COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Smillie v. British Columbia (Securities Commission),* 2025 BCCA 179

Date: 20250515
Docket: CA50339

Between:

David Smillie

Appellant

And

Executive Director of the British Columbia Securities Commission, the British Columbia Securities Commission, and 1081627 B.C. Ltd., operating as ezBtc

Respondents

Before: The Honourable Justice Iyer
(In Chambers)

On appeal from: Decisions of the British Columbia Securities Commission, dated August 7, 2024 and November 27, 2024 (*Re Smillie*, 2024 BCSECCOM 348 and 2024 BCSECCOM 496).

Oral Reasons for Judgment

Counsel for the Appellant:	C.G. Reedman (appearing via videoconference on May 15, 2025) N. Ngwaba, Articled Student
Counsel for the Respondents, Executive Director of the British Columbia Securities Commission and the British Columbia Securities Commission (appearing via videoconference on May 15, 2025):	J.A. Dean
Place and Date of Hearing:	Vancouver, British Columbia May 13, 2025
Place and Date of Judgment:	Vancouver, British Columbia May 15, 2025

Summary:

The applicant seeks leave to appeal liabilities and sanctions decisions of the B.C. Securities Commission. The Commission found him liable for perpetrating securities fraud and imposed significant penalties and sanctions of over $18 million. At the hearing, the applicant consolidated some of his grounds of appeal and abandoned others. He argued the Commission erred in its valuation of the losses attributable to fraud. Held: Application dismissed. The Commission's valuation analysis was based on the evidence, and the applicant could not identify any reviewable error.

IYER J.A.:

[1] The appellant, David Smillie, applies for leave to appeal two decisions of a panel of the respondent, British Columbia Securities Commission ("Panel"). In the first decision (indexed at 2024 BCSECCOM 348), the Panel found Mr. Smillie liable for perpetrating a fraud contrary to s. 57(b) of the *Securities Act*, R.S.B.C. 1996, c. 418 ("Liabilities Decision"). In the second decision ("Sanctions Decision"), it imposed significant sanctions on Mr. Smillie as a result of his contravention (indexed at 2024 BCSECCOM 496).

The Liabilities Decision

[2] In the Liabilities Decision, the Panel found that Mr. Smillie and his company, 1081627 B.C. Ltd., operating as ezBtc ("ezBtc"), perpetrated a fraud relating to securities contrary to s. 57(b) of the *Securities Act*. The fraud related to cryptocurrency assets deposited by customers on the ezBtc platform between 2016 and 2019. Mr. Smillie and ezBtc represented to customers that cryptocurrency they deposited with ezBtc would be held safely in "cold wallets" (offline storage) when, in fact, a very significant number of these bitcoin and ether assets were transferred to two online gambling sites without customer authorization.

[3] Mr. Smillie was the sole authorized signatory of two of ezBtc's bank accounts, and "represented himself variously as the founder, CEO, president or director of ezBtc when speaking with customers": Liabilities Decision at para. 15. The corporate registry also listed Mr. Smillie as the incorporator and sole director of ezBtc in 2016, 2021, and 2022.

[4] In arriving at its conclusion, the Panel rejected Mr. Smillie's arguments that it lacked jurisdiction, that fraud was not proved, and that the proceedings were procedurally unfair because the Panel denied his applications to bifurcate the liability hearing and to adjourn the proceedings, and because of investigative delay.

Jurisdiction

[5] The Panel found that the agreements ezBtc entered into with customers satisfy the definition of "futures contract" under s. 1(1) of the *Securities Act* and are therefore within the Securities Commission's jurisdiction. Specifically, the Panel concluded that the ezBtc agreements contained an "'obligation to make or take future delivery of' a commodity" as required by s. 1(1): Liabilities Decision at para. 106. It explained:

