COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Wang v. British Columbia (Securities Commission),* 2023 BCCA 101

Date: 20230301
Docket: CA47483

Between:

Hunter "Wei-Shun" Wang

Appellant

And

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

Respondents

Before: The Honourable Madam Justice Fenlon
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman

On appeal from: Decisions of the British Columbia Securities Commission, dated December 9, 2020 and April 16, 2021 (*Re Wang,* 2020 BCSECCOM 504 and 2021 BCSECCOM 153).

Counsel for the Appellant:	C.P. Dennis, K.C. E.J.S. Aitken
Counsel for the Respondents:	L.L. Bevan S.B. Hannigan
Place and Date of Hearing:	Vancouver, British Columbia December 14, 2022
Place and Date of Judgment:	Vancouver, British Columbia March 1, 2023

Dissenting Reasons by:
The Honourable Madam Justice Horsman

Written Reasons by:
The Honourable Madam Justice Fenlon (p. 23, para. 78)

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

Summary:

The appellant coached a dissatisfied investor to lie to an investigator for the British Columbia Securities Commission. The appellant challenges decisions of the Commission finding that he breached s. 57.5 of the Securities Act, R.S.B.C. 1996, c. 418 (as it was prior to an amendment brought into force in 2020), and imposing various sanctions. Section 57.5 prohibits conduct amounting to an obstruction of justice. The appellant argues that the Commission panel erred in finding that 1) an "investigation" under s. 57.5 includes informal investigations, and 2) his conduct was caught under s. 57.5, which refers to conduct "before the… investigation".

Held: Appeal allowed, Justice Horsman dissenting. The matter is remitted to the Commission to determine the outstanding alternative allegation against the appellant. The "investigation" under s. 57.5 includes informal investigations undertaken pursuant to the Commission's implied powers. However, the majority concludes that the appellant's actions were not captured by s. 57.5, as he coached the investor to lie after the commencement of an investigation. Justice Horsman, in dissent, would have dismissed the appeal on the basis that s. 57.5 applies to conduct that occurs both before and after the commencement of an investigation.

Reasons for Judgment of the Honourable Madam Justice Horsman:

[1] The appellant, Mr. Wang, appeals decisions of the British Columbia Securities Commission (the "Commission") finding that he breached s. 57.5 of the *Securities Act*, R.S.B.C. 1996, c. 418, and imposing various sanctions. Section 57.5 prohibits conduct amounting to an obstruction of justice.

[2] In its decision on liability, the Commission found that the appellant had coached a dissatisfied investor to lie to an investigator looking into the investor's complaint to the Commission. The appellant's purpose was to stop the investigation into his conduct. The liability decision is indexed as: *Re Wang*, 2020 BCSECCOM 504 (the "Liability Decision").

[3] In a subsequent decision on sanctions, the Commission: (1) ordered the appellant to resign any position he holds as a director or officer of an issuer or registrant, (2) imposed a two-year market ban, and (3) ordered the appellant to pay an administrative penalty of $30,000. The sanctions decision is indexed as: *Re Wang*, 2021 BCSECCOM 153 (the "Sanctions Decision").

[4] This appeal concerns the proper interpretation of s. 57.5 of the *Securities Act*. The appellant says that in the Liability Decision, the Commission erred in interpreting s. 57.5 to apply to an informal investigation in addition to one of the formal investigation processes explicitly provided for in the *Securities Act*. Alternatively, even if s. 57.5 captures conduct related to an informal investigation, the appellant says that on the plain wording of the provision the impugned conduct must have occurred before the commencement of the investigation. The appellant says that as a matter of statutory interpretation, his conduct is not caught by s. 57.5 because either: (1) the investor's complaint was not required for a formal investigation, or (2) the investigation had commenced by the time that the appellant coached the investor to lie.

[5] The appellant does not challenge the Commission's findings of fact in the Liability Decision, and does not challenge the Sanctions Decision if the liability finding is not set aside. The appellant concedes that if this Court concludes that the Commission correctly interpreted s. 57.5, his appeal must be dismissed.

Factual Background

[6] I take the following summary of facts from the Commission's Liability Decision.

The Investment

[7] The proceeding before the Commission concerned an investment made by an individual (the "Investor") in FS Financial Strategies Inc. ("FS Strategies") in March 2014. At this time, the appellant held an insurance licence and worked at FS Strategies. Jing Zhang, who was a co-respondent with the appellant before the Commission, worked for FS Strategies as a marketing director. Ms. Zhang cold-called the Investor, who had no previous relationship with either the appellant or Ms. Zhang. She told the Investor that FS Strategies offered an investment opportunity that would guarantee him a 10% return for three years, risk-free.

[8] On March 29, 2014, the Investor and his mother met with Ms. Zhang and the appellant. Ms. Zhang provided the Investor with a form of investor agreement. Under

its terms, the Investor would invest $25,000 in FS Strategies for three years, at which time the investment would be repaid. The Investor was to receive monthly interest payments of $209 over the term of the investment.

[9] The Investor signed the agreement in the presence of Ms. Zhang and the appellant. At the time he made the investment, the Investor was 28 years old and he earned an annual income of $75,000. The money for his investment came from savings he had accumulated over approximately nine years.

