CIRCUMSTANTIAL EVIDENCE AND INSIDER TRADING

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Introduction

It is trite law that evidence will not be inadmissible simply because it is circumstantial, rather than direct. However, the appropriate use and weight to be given to such evidence varies with the context of each case and the area of law in which it arises. In the case of the regulatory and quasi-criminal offences of insider trading and tipping, particular care must be taken to avoid a mechanistic application of certain factors, recently developed by the provincial securities regulators (including the Ontario Securities Commission (the "OSC" or the "Commission")) to create a compelling inference of the offences.

Insider trading and tipping are offences under provincial securities legislation and may be prosecuted criminally as a provincial offence. Direct proof of insider trading or tipping often does not exist and instead triers of fact are asked to consider circumstantial evidence. Reliance upon relevant circumstantial evidence may be appropriate where its value is carefully considered and proper weight assigned to it by the trier of fact. In assessing weight, the trier of fact must consider the strength of the inferences that can be drawn from the evidence itself. Such inferences are central to the application of circumstantial evidence to the legal and factual questions put to the trier fact. The methodologies relied upon by the trier of fact, whether administrative or judicial, to draw such inferences must be scrutinized to ensure that they do not themselves alter the requisite standards that must be met by various parties or convert an otherwise holistic assessment of the evidence into a mechanistic calculation.

The provincial securities commissions in Ontario and Alberta, particularly, have developed a set of circumstantial factors to which they will look to create a "compelling inference" of the elements of insider trading and tipping. The Alberta Court of Appeal has recently weighed in to challenge what some have criticized as this

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formulaic approach to a serious offence. In *Holtby, Re*,[1] the Court of Appeal overturned the Alberta Securities Commission's finding that the respondent had engaged in insider trading using the five-factor approach. The court held that the evidence must be weighed in context and that drawing reasonable inferences has its limits, no matter the offence or difficulty in proving its elements. A similar approach was also recently adopted by the OSC in *Re Azeff*, where the commission relied upon "firmly established" circumstantial evidence to support several findings of tipping and insider trading.[2]

Holtby and *Azeff* demonstrate that reliance upon circumstantial evidence may be appropriate, but only to the extent that the evidence as a whole satisfies the requisite standard of proof and establishes the statutory requirements of the offence. A predetermined set of factors may lead the trier of fact away from an analysis of the evidence as a whole and into a checklist which might in one case not otherwise satisfy the burden of proof or make it unduly onerous in another. It is in this context that we consider the application of circumstantial evidence by provincial securities commissions before and after the decision in *Re Suman*,[3] as well as the assessment of such evidence in criminal law, and fraudulent conveyances and civil conspiracy cases. While the *Suman* factors may serve as a useful guide in insider trading and tipping cases, a strict application risks altering the legal test set in the provincial securities legislation and bringing the OSC's decisions out of step with the treatment of circumstantial evidence by courts and other provincial securities commissions.

1. The Elements of the Offence and the Use of Circumstantial Evidence

In order to establish the offence of insider trading under s. 76(1) of the OSA, OSC Staff must prove the following elements:

(a) at the material time, the respondent(s) was in a