THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2012 SKCA 41 Date: 20120404

Between: Docket: 1774

Tri-Link Consultants Inc. and Klaus Link

Appellants

- and -

Saskatchewan Financial Services Commission

Respondent

Coram:
Cameron, Jackson and Herauf JJ.A.

Counsel:
J. Paul Malone for the Appellants
Sonne Udemgba for the Respondent

Appeal:

From:	Saskatchewan Financial Services Commission
Heard:	January 18, 2012
Disposition:	Dismissed
Written Reasons:	April 4, 2012
By:	The Honourable Mr. Justice Herauf
In Concurrence:	The Honourable Mr. Justice Cameron
	The Honourable Madam Justice Jackson

Herauf J.A.

I. Introduction and Background

[1] On October 30, 2008, counsel for Tri-Link Consultants Inc. and Klaus Link ("the appellants") endorsed his consent to an Agreed Statement of Facts and Allegations ("Agreed Statement"). The Agreed Statement was filed in response to a Notice of Hearing pursuant to Part XVIII of *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2 (the "*Act*") alleging violations of provisions of the *Act* by the appellants. The Agreed Statement acknowledged "[t]he Respondents [the appellants] failed to act honestly, fairly and in good faith toward their clients."

[2] The hearing before the Saskatchewan Financial Services Commission ("the Commission") was scheduled for November 4, 2008. On that date, counsel for the appellants and counsel for the Commission staff appeared before the Commission and filed the Agreed Statement and various exhibits by consent. The Commission, without making any findings, adjourned the hearing to a date when evidence was to be presented concerning financial compensation for Saskatchewan investors who lost money as a result of the activities of the appellants. The hearing was eventually set for April 6 and 7, 2009.

[3] On February 26, 2009, counsel for the Commission staff received a letter from counsel for the appellants that indicated the appellants would not be questioning the accuracy of the amounts owing to respective claimants. However, counsel for the appellants made it clear in this letter that the appellants were not admitting that the quantum of the claims was necessarily

caused by the appellants' "contravention or failure to comply with Saskatchewan securities laws."

[4] On April 3, 2009, three days prior to the hearing, counsel for the appellants withdrew as counsel of record. Klaus Link appeared on behalf of the appellants on April 6, 2009. Mr. Link did not request an adjournment to obtain new counsel and participated in the hearing by cross-examination of witnesses; gave evidence on behalf of the appellants; and, made submissions before the Commission.

[5] The Commission reserved its decision on April 7, 2009. On April 21, 2009, the Commission filed a written decision whereby it found the appellants had contravened provisions of the *Act*. The Commission permanently prevented the appellants from trading in securities in Saskatchewan; ordered the appellants to pay administrative penalties and costs; and, ordered the appellants to pay compensation for financial losses to investors in an amount exceeding $1,200,000.

[6] The appellants have appealed the Commission decision to this Court pursuant to s. 11 of the *Act*. The appellants advanced two grounds of appeal, namely:

> (i) the Commission erred by proceeding with the hearing immediately after counsel for the appellants, who had endorsed the Agreed Statement, had withdrawn, and
>
> (ii) the Commission acted contrary to the rules of natural justice by proceeding when the appellants did not have legal counsel.

[7] For the reasons that follow, I find that the process followed by the Commission did not deny the appellants procedural fairness and natural justice. In the result, I would dismiss the appeal with costs to the respondent.

II. Submissions of the Appellants

[8] The appellants submit that since their right to continue to work in their profession was at stake a high standard of procedural fairness is to be afforded. As a result, the failure to adjourn to ensure that the affected party has legal representation is contrary to the principles of natural justice. Viewed in this context, the appellants contend that the Commission should not have permitted legal counsel for the appellants to withdraw three days prior to the hearing. The appellants place reliance on the Supreme Court of Canada decision in *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331 to support this point.

[9] The appellants submit that former counsel for the appellants should have been required to appear before the Commission to seek leave to withdraw and if the withdrawal was for non-payment of legal fees, permission to withdraw should have been withheld to prevent serious harm to the administration of justice.

[10] Since this process was not followed by the Commission, the appellants allege that they suffered serious harm as they were denied the right to fully and adequately state their case and address the allegations against them. The Commission, according to the appellants, by allowing the hearing to proceed without representation for the appellants, acted contrary to the rules of natural justice.