The Complaint to the Commission

[10] The Investor immediately regretted his investment. On April 1, 2014, he contacted the appellant by email, copying his mother, requesting a refund of his money. On April 2, 2014, the appellant emailed back that he had forwarded the Investor's email to Ms. Zhang and that she would be in touch.

[11] The Investor's mother remained concerned about her son's investment. She spoke to a senior representative at her own bank, who suggested that the Investor's mother contact the Commission.

[12] On April 3, 2014, the Investor's mother spoke to an investigator at the Commission (the "Investigator"). She explained that she wanted to complain about an investment. Later that day, she emailed a number of documents to the Investigator, including a copy of the investment agreement, business cards for the appellant and Ms. Zhang, and a copy of the email exchange between the Investor and the appellant regarding the refund request.

[13] On the same day, the Investigator contacted the appellant by telephone and email to request details about the investment in question. The appellant said he would call the Investigator the following day. The Investigator's signature line on his email identified him as an: "Investigator, Case Assessment Branch, Enforcement Division" of the Commission.

The April 3, 2014 Meeting

[14] Ms. Zhang and the appellant met with the Investor and his mother on April 3, 2014. Unbeknownst to the appellant and Ms. Zhang, the Investor's mother recorded the meeting.

[15] Ms. Zhang led the discussion at the meeting. The main topic was the complaint that the Investor's mother had made to the Commission. Ms. Zhang stated that before the complaint was made, she could have made the decision on her own as to whether to provide a refund. However, she said that in light of the complaint, the availability of a refund would depend on how the Investor and his mother handled the matter with the Commission. Ms. Zhang asked the Investor to promise that his mother would not say anything in further dealings with the Commission. Both the appellant and Ms. Zhang expressed frustration that the complaint had been made.

[16] Later in the evening of April 3, Ms. Zhang called the Investor and his mother to set up a meeting for the next day. The Investor's mother also recorded this call. During the call, Ms. Zhang stated:

> Let me tell you. You just tell [the Investor] not to sign anything for me. As for other things, I tell [the Investor] what to say, I tell him to say one, then he says one. I tell him to say two, he says two. Don't say at one side not to say one when he should say one, not to say two when he should say two.
>
> Right. Don't participate in anything that I have with the Securities Commission. What you can participate is the money matter that I have with your son. Don't participate in anything else.

[17] Ms. Zhang told the Investor and his mother that after things were settled, they would go to her bank to deal with the refund of the investment.

The April 4, 2014 Meeting

[18] The Investor and his mother met with the Investigator on the morning of April 4, 2014. They told the Investigator about their dealings with the appellant and Ms. Zhang, including the upcoming meeting later that day.

[19] On the afternoon of April 4, 2014, the Investor and his mother met with Ms. Zhang and the appellant. The Investor's mother recorded this meeting. During the meeting, Ms. Zhang outlined a proposal for ending further inquiries from the Commission. The proposal involved concocting a false story that the appellant had proposed two investments of $25,000 each with FS Strategies, with the second investment requiring borrowing to invest. Ms. Zhang instructed the Investor to tell the Investigator that he had not explained to his mother that there were two separate investments of $25,000, and that he had not proceeded with the second investment because she was unhappy with the idea of borrowing to invest. The Investor was to then explain that he and his mother had sorted out the confusion, and that both were now "okay" with the FS Strategies investment.

[20] During the meeting, Ms. Zhang initially coached the Investor on this story in Chinese. The appellant then took over and coached the Investor in English on exactly what he was to say to the Investigator. The coaching included role-playing where the appellant pretended to be the Investigator taking the Investor's call. The appellant explained that it was necessary for the Investor to make the call because the Commission was now looking into the complaint and that was "trouble".

[21] After rehearsing the call numerous times with the appellant, the Investor called the Investigator in the presence of Ms. Zhang and the appellant. Following the script that he had prepared with the appellant, the Investor apologetically explained that the complaint was the result of his mother's confusion between two investments. This call was recorded by the Investigator and the Investor's mother.

[22] After the Investor had completed his call to the Investigator, Ms. Zhang and the appellant coached the Investor's mother on what to say if the Investigator followed up with her. The Investor's mother then drove Ms. Zhang to the bank, where Ms. Zhang gave the Investor a $25,000 bank draft drawn on her own account as a refund for his investment in FS Strategies.

The Notice of Hearing

[23] On April 6, 2014, the Investor's mother emailed the Investigator details of the April 4 meeting with the appellant and Ms. Zhang. The Investor's mother advised the Investigator that she had secretly recorded her interactions with the appellant and Ms. Zhang.

[24] On October 7, 2019, the executive director of the Commission issued a notice of hearing alleging that the conduct of the appellant (and Ms. Zhang) contravened s. 57.5 of the *Securities Act*, or, alternatively, that they had engaged in conduct abusive to capital markets, and that it was in the public interest to issue orders against them.

The Liability Decision

[25] The appellant was represented by counsel at the liability hearing and testified in his own defence. Ms. Zhang attended the liability hearing but did not testify. The Investigator, the Investor, and the Investor's mother were all called as witnesses by the executive director.