> [107] Once a customer deposited their crypto assets on the ezBtc platform, they no longer had possession or control of the assets. The same was true for crypto assets that a customer acquired through the platform. The acquisition was simply recorded in their accounts at ezBtc to evidence the transaction and the customer's right to receive the crypto assets on demand. In each instance, the customer could not transfer, trade or deal with these assets except through ezBtc and through strict adherence with formal process requirements and the payment of fees. The customer could not obtain possession or control except by requesting a withdrawal on the platform and upon ezBtc transferring them to a customer-controlled wallet address. The customer's ability to deal with or obtain the assets was entirely dependent on ezBtc.
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> …
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> [110] The obligation on ezBtc, and its stated commercial practice, was to deliver the underlying crypto assets when requested by the customer, which could be at some unspecified date in the future to be determined by the customer. Therefore, when a customer deposited or acquired contractual interests in a crypto asset on the ezBtc platform, they acquired a right to take future delivery of the underlying crypto asset, and ezBtc acquired an equal and offsetting "obligation to make future delivery" of the crypto asset to the customer.

Fraud

[6] The Panel found the transfers to gambling websites, either directly from ezBtc or indirectly from ezBtc to Smillie's accounts and then to the gambling websites, constituted fraud contrary to s. 57(b) of the *Securities Act*. The first element of fraud,

a prohibited act, was established by evidence of the transfers themselves. Evidence that ezBtc had a daily balance of cryptocurrency much lower than the amount of cryptocurrency deposited with it demonstrated that "ezBtc did not keep custody of most of the bitcoin and ether that customers deposited" and "support[ed] the inference that the crypto assets transferred from ezBtc to gambling sites and Smillie's Exchange Accounts were customer crypto assets": Liabilities Decision at para. 117. The second element of fraud, deprivation resulting from the prohibited act, was clearly met through testimony of customers who were unable to recover their assets from ezBtc.

[7] The third element of fraud, subjective knowledge, was established because Mr. Smillie "knew that customers were told their crypto assets would be in ezBtc's custody and held in cold storage, but they were in fact transferred to gambling websites or to Smillie's personal accounts": Liabilities Decision at para. 123. This conclusion was based on evidence of Mr. Smillie's personal representations to customers that their assets would be held in cold storage, and the evidence that Mr. Smillie was the person who managed and controlled ezBtc. The Panel also found that Mr. Smillie's subjective knowledge could be attributed to ezBtc.

[8] The Panel concluded both ezBtc and Mr. Smillie had contravened s. 57(b) of the *Securities Act* by:

> … perpetrat[ing] a fraud relating to securities by lying to customers about holding their crypto assets in cold storage in ezBtc's custody, but instead diverting 935.46 customer bitcoin and 159 customer ether for their own purposes;

Liabilities Decision at para. 140.

Procedural Fairness Issues

[9] With respect to Mr. Smillie's application to bifurcate the issue of jurisdiction from liability, the Panel found bifurcation was not in the public interest because witnesses on those issues overlapped and Mr. Smillie's application was made very late in the day.

[10] The basis of the adjournment application was a “no-action” letter Mr. Smillie believed he received from the Securities Commission in 2017, that he said made representations that ezBtc’s activities were exempt from securities law. Commission staff tried but could not find such a letter. However, on March 7, 2024, the Commission disclosed to Mr. Smillie 41 pages of additional documents found during the search. On March 15, Mr. Smillie applied for an adjournment of the hearing set to commence on April 2. The Panel denied the adjournment because Mr. Smillie had provided no evidence beyond his assertion that a no action letter existed, nor had he explained why the March 7 disclosure created the need for more time in the face of the Panel’s observation that additional disclosure had little relevance.

[11] With respect to unfairness arising from delay, the Panel rejected Mr. Smillie’s characterization of the investigation as having started in December 2017. At that time, the Commission wrote to Mr. Smillie, not to commence an investigation, but to seek information about ezBtc’s operations as part of an initiative to “better understand the crypto industry”: Liabilities Decision at para. 138. The investigation only started in 2019, after customers complained to the Commission about ezBtc, and the Panel found the investigation period did not constitute undue delay.