III. Submissions of the Respondent

[11] The respondent contends that the appellants voluntarily admitted the allegations against them when they were represented by legal counsel and the Commission had every right to accept the admission. Furthermore, the respondent submits that the appellants made no request to adjourn the compensation hearing. As well, *Cunningham* involves a criminal case and the principles set out for withdrawal for non-payment of legal fees are not applicable in regulatory proceedings.

[12] Finally, the respondent suggests that the appellant Klaus Link is a knowledgeable businessman, who was likely aware of his right to request an adjournment to obtain new legal counsel. Since he made no such request, it was not incumbent upon the Commission to unilaterally adjourn to permit the appellants to obtain representation when the request to do so had not been made. This makes even more sense in light of the admission filed relating to the contravention of provisions of the *Act* and the admission relating to the amount of compensation for investors.

IV. Analysis

[13] As previously mentioned, the appellants assert that the Commission should have followed *Cunningham* and not permitted the withdrawal of counsel for the appellants three days prior to the hearing and, secondly, the appellants were denied natural justice by proceeding when they were unrepresented by counsel. I will address each issue in turn.

(i) The applicability of *Cunningham* to this case

[14] In *Cunningham*, the Supreme Court of Canada held that a court, in criminal cases, does have the discretion to refuse an application by defence counsel to withdraw for non-payment of legal fees in certain situations. The Supreme Court outlined a number of principles a court should consider when faced with an application from counsel to withdraw for non-payment of legal fees. After weighing these factors, the court can refuse to permit counsel to withdraw if it "would cause serious harm to the administration of justice."

[15] In my view, the application of *Cunningham* to the proceedings in this case is questionable. The Supreme Court of Canada in *Cunningham* appears to confine its application to criminal matters only. The Supreme Court identified the issue in para. 1 of its decision as follows:

> What is the role of a court when defence counsel, in a criminal matter, wishes to withdraw because of non-payment of legal fees? [Emphasis added]

And subsequently at para. 8:

> The issue in the present appeal is whether, in a criminal matter, a court has the authority to refuse to grant defence counsel's request to withdraw because the accused has not complied with the financial terms of the retainer. … [Emphasis added]

Reference can also be made to paras. 21, 34, 36 and 50 as but a few instances where the Supreme Court reiterates that the decision relates to a criminal matter.

[16] The question need not be decided in this case because even if we were to determine that *Cunningham* applies to a quasi-judicial tribunal, there is absolutely no information or evidence before this Court that would indicate the reason for the withdrawal of the appellants' counsel. By this I mean that

there is nothing on the record that would indicate that the Commission was aware of the reason for withdrawal. It is not possible for this Court, without this information, to make an assumption that the withdrawal was for non-payment of fees as opposed to ethical reasons. Neither party made an application to adduce further evidence to identify the reason for the withdrawal and/or if the Commission had been made aware of the reason. Without this information, it is inappropriate for this Court to make a determination as to whether the Commission could have denied appellants' counsel permission to withdraw if the reason for withdrawal was non-payment of legal fees. In the result, I would dismiss this ground of appeal.

(ii) Were the appellants denied natural justice by proceeding when they did not have legal counsel?

[17] I start this discussion by reiterating the principles of natural justice, namely: (i) persons whose interests may be affected by a decision should be given full notice of the case to be met and the allegations against them; and (ii) they must be given an opportunity to be heard. See: *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. No one disputes that these principles apply to quasi-judicial tribunals such as the Commission in this case.

[18] There is also little doubt that the appellants were aware of their right to be represented by counsel. Section 9(10) of the *Act* provides that: "A person or company attending or submitting evidence at a hearing or review may be represented by counsel … ." This is reiterated in the Notice of Hearing and many times in the "Procedure on Hearings and Reviews Before the Commission." It is clear that the appellants were aware of this option because

they did in fact retain counsel. I mention this up front to point out the irony of the appellants' contention that the Commission should have made them aware of a right to counsel, a right they obviously knew about and had previously utilized.