[26] At the relevant time, s. 57.5 of the *Securities Act* read as follows:

> **Obstruction of justice**
>
> 57.5 (1) A person must not
>
> (a) refuse to give any information or produce any record or thing, or
>
> (b) destroy, conceal or withhold, or attempt to destroy, conceal or withhold, any information, record or thing
>
> reasonably required for a hearing, review, investigation, examination or inspection under this Act.
>
> (2) A person contravenes subsection (1) if the person knows or reasonably should know that a hearing, review, investigation, examination or inspection is to be conducted and the person takes any action referred to in subsection (1) before the hearing, review, investigation, examination or inspection.

[27] The panel framed its analysis by setting out the three elements that the executive director had to prove on a balance of probabilities in order to establish a contravention of s. 57.5:

(1) First, that the appellant destroyed, concealed or withheld, or attempted to destroy, conceal or withhold, any information, record or thing reasonably required for a hearing, review, investigation, examination or inspection under the Act;

(2) Second, that the appellant knew or reasonably should have known that a hearing, review, investigation, examination or inspection was to be conducted; and

(3) Third, that the appellant took such action before the hearing, review, investigation, examination or inspection.

[28] The first element raised the proper interpretation of the term “investigation” in s. 57.5. The appellant argued that the Investigator had been conducting an inquiry rather than a full investigation, and that s. 57.5 did not apply to an informal inquiry process. The panel concluded that the procedures carried out by the Investigator in connection with the Investor’s complaint constituted an “investigation”: at para. 84. It found that the term “investigation” under s. 57.5 should be broadly construed based on the substance of the activities undertaken by Commission investigators: at para. 81. The panel also found that the appellant attempted to conceal or withhold the Investor’s complaint, and that the complaint was reasonably required for the investigation: at paras. 86–89.

[29] The third element raised the proper interpretation of the term “before” in s. 57.5. The appellant argued that there was never an investigation of the Investor’s complaint, and therefore he took no actions “before the investigation”. The panel dismissed this argument, noting that the Investigator’s preliminary investigative procedures were an “investigation” under s. 57.5. The panel found that the language of s. 57.5(2) is intended to target the type of conduct present in this case, where a person coaches an investor to lie to an investigator in an attempt to prevent an investigation into a complaint from proceeding: para. 162.

[30] In concluding that the appellant breached s. 57.5 of the *Securities Act*, the panel made a number of factual findings about his conduct. The panel found that the

appellant coached the Investor to lie to the Investigator in an attempt to prevent the Commission from obtaining information, records or things that would assist them in pursuing an investigation into the Complaint, and that the appellant knew or ought to have known that an investigation was to be conducted. As noted, the appellant does not challenge the panel's factual findings on appeal.

The Alleged Errors

[31] The appellant alleges two errors by the Commission panel in its interpretation of s. 57.5 of the *Securities Act*:

(1) First, the panel erred in law in concluding that the appellant concealed or withheld, or attempted to conceal or withhold, information reasonably required for an "investigation…under this Act" within the meaning of s. 57.5; and

(2) Second, in the alternative, the panel erred in law in concluding that the appellant contravened s. 57.5(1) when all of his impugned conduct occurred after the investigation had commenced, and not "before" the investigation as required by s. 57.5(2).

Standard of Review

[32] In bringing this appeal, the appellant exercises his statutory right of appeal, with leave, under s. 167 of the *Securities Act*.

[33] It is common ground between the parties that, in keeping with the direction in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 36–37 [*Vavilov*], appellate standards of review apply. Accordingly, questions of law are reviewed on a standard of correctness, whereas questions of fact and questions of mixed fact and law will be reviewed on the palpable and overriding standard: *Dunn v. British Columbia (Securities Commission)*, 2022 BCCA 132 at paras. 25–26; *Party A v. British Columbia (Securities Commission)*, 2021 BCCA 358 at paras. 109–111.

[34] The appellant maintains that his appeal is limited to issues of statutory interpretation, which are questions of law subject to a correctness standard of review. The Commission disputes this, and says that the appeal is concerned not only with the interpretation of s. 57.5 of the *Securities Act* but also its application to the appellant's conduct in the circumstances, which is a question of mixed fact and law. The Commission says that the appellant has not identified an extricable error of law to which the correctness standard would apply.

[35] I am not persuaded by the Commission's submission on standard of review. The Commission is correct that a tribunal's conclusions on the application of a statute to a set of facts may give rise to questions of mixed fact and law: *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161 at para. 24. However, the appellant's arguments are not about how s. 57.5, properly interpreted, applies to the appellant's conduct. This appeal is about discerning the legislative intent behind the terms "investigation" and "before" as they appear in s. 57.5. The appellant concedes that his conduct is captured if the Commission is correct in its interpretation. Thus, the appellant alleges errors by the panel in its interpretation of s. 57.5 of the *Securities Act*, which raise issues of law reviewable on a standard of review of correctness: *Vavilov* at para. 36; *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51 at para. 40; *Telus Communications Inc. v. Wellman*, 2019 SCC 19 at para. 30.

Discussion

[36] For ease of reference, I will reproduce the version of s. 57.5 of the *Securities Act* that was in force at the relevant time, with added emphasis on the language in issue:

> **Obstruction of justice**
>
> 57.5 (1) A person must not
>
> (a) refuse to give any information or produce any record or thing, or
>
> (b) destroy, conceal or withhold, or attempt to destroy, conceal or withhold, any information, record or thing

> reasonably required for a hearing, review, investigation, examination or inspection under this Act.
>
> (2) A person contravenes subsection (1) if the person knows or reasonably should know that a hearing, review, investigation, examination or inspection is to be conducted and the person takes any action referred to in subsection (1) before the hearing, review, investigation, examination or inspection.

