in not assuming jurisdiction;

e) the involvement of other parties to the suit;

f) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;

g) whether the case is interprovincial or international in nature; and

h) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[162] Justice Strathy concluded in *Unity Life* that:

- the real and substantial connection test (requiring a connection that is "both demonstrable and weighty") should not be glossed over (at para. 27);

- no single factor is determinative and all relevant factors should be weighed together (at para. 28); and

- the forum has a legitimate interest "in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors" (at para. 29).

[163] Some assistance in applying these principles in interprovincial or international securities cases may be found in the following passages from the judgment of this Court in *Torudag*:

> [24] The respondent … submits that it is highly relevant that this trading concerned securities of a British Columbia reporting company and a large proportion of the shares purchased by the appellant were sold by British Columbia residents. This latter, perhaps somewhat adventitious circumstance, appears to bear some analogy to the circumstances that were present in the case of *R. v. W. McKenzie Securities Limited, West and Dubros.* In that case the Manitoba Court of Appeal upheld the conviction of an Ontario stockbroker for unlawful securities trading in Manitoba. A person in Manitoba had been solicited by the Ontario broker, who was not registered to trade in Manitoba, and had purchased shares. In upholding the conviction of the broker, Freedman J.A. said this at para. 23:
>
> > 23 ... It was in this province that McCaffrey was solicited by the accused to purchase the shares in question, and it was in this province that McCaffrey responded favourably to such solicitation. I would agree with the learned magistrate and the learned county court judge that what took place in the present case constituted an act of trading in securities within the definition of *The Securities Act* of Manitoba.
>
> …
>
> [26] In my opinion, the more significant circumstances that constitute a real and substantial connection to this jurisdiction and which permitted the Commission to properly take jurisdiction over the appellant are the regulatory functions of the Commission concerning the Exchange and the fact that Icon was a reporting issuer in British Columbia.
>
> [Emphasis added.]

[164] EHT and Craven contend the connection between them and this jurisdiction is more tenuous than the connection that existed in *Torudag*. The trades in this case occurred in the U.S. over-the-counter markets, whereas those in *Torudag* were made directly through the facilities of the TSX Venture Exchange, for which the Commission, in cooperation with the Alberta Securities Commission, was responsible for regulatory oversight. The other provincial securities regulators in the “Canadian Securities Administrators” (an umbrella organization of Canadian securities regulators) relied on the British Columbia and Alberta Securities Commissions to perform a regulatory function for the TSX Venture Exchange.

[165] With respect to the provision that deems Kunekt to be a reporting issuer in British Columbia, counsel for EHT says that facts deemed to be true are neither real nor substantial. It argues that the deeming provisions are “statutory fictions”.

[166] Finally, EHT says the Panel cannot rely upon the FINMA audit exhibited to the appellant’s supplemental affidavits in support of its decision to assert jurisdiction. It cannot exclude the material for one purpose and accept it for another.

[167] Insofar as jurisdiction is concerned, it says if there is jurisdiction in this case there is therefore jurisdiction everywhere EHT’s clients are domiciled. The real and substantial connection test, it submits, must not be rendered a technical formality.

The Executive Director’s submissions

[168] The Executive Director says BC Instrument 51-509, *Issuers quoted in the U.S. Over-the-Counter Markets*, by operation of which Kunekt became and was a reporting issuer in British Columbia, was intended to assist in addressing manipulation of stocks traded in the U.S. over-the-counter markets by deeming certain issuers whose business is directed or administered in British Columbia to be reporting issuers in this province. It notes that the deeming provision in the instrument was only effective where certain facts were established. These facts themselves ground a conclusion that a company captured by the deeming provision has a substantial connection to British Columbia. The deeming does not occur in a factual vacuum.

[169] To this end, the Executive Director points to a regulatory filing made by Kunekt with the U.S. Securities and Exchange Commission in 2007. In that filing, Kunekt listed an office address on Broughton Street in Vancouver. It identified Bruk, a resident of Vancouver, as its sole director and its president. Bruk, the Executive Director says, directed or administered Kunekt’s business from his residence in Vancouver.