The Sanctions Decision

[12] The Panel imposed three sanctions:

- a lifetime prohibition on trading securities and an order that Mr. Smillie resign any position as a director or officer of any issuer or registrant under the *Securities Act*;

- an award of $10.4 million, against ezBtc and Mr. Smillie jointly and severally, under s. 161(1)(g) of the *Securities Act*, representing the money ezBtc and Mr. Smillie obtained as a result of their contraventions of the *Act*; and

- an administrative penalty of $8 million against Mr. Smillie under s. 162 of the *Securities Act*, for general and specific deterrence.

[13] The Panel relied on *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 in making the s. 161(1)(g) award. It considered the challenges of quantifying the award in light of rapidly escalating values for cryptocurrency assets during the relatively long period they were misappropriated. It chose a valuation date of April 30, 2018 as the midpoint of the period during which Mr. Smillie and ezBtc misappropriated crypto assets. It rejected Mr. Smillie's argument that the amount should be calculated based on the value of each asset at the time it was diverted because of the near impossibility of doing that calculation on the evidence before the Panel and Mr. Smillie's failure to provide any evidence to ground a more precise calculation. It also referred to this Court's comment in *Poonian* that the Commission has broad latitude in making such approximations.

Test for Leave to Appeal

[14] Section 167(1) of the *Securities Act* permits appeals of Commission decisions to this Court with leave of a justice. The test for leave to appeal is well known. It requires consideration of four factors:

> 1) Whether the point on appeal is of significance to the practice;
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> 2) Whether the point raised is of significance to the action itself;
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> 3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
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> 4) Whether the appeal will unduly hinder the progress of the action.

[15] These factors "are considered under the overarching 'rubric of the interests of justice'": *Vancouver Shipyards Co. Ltd. v. Canadian Merchant Services Guild*, 2023 BCCA 77 at para. 21 (Chambers), citing *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).

Analysis

[16] As the decisions are final decisions, I accept that the appeal is significant to the action and an appeal would not hinder the progress of the action.

[17] Mr. Smillie asserts 14 separate errors of law as grounds of appeal. The errors listed are repetitive and disorganized. It is clear that Mr. Smillie takes issue with nearly all of the Panel's findings, including jurisdiction, fraud, procedural fairness and all of the sanctions.

[18] Mr. Smillie's written submission fails to identify why the asserted errors are properly characterized as errors of law. Bald assertions of errors of law cannot satisfy even a low merits threshold.

[19] At the application hearing, Mr. Smillie abandoned several grounds of appeal. While he asserted that the Panel's interpretation of "futures contract" as including ezBtc's agreements with customers is significant to the practice, he agreed that its significance is much diminished because the definition of "futures contract" at issue was removed from the *Securities Act* in 2020. Although futures contracts fall within the Commission's jurisdiction over derivatives, I find this Court's interpretation of a repealed definition is not of significance to the practice.

[20] Mr. Smillie then distilled his proposed grounds of appeal into: (1) the valuation of the losses at $10.4 million; and (2) procedural fairness issues. However, he acknowledged he had no substantive argument that in finding no procedural unfairness the Panel had made a reviewable error. That dispenses with the merits of that ground.

[21] Turning to the valuation issue, Mr. Smillie characterized the Panel's valuation method as arbitrary. However, he acknowledged that the Commission need only prove on a balance of probabilities a "reasonable approximation" of the amount obtained by the wrongdoer as a result of that wrongdoer's contravention. Then, the burden shifts to the wrongdoer to disprove the reasonableness of the amount. Any ambiguity or uncertainty in the calculation is resolved in favour of the Commission: *Poonian* at para. 129.

[22] In the face of this, Mr. Smillie was unable to point to any reviewable error. I see no error. The Panel's approach to valuation was supported by the evidence.

Mr. Smillie did not tender evidence permitting the valuation approach for which he advocated. As Commission counsel noted, it appears the Panel's approach was actually more favourable to Mr. Smillie than the alternatives he suggested at the application hearing.

[23] As the applicant, Mr. Smillie bears the burden of showing his appeal has *prima facie* merit. While this is a low bar, Mr. Smillie has not met it. I conclude, considering all of the factors, that it is not in the interests of justice for a division to hear this appeal.

[24] The application for leave to appeal is dismissed.

"The Honourable Justice Iyer"