[37] The appellant argues that an "investigation…under this Act" within the meaning of s. 57.5(1) does not encompass informal inquiries by an investigator but rather must be taken to refer to the formal investigation process set out in ss. 142–150 of the *Securities Act*. Alternatively, the appellant argues that the word "before" in s. 57.5(2) should be interpreted as having a temporal meaning, so that the provision only captures conduct that occurs before an investigation commences. The Commission says that the appellant's proposed interpretation of s. 57.5 would undermine legislative objectives and lead to absurd consequences.

[38] Section 57.5 of the *Securities Act* has not been judicially interpreted to date. It is therefore necessary to start from first principles of statutory interpretation. I will begin with a review of those principles.

General Principles of Statutory Interpretation

[39] The modern rule of statutory interpretation requires that the words of a statute be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act and statutory objects and purposes: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 [*Rizzo*]; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26 [*Bell ExpressVu*]. The modern rule is consistent with s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which provides that every statute must be construed as remedial and "given such fair large and liberal construction and interpretation as best ensures the attainment of its objectives".

[40] As the Supreme Court of Canada has stated on a number of occasions, the grammatical and ordinary sense of a provision is not, on its own, determinative. A statutory interpretation analysis is incomplete without consideration of context and purpose, no manner how plain the meaning might appear when the provision is

viewed in isolation: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 48; *R. v. Alex*, 2017 SCC 37 at para. 31. As explained by the Court in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at para. 10:

> Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to statutory interpretation…

[41] Thus, it is necessary in every case for the court to undertake the contextual and purposive approach mandated by the modern rule, and thereafter determine whether there is ambiguity in the wording of a statute. There is a genuine ambiguity only where the words of a provision are capable of more than one meaning when read in light of the entire context of a provision, which includes the statutory purpose: *Bell ExpressVu* at paras. 29–30.

[42] It is a well-established principle of statutory interpretation that the Legislature does not intend absurd consequences. An interpretation may be considered absurd if it leads to ridiculous or frivolous consequences; if it is unreasonable, inequitable, illogical or incoherent; or if it is incompatible with other statutory provisions or statutory objectives: *Rizzo* at para. 27. The issue in *Rizzo* was whether employees were entitled to termination and severance pay under provincial employment standards legislation when their employment was terminated by operation of the law due to the bankruptcy of the employer. The Supreme Court of Canada acknowledged that the plain language of the provisions suggested that employees were only entitled to these benefits where their employment was actively terminated by the employer. However, the Court found that such an interpretation was contrary to statutory objectives, and would result in absurd consequences in distinguishing between employees on the arbitrary basis of the timing of their dismissal: *Rizzo* at paras. 24–29. The Court therefore rejected a plain language interpretation of the legislation in favour of an interpretation that was consistent with legislative intent.

[43] The presumption against absurdity may permit a court to depart from the plain language of a provision, but only if the words of the provision can reasonably bear the interpretation ultimately adopted. There is a difference between invoking the

principle that the Legislature does not intend absurd consequences as an aid to interpretation, and correcting legislative drafting errors. Judicial corrections of perceived errors in legislative enactments can be justified in rare circumstances on the basis that the error is apparent on the face of the enactment itself, and the correction expresses the intent of the Legislature: *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 69.

Issue 1: the Meaning of "investigation…under this Act"

The Parties' Positions

[44] The appellant argues that the Commission panel erred in concluding that the Legislature intended to capture informal investigations within the scope of s. 57.5 of the *Securities Act*. He argues that it overlooked the statutory context of the provision. The appellant notes that the Commission's formal investigation powers are set out in Part 17 of the *Act*, which is entitled "Investigations and Audits". Section 142 empowers the Commission to make an order appointing a person "to make an investigation the commission considers expedient", while the same power is given to the Minister in s. 147. Section 143.1 authorizes the appointment of an investigator to identify or investigate property that might meet the conditions for an interim preservation order. Other provisions of Part 17 set out the powers and duties of an investigator once appointed. The appellant argues that the Commission's interpretation ignores these provisions. While acknowledging that the *Securities Act* does not define "investigation", the appellant says that the term must be given meaning by reference to other provisions in the *Act*, and not by resort to dictionary definitions applied "in a vacuum": Appellant Factum at para. 44. As no investigation order was issued in this case under Part 17, the appellant says his conduct is not caught by s. 57.5 because the Investor's complaint was not reasonably required for "an investigation…under this Act".

[45] The Commission says that the appellant's proposed interpretation is inconsistent with a purposive and contextual approach. The Commission notes that s. 57.5 is not located within Part 17 of the *Securities Act* but rather is in Part 7, which—as its heading suggests—contains provisions pertaining to "Trading in

Securities Generally". If the Legislature intended to limit the scope of s. 57.5 to investigations for which an investigation order has been issued under Part 17 of the *Act*, it could have used limiting language as it has in other provisions: for example, ss. 159(2), 164.04(2)(b), and 164.04(3)(b). Instead, the Legislature used the phrase "under this Act", which the Commission says encompasses any powers of investigation exercisable by the Commission.