[19] It is appropriate to mention at this point that we are disadvantaged by lack of knowledge as to the information the Commission had regarding the withdrawal of counsel for the appellants. This becomes troublesome since an examination of the record indicates that the Commission, at the commencement of the hearing, did not ask the appellants any questions relating to legal representation. Therefore, it becomes necessary to carefully examine the evidentiary record to ascertain what transpired. The record reveals the following:

(a) At the commencement of the hearing, counsel for the Commission staff advises the Commission that she believes Mr. Klaus Link is "self-represented".

(b) Mr. Link advises the Commission that he found out on April 3, 2009 at 3:00 p.m. that his lawyer would not be representing him and therefore requests the Commission's indulgence as to the proper procedure to be followed since he is not a lawyer.

(c) Mr. Link advises the Commission that he accepts what is in the Agreed Statement.

(d) Mr. Link advises the Commission that his former counsel put together an outline for him to follow when conducting the hearing.

(e) Mr. Link, at the close of his evidence, requests permission to file his sworn affidavit in response to the Commission's case. He indicates that he is doing this on the advice of his former counsel.

(f) During the course of the hearing before the Commission, Mr. Link cross-examines witnesses called on behalf of the Commission staff, gives sworn testimony on behalf of the appellants and makes submissions on behalf of the appellants.

[20] What is abundantly clear from an examination of the record is that at no time during the proceedings of April 6 and 7, 2009 did Mr. Link complain that he did not understand the procedure; he required legal counsel; he required an adjournment; he was not in agreement with any step taken in the matter by his previous counsel in regard to the proceedings; and, he no longer admitted the allegations.

[21] In my view, it appears obvious from the record that Mr. Link was willing to proceed without representation. Mr. Link prepared his case with the assistance of his former lawyer and fully participated in the hearing before the Commission. Based upon these observations, I am confident that Mr. Link did not request an adjournment to obtain counsel as he had intended to proceed without representation. Furthermore, it is not a denial of procedural fairness to proceed with a hearing if an adjournment is not requested. See: *Re Crux and Leoville Union Hospital Board* (1973), 35 D.L.R. (3d) 619 (Sask. C.A.) and Donald J.M. Brown, Q.C. and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf, vol. 2 (Toronto: Canvasback Publishing, 2011) at 9:9340.

[22] The appellants did not request an adjournment. Therefore, the cases cited by them in support of their position that the Commission should not have proceeded in the absence of legal counsel for the appellants are of little

assistance. Both *Igbinosun v. Law Society of Upper Canada*, 2009 ONCA 484, 96 O.R. (3d) 138 and *Markwart v. Prince Albert (City)*, 2006 SKCA 122, 277 D.L.R. (4th) 360 deal with situations where a request to adjourn to obtain counsel had been refused. This is certainly not the case here.

[23] There is another fundamental point that does not support the appellants' position. Even if there was an obligation by the Commission to, at the very least, have made some inquiries of the appellants at the outset of the hearing on the issues of legal representation, it is questionable that it would have made any difference to the outcome. I say this because it is difficult to see how the presence of counsel for the appellants would have affected the result. By this time, the appellants had admitted to contraventions of provisions of the *Act* and also to amounts owing to the investors affected by the contraventions. The result would have been the same with or without counsel. This becomes apparent when one examines the written decision of the Commission filed on April 21, 2009. At para. 61, the Commission stated:

> Link gave evidence on behalf of the Respondents. However, in view of the admissions made by the Respondents in their Agreed Statement of Facts and Allegations, and the admissions by the Respondents relative to the claims for financial compensation hereinafter referred to, said evidence did not provide a defence for the Respondents.

[24] As previously indicated, at no time during the course of the hearing did Mr. Link attempt to distance himself from the admissions. In fact, he not only endorsed the admissions but also made it clear that the admissions were prepared on his instructions. In view of the admissions, it is difficult to find any prejudice to the appellants by having the hearing proceed without legal representation. I am satisfied that, in the circumstances, the appellants were

not denied natural justice by proceeding without legal counsel and would not give effect to this ground of appeal.

V. Conclusion

[25] The appeal is dismissed with costs to the respondent in the usual way.

DATED at the City of Regina, in the Province of Saskatchewan, this 4th day of April, A.D. 2012.

"Herauf J.A."

Herauf J.A.

"Cameron J.A."

Cameron J.A.

"Herauf J.A."

for Jackson J.A.