[170] The Executive Director also relies on the Panel's findings. It notes the Panel determined that payments of the CFM invoices had been made through a complex web of layered accounts, in an attempt to conceal the payments. It says EHT knew or ought to have known that Kunekt was a reporting issuer in British Columbia when it made the payments and by doing so participated in market manipulation of a British Columbia issuer. There was a concealing of the involvement of British Columbia residents. The Commission contends the sufficient connection test is "not a zero-sum game" and that we are not determining which is the most convenient forum but are seeking, rather, to apply a test that is deliberately general in order to allow for flexibility in seeking to establish a regime that is fair and orderly.

Analysis of the jurisdiction arguments

[171] In *Torudag*, Hall J.A. observed, at para. 20, that when addressing the territorial jurisdiction of securities regulators, the law has to "take account of the reality of technical developments in commerce and communication." He described as prescient the view expressed by MacKenzie J.A. in *Pacific International Securities Inc. v. Drake Capital Securities Inc*., 2000 BCCA 632 at para. 20, that in the world of electronic commerce, "physical locations can become almost incidental and other factors assume greater importance". Comments to similar effect were made by the majority in *Sharp*:

> [128] The "sufficient connection" analysis must recognize the transnational nature of modern securities regulation and the public interest in addressing international market manipulation. Securities regulation raises unique considerations that highlight the need for transnational enforcement. As this Court noted in *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, the "securities market has been an international one for years" and the "Internet has greatly increased the ability of securities traders to extend across borders" (para. 28). To effectively regulate the securities market, "regulators must equally be able to respond, and surmount borders where legally possible" (para. 28).

[172] In my view, having concluded that EHT and Craven, along with two British Columbia residents, Khorchidian and Deyrmenjian, were fundamental to implementing a grossly promotional tout sheet campaign to artificially inflate the

price of the shares of Kunekt, a reporting issuer in British Columbia, the Commission did not err in law in concluding there was a real and substantial connection between them and this jurisdiction.

[173] There was some basis to find that the manipulation in question would adversely affect British Columbia capital markets. British Columbia residents were found to have participated in the manipulation of the market for shares in a company deemed to be a British Columbia reporting issuer because it was directed or administered in or from this jurisdiction. On the evidence, Craven and EHT were directly engaged in that very scheme. There was thus a connection between the jurisdiction and the regulatory offences, parties to the manipulation which formed the basis of the offences are resident here, and it was not suggested that taking jurisdiction would offend comity or the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[174] I can see no unfairness to EHT or Craven in the Commission taking jurisdiction over them because, as the Commission argues, EHT knew or ought to have known that Kunekt was a reporting issuer in this province when it made the first payment to CFM and thereby chose to participate in market manipulation of a British Columbia issuer.

[175] Having regard to these considerations, it is my opinion that the Panel's conclusion on jurisdiction was consistent with the applicable principles described in the authorities, including the decisions in *Sharp* and *Unifund*.

EHT and Craven's S. 171 Application Appeal

[176] Finally, EHT and Craven contend the Panel reversibly erred in its disposition of the s. 171 application. In my opinion, that argument must be addressed by asking, first, whether the Panel applied the correct test in addressing the application and, if so, whether the Panel exercised its discretion unreasonably when determining whether it would be prejudicial to the public interest to revoke the liability findings.

[177] In *Party A*, Griffin J.A. described the exercise that should be engaged in by a Panel addressing a s. 171 application to revoke or vary an asset freeze order. She held:

> [235] … It seems reasonable that where the order under review was made or continued after a full hearing with participation of the affected parties, more deference to the original order may be appropriate. In such a circumstance, it makes sense that there will be an onus on the applicant seeking to revoke or vary it to show that there is something new justifying a change, although the "something new" may be simply the passage of considerable time.