[46] The Commission cites cases holding that provincial securities regulators have the implied authority to conduct informal investigations to gather information on a voluntary basis without invoking the intrusive powers available once a formal investigation is initiated: *Cusack v. Ontario (Securities Commission)* (1993), 104 D.L.R. (4th) 54 (Ont. C.J., Gen. Div.) [*Cusack*]; *Re Botha*, 2009 BCSECCOM 10 at paras. 27–32. The Commission says that in order to give effect to the statutory purposes of the *Securities Act*, it must be able to take enforcement action against attempts to thwart its investigative functions, whether or not a formal investigation order has been issued.

Analysis

[47] The starting point of this analysis is the ordinary meaning of the words in s. 57.5. Ordinary meaning refers to the reader's first impression; that is, the natural meaning that appears when the provision is simply read through: *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724 at 735.

[48] In my view, the ordinary meaning of the word "investigation" in s. 57.5 encompasses informal investigations undertaken by the Commission pursuant to its implied powers, as well as formal investigations under Part 17 of the *Securities Act*. There is nothing in the plain language of the provision to indicate that the Legislature intended to limit the scope of s. 57.5 to investigations conducted under Part 17 of the *Securities Act*. As the Commission notes, there is no limiting language indicating such an intent. Instead, the provision broadly refers to investigations "under the Act".

[49] Of course, the ordinary meaning of the provision is not the end of the analysis. It is necessary at this stage to "suspend judgment" on the precise scope of

the language, and to analyze legislative intent by reference to the context and purpose of the provision: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 at para. 44.

[50] The primary purpose of the *Securities Act* is the protection of investors. Other statutory goals include capital market efficiency and ensuring public confidence in the system: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 589. The *Act* is remedial legislation that must be broadly construed: *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 at para. 56. Section 57.5 serves these statutory purposes by prohibiting conduct that would thwart the Commission in gathering information that is reasonably necessary for an investigation, among other regulatory processes.

[51] In support of his proposed interpretation, the appellant places emphasis on the statutory context. In his factum, the appellant argues that, in order to achieve legislative consistency, the Legislature must have intended the word “investigation” in s. 57.5 to refer only to investigations initiated under Part 17. The appellant modified this position somewhat in oral submissions in recognition of the fact that the *Securities Act* contains explicit provision for investigations outside of Part 17. For example, s. 13 of the *Act*—which is in Part 2, setting out the general structure and powers of the Commission—authorizes the Commission to appoint an expert “to assist in any way it considers expedient”, and the expert may conduct an “investigation”. The appellant agrees that the word “investigation” in s. 57.5 of the *Act* would encompass an investigation under s. 13, and therefore s. 57.5 must be taken to refer to investigations under that provision as well.

[52] The appellant’s modified argument is that s. 57.5 should be interpreted to apply to conduct relating to investigations that are explicitly authorized in other provisions of the *Securities Act*. He argues that it does not apply to investigations carried out pursuant to the Commission’s implied statutory powers, as described in *Cusack*. In *Cusack*, the Court made the following statement in relation to provisions of the Ontario *Securities Act*:

> 39 … As found in *Brosseau*, admittedly in different circumstances where an earlier formal investigation had been ordered, I think one can only conclude that the commission has the implied authority to conduct informal investigations and gather information on a voluntary basis without having recourse to the intrusive powers contained in the Act which were enacted for the purpose of enabling it to do its task in cases where some coercion is required.

[53] The appellant accepts that the Commission has the implied power to carry out informal investigations under the *Act*. However, the appellant argues that the Legislature intended to exclude investigations undertaken pursuant to the Commission's implied powers from the scope of s. 57.5.

[54] I do not agree with the appellant's proposed statutory interpretation of the word "investigation" in s. 57.5. It is inconsistent with the ordinary meaning of the word, as well as with legislative context and purpose. Section 57.5, on its face, is broadly worded to apply to conduct related to an "investigation…under the Act". There is no limiting language. There is no indication in the statutory language or context that the Legislature intended to draw a distinction between formal and informal investigations. The purpose of s. 57.5 is to facilitate the Commission's effective administration of the *Securities Act* by prohibiting conduct that would thwart the Commission in carrying out various regulatory processes, including investigations. An individual deliberately withholding or concealing information reasonably required for an informal investigation undermines the Commission's mandate of investor protection just as much as the same conduct in relation to a formal investigation. Indeed, such conduct may be more damaging to the Commission's mandate if it obstructs an investigator from gathering information that the Commission may require in order to determine whether or not to issue a formal investigation order.

[55] I am also not persuaded by the appellant's argument that the panel did not specify what information "reasonably required for the investigation" the appellant withheld or concealed. The appellant says that the phrase "reasonably required" calls for an objective inquiry into the nature of the information concealed, which necessarily must relate to the content of a formal investigation order. With this

argument, the appellant appears to stray into a challenge to the panel's factual findings. In any event, I see no legal or factual error in the Commission's analysis on this point. Without the Investor's complaint, which included supporting evidence submitted by the Investor and his mother, there would have been no basis for the investigation. The appellant attempted to conceal or withhold the complaint when he coached the Investor to withdraw the complaint by lying to the Investigator. On a purposive interpretation of the statute, the appellant's conduct was caught by s. 57.5 of the *Securities Act* whether or not a formal investigation order had been issued.

[56] For these reasons, I agree with the Commission that the Legislature intended the word "investigation" in s. 57.5 to include both formal and informal investigation processes. The appellant's proposed interpretation would lead to absurd consequences. It would impair the Commission's ability to achieve statutory objectives by prohibiting conduct that obstructs justice on the basis of an irrational distinction between formal and informal investigations.

[57] For these reasons, I conclude that the Commission panel was correct in interpreting the word "investigation" in s. 57.5 to include informal investigations of the type that occurred in this case.

Issue 2: the Meaning of "before"

The Parties' Positions

[58] The appellant's alternative argument focuses on the meaning of the word "before" in s. 57.5(2) of the *Securities Act*. The appellant says that the word "before" in this context clearly has a temporal meaning—that is, the appellant's conduct must have occurred earlier in time than the commencement of the investigation in order to be caught by s. 57.5. The appellant says that the panel's implicit finding that the appellant's conduct during an ongoing investigation breached s. 57.5 offends the principle of statutory interpretation that each word in a provision must be presumed to have meaning and advance the legislative purpose. The appellant notes that s. 57.5 also contains the language "to be conducted", which is further evidence that the Legislature intended "before" to mean "in advance of". In answer to the

Commission's argument that his proposed interpretation would lead to absurd results, the appellant says that the presumption against absurdity does not permit the court to entirely disregard unambiguous statutory language.

[59] The Commission says that that the appellant's argument overlooks the fact that the word "before" ordinarily has different meanings in different contexts. In the context of s. 57.5(2), the Commission says that the word "before" has at least two possible ordinary meanings: (1) in a temporal sense as meaning "earlier in time than" the investigation, or (2) as a preposition, meaning "in the presence of" or "in the face of" the investigation. The Commission says that any ambiguity as to the meaning of the word "before" is easily resolved. It argues that based on a purposive and contextual interpretive approach, the provision cannot reasonably bear the appellant's proposed interpretation. His interpretation would, the Commission says, lead to an absurdity in that persons could destroy, conceal, or withhold information with impunity once an investigation (or any of the other listed processes, such as a hearing) had commenced.

The Subsequent Legislative Amendment of Section 57.5(2)

[60] In their factums, both parties referred to a subsequent amendment to s. 57.5(2), which was enacted by the *Securities Amendment Act, 2019*, S.B.C. 2019, c. 38 (Bill 33) and brought into force by regulation in 2020. The appellant describes the amendment as "notable", but does not explain its significance: Appellant Factum at para. 53. The Commission relies on s. 37(2) of the *Interpretation Act* in support of the proposition that the subsequent amendment cannot be construed as an indication that the Legislature intended to change the law: Respondent Factum at para. 95. I will address the significance of the amendment, if any, to the statutory interpretation analysis.

[61] The two versions of s. 57.5(2) read as follows:

> **As in force in 2014:**
>
> (2) A person contravenes subsection (1) if the person knows or reasonably should know that a hearing, review, investigation, examination or inspection is to be conducted and the person takes any action referred to in subsection (1) before the hearing, review, investigation, examination or inspection.

> **As amended in 2020:**
>
> (2) A person contravenes subsection (1) if the person knows or reasonably should know that a hearing, review, investigation, examination or inspection is being conducted or is likely to be conducted and the person takes any action referred to in subsection (1).
>
> [Emphasis added.]

[62] Accordingly, the current version of s. 57.5(2) does not contain the word "before", and the provision has been modified to include reference to an investigation that "is being conducted or is likely to be conducted". The question is whether this change in the language has any bearing on the interpretation of the previous wording of s. 57.5(2).

[63] The general rule is that absent clear legislative intent to the contrary, courts cannot rely on a subsequent amendment as confirmation of the proper interpretation of a statute prior to the amendment: *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 54. This rule is reflected in s. 37(2) of the *Interpretation Act,* which states that a legislative amendment must not be construed as a declaration that the Legislature considered the law to have changed with the amendment. Among the reasons for caution in relying on subsequent legislative history to interpret legislative intent is the difficulty in distinguishing between amendments that are meant to clarify or confirm the law and amendments that are meant to change it: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada Inc., 2022) at 645.

[64] I observe that the Explanatory Note that accompanies the 2020 amendment to s. 57.5(2) states that the amendment "clarifies the application of the provision". Explanatory notes are not authoritative, but they may provide some insight into legislative purpose: *R. v. Telus Communications Co.*, 2013 SCC 16 at para. 138. However, neither party in this case argued that there was sufficiently clear indication of legislative intent to permit safe reliance on the 2020 amendment as an aid to interpreting the meaning of the provision before it was amended. That being the case, the general rule applies and the 2020 amendment to s. 57.5(2) cannot be used in interpreting the provision as it read in 2014.

Analysis

[65] The task of determining the ordinary meaning of the language in s. 57.5(2) is a difficult one. The language, on its face, is not easily susceptible to a coherent interpretation of its ordinary meaning.

[66] The Commission's proposed interpretation is plausible based on the language of s. 57.5(2), but it is awkward. It is difficult to rationalize the Legislature's choice to use "before" as a preposition ("in the face of" or "in the presence of") with the inclusion of the phrase "is to be conducted", which connotes a temporal meaning. The legislative intent would have been clearer if the Legislature had used the words "in the presence of" or "in the face of" in place of the word "before".