[178] EHT and Craven say the additional evidence they sought to adduce was relevant to the allegations, insofar as it contradicted the Panel's conclusion that EHT paid CFM's first invoice for the tout sheet marketing campaign with funds from its own CBH account, and the Panel's view (expressed at para. 163) that there was "no evidence that any third party funded the payment". They say the additional evidence was "new" in that it was not reasonably available for their use at the time of the liability hearing, because identification of third-party depositors as the source of the funds used to make the first CFM payment at the outset of the Commission's inquiry posed a risk to those depositors, and to EHT and Craven. The statutory limitation had not tolled in favour of the third-party depositors. Their identification would likely breach Swiss Banking laws and such a breach would become known if the depositors became involved in proceedings here at the instance of the Commission.

[179] EHT and Craven further argue that they could reasonably have assumed the Panel would impose upon the Executive Director the burden of establishing who paid the first CFM invoice and to consider it insufficient to merely show that the payment was made from an EHT account. Finally, they say the evidence is compelling because it establishes that EHT did not, in fact, fund payment of the invoice itself.

[180] I would not accede to these arguments. The Panel found that the evidence was relevant to its inquiry but that it was not "new", that it should not have been withheld, and that it was not compelling. In my view, the Panel identified the

appropriate test, applied that test correctly, and exercised its discretion reasonably in dismissing the application.

[181] EHT appears clearly to have made a strategic decision to withhold its own CBH account statement at the liability hearing. That decision does not appear to have been strictly related to the expiry of a limitation period. At the outset of the Panel's hearing in June 2017, more than six years had elapsed since the first CFM invoice was paid on January 20, 2011. The fourth and final CFM invoice was for a six week email and marketing campaign commencing on March 7, 2011, and running until approximately April 15-17, 2011. The market manipulation appears to have ended by April 27, 2011, when the Kunekt share price closed at $0.77. There is no apparent event in the record which occurred in or after June 2011 from which the running of an applicable limitation date might be said to have commenced.

[182] The alternative explanation for not leading evidence that a third party funded the payment—that EHT did not expect to bear the burden of proving that fact—simply amounts to saying a strategic decision was made to take the risk of not leading the evidence. The Panel did not err in considering that to be an insufficient basis for regarding the evidence as "new", as that word has been defined by the Commission.

[183] Finally, the heavily redacted version of EHT's account statement is not compelling evidence that must lead to the setting aside of the Panel's decision. EHT contends the Panel inappropriately reversed the evidentiary burden on the s. 171 application when it held:

> [45] Without information regarding the balance in the account prior to the deposits and the identity of the depositors and their relationship, if any, to Kunekt, this coincidence fell short of constituting clear, convincing and cogent evidence from which we could make a reasonable inference that someone other than [EHT or Craven] or the EHT group funded payment of the first CFM invoice.
>
> [Emphasis added.]

[184] As this Court held in *Party A*, the applicant seeking to revoke or vary a panel's decision bears the onus of establishing that there is something new justifying a change. The Panel held that the new evidence presented on the application in this case was vague and unpersuasive. The redacted records were produced by or on behalf of a party that had been found to be concealing the involvement of persons in a sophisticated market manipulation scheme. It showed only that two deposits were made into the EHT account on the same day as the transfer out of the EHT account to pay the first CFM invoice, and that the two amounts were, when added together, similar in total to the amount transferred out as payment to CFM. It did not identify the source of the deposits. It did not establish that the money used to pay the first invoice came from a party with an interest in the manipulation, such as either the other appellants or another Kunekt shareholder. Such evidence that the campaign was initially funded by Khorchidian, Deyrmenjian or another interested shareholder might have been persuasive evidence that the Panel erred in finding EHT paid CFM's first invoice. There was no such evidence.

[185] In my view, the Panel's decision on the s. 171 application, read as a whole, does not support the view that an inappropriate evidentiary burden was placed on the appellants.

[186] Given the limited value of the new evidence; the fact that its limited value is due, in part, to EHT's redaction of the record and its inability or unwillingness to identify the source of the funds in question; and the fact the evidence was intentionally not disclosed at the first hearing, I would not interfere with the Panel's determination that it would not be in the public interest to revoke or vary its liability findings.

Conclusion

[187] For all of these reasons, I would dismiss the appeals.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Fisher"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"