[67] The appellant's proposed interpretation is also plausible based on the ordinary meaning of the language of s. 57.5(2). However, in my view, he overstates the point in suggesting that the language of the provision can bear no other interpretation. If the Legislature had intended "before" to have the meaning suggested by the appellant, it could have included the word 'commences' ("before the hearing, review, investigation, examination or inspection commences") to make that intent clear.

[68] There are, therefore, two plausible interpretations of the grammatical and ordinary language of s. 57.2(2). It is necessary to suspend judgment on the plain meaning of the words "before the…investigation" and consider both proposed interpretations in light of the context and purpose of the *Act*.

[69] In my view, the appellant's proposed interpretation is not supported by a purposive and contextual approach to interpreting s. 57.5(2). As I have found, the purpose of s. 57.5 is to facilitate the Commission's effective administration of the *Securities Act* by prohibiting conduct that would thwart the Commission in carrying out investigations, among other processes. I agree with the Commission that the appellant's proposed interpretation would lead to absurd consequences, in that obviously unacceptable forms of obstruction would be permitted under s. 57.5. For example, at the hearing stage, a person would obstruct justice if they destroyed

evidence before the commencement of the hearing, but not if they did so once the hearing was called to order. Identical conduct with identical repercussions for the Commission's administration of the *Securities Act* would result in completely different legal consequences, for no apparent reason. The appellant does not explain why the Legislature would have intended to draw such a distinction on the basis of timing alone.

[70] In the context of an investigation, the appellant's interpretation would create an exceedingly small sphere of conduct captured by s. 57.5. Conduct amounting to an obstruction of justice would only be caught if: (1) a person knew or reasonably ought to have known that an investigation was to be conducted, and (2) the impugned conduct occurred before that investigation commenced. As the Commission notes, the appellant's theory would thus require a person to have prescient knowledge of the Commission's intention to investigate before the Commission had undertaken even preliminary investigative steps. In most cases, individuals like the appellant find out about an investigation because it has already begun. Accepting the appellant's interpretation, s. 57.5 would permit those individuals to attempt to conceal or withhold evidence reasonably necessary for such investigations. The Commission would thus be largely unable to fulfil the specific statutory purpose of s. 57.5.

[71] Therefore, the appellant's narrow interpretation of s. 57.5(2) would undermine its specific purpose of preserving evidence reasonably necessary for an investigation, as well as broader statutory purposes including investor protection. It would lead to absurd consequences, as the application of the provision would depend on an irrational distinction as to when the impugned conduct occurred.

[72] In light of the statutory purposes, the correct interpretation of s. 57.5(2) is that the Legislature did not intend the word "before" to have the temporal meaning suggested by the appellant, but rather intended it to mean "in the face of" the investigation. In other words, the Legislature intended s. 57.5 to capture the conduct of an individual who knows or reasonably should know that an investigation is to be conducted, and destroys, conceals or withholds information with that knowledge.

The Legislature did not intend s. 57.5 to be limited in its application depending on the timing of the destruction, concealment or withholding of the information.

[73] I have had the privilege of reading the majority's reasons for judgment in draft form. With respect, I cannot agree that the interpretation of s. 57.5(2) adopted by the majority is justified on a purposive interpretation.

[74] The absurdity of the appellant's proposed interpretation does not consist only of its result in this case, although this case is certainly a useful illustration of the absurdity. The absurdity lies in an interpretation that unevenly applies the prohibition in s. 57.5 to conduct occurring in the course of ongoing regulatory processes depending on when an individual destroys, conceals or withholds information. A person contravenes s. 57.5 if they destroy, conceal or withhold information before an investigation commences, but the prohibition ceases to apply once the investigation starts. During the course of the investigation, a person may at some indistinct point in time become aware that a hearing is likely to be conducted, at which point the prohibition applies again, but only until such time as the hearing commences. This seemingly irrational distinction based on the timing of the conduct is not justified through any reference to legislative purpose. The majority notes that other remedies may, in some cases, be available to the Commission to address a person's conduct in destroying evidence at discrete points in time during this continuum. However, this does not, to my mind, answer the question of why the Legislature would have intended the general prohibition in s. 57.5 to apply in such an uneven manner to the same conduct, depending on when it occurred.

[75] The majority acknowledges that the word "before" can be used as a preposition in the sense I have described, although they consider this to be an "unnatural and forced" reading of the language of s. 57.5(2). While I do not agree with my colleagues that interpreting "before" in the way I have proposed is unnatural and forced, it seems to me that the outcome of the interpretative process does not turn on this disagreement. Even accepting the majority's characterization, we are then left with two possible interpretations of s. 57.5(2): (1) one which is unnatural and forced on a literal reading of the provision, but is consistent with statutory

purposes, and (2) one which is natural and unforced on a literal reading of the provision, but which leads to an irrational distinction that cannot be reconciled with statutory purposes. In my view, the modern approach to statutory interpretation requires us to adopt the interpretation that is consistent with statutory purposes.

[76] For these reasons, I conclude that the Commission panel was correct in its finding that s. 57.5(2) is intended to encompass conduct that prevents, or attempts to prevent, the Commission from obtaining information, records or things that the Commission reasonably requires for an ongoing investigation. The appellant's conduct is clearly caught by the provision.

Disposition

[77] I conclude that the Commission panel was correct in its interpretation of s. 57.5 of the *Securities Act*. I would therefore dismiss the appellant's appeal.

"The Honourable Madam Justice Horsman"

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[78] I have had the benefit of reading my colleague's draft judgment. I am entirely in agreement with Justice Horsman's conclusions concerning the standard of review and the meaning of "investigation" raised in the first ground of appeal, but respectfully differ as to the second ground, and in particular the interpretation of "before" in s. 57.5(2).

[79] Fundamentally, my colleague and I disagree on whether the plain reading of the provision contains an ambiguity when read in the context of the statute as a whole, and on whether the provision results in an absurdity if given its plain reading.

[80] As my colleague notes at para. 47, the starting point of the analysis is the ordinary meaning of the words used in s. 57.5. Ordinary meaning refers to the reader's first impression, i.e., the natural meaning that appears when the provision is simply read through. In my view, the ordinary meaning of the words "[a] person

contravenes subsection (1) if the person knows or reasonably should know that a hearing, review, investigation, examination or inspection is to be conducted and the person takes any action referred to in subsection (1) before the… investigation" (emphasis added) captures actions taken in advance of an investigation commencing. Although I agree with my colleague that "before" can be used as a preposition, as in "appearing before the tribunal," I do not read s. 57.5 as supporting that meaning of the word. In my view reading "before" as a preposition in this context is more than simply awkward—it is an unnatural and forced reading.

[81] In my opinion the words of the section are consistent with the scheme of the *Securities Act.* I do not see the interpretation proposed by the appellant as one resulting in an absurdity in the sense of something that could not have been intended by the Legislature. While I agree that reading "before" as a temporal limitation on the scope of behaviour leads to some conduct falling outside the reach of the section, as in the present case, that does not equate to absurdity or a provision that captures an exceedingly small sphere of conduct.

[82] The section as drafted could capture destruction or concealment of evidence during an investigation because at that point a person might well know that another process available to the Commission and listed under s. 57.5 is about to occur, such as an examination, inspection or hearing. The Commission in the present case chose to limit the allegation to prohibited conduct knowing that an investigation was to occur, and to take the position that the investigation was already underway when the Commission sent an inquiry to the appellant. But the case could have been framed differently or more broadly. The fact that a provision fails to apply in a particular case does not result in an absurdity. Although obstruction during a hearing could fall outside the scope of the section—since there is no next step that the conduct could be "before"—at that point orders for inspection, production, and compulsion of witnesses and information under Part 17 almost certainly would be in place. In that case, the type of conduct engaged in here would amount to a contravention of those compulsory orders, giving rise to other consequences including contempt.

[83] My colleague notes that if the Legislature had intended "before" to have the meaning suggested by the appellant, it could have included the word "commences" as in "before the hearing, review, investigation, examination or inspection commences" to make that intention clear: at para. 67. But in my respectful view, the word "commences" is implicit in the phrase "before an investigation," a view reinforced by the provision's use of the future verb tense "to be conducted." I note that the executive director in written submissions before the Commission accepted the temporal effect of the word "before", saying:

> Section 57.5 focuses on the actual or objective knowledge of the respondent who engages in obstruction of justice [knowing] that an investigation is to be conducted and before it begins.
>
> [Emphasis added.]

[84] The interpretation proposed by the Commission and adopted by my colleague is undoubtedly consistent with the purpose and the objects of the *Securities Act*, but that is but one of the principles that must be applied in interpreting a statute. As the Supreme Court of Canada stated in *Re: Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38 at para. 33, "[a]lthough statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament." The purpose of the *Securities Act* should not overwhelm the words of a section if they are consistent with the scheme of that *Act*: *625536 B.C. Ltd. v. Owners of Strata Plan LMS 4385*, 2021 BCCA 158 at paras. 42–43.

[85] Further, faced with an interpretation it seems the Legislature is unlikely to have intended, it is not the task of the court to search for an ambiguity in order to avoid that result. It is only where a statutory provision is ambiguous, and therefore reasonably open to two interpretations, that the absurd results flowing from one of the available interpretations will justify rejecting it in favour of the other. Thus "[a]bsurdity is a factor to consider in the interpretation of ambiguous statutory provisions, but there is no distinct "absurdity approach"": *R. v. McIntosh*, [1995] 1 S.C.R. 686 at 704–705, 1995 CanLII 124; *Bedwell v. McGill*, 2008 BCCA 526 at para. 31.

[86] The interpretation my colleague endorses (and indeed which is expressly captured by the 2020 legislative amendment) undoubtedly provides for a more seamless and effective tool for penalizing obstructive conduct that could frustrate the Commission's supervisory role in protecting investors. But, absent ambiguity and absurdity—which I do not see here—no departure from the plain meaning is permissible "… no matter what the court may think of the consequences": *Bedwell* at para. 31, citing Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 54.

[87] The Commission found that at the time of the appellant's impugned conduct, an investigation was already underway. Consequently, I would allow the appeal and remit the matter to the Commission panel to determine the outstanding alternative allegation: whether it is in the public interest to issue orders against the appellant on the basis that he engaged in conduct abusive to capital markets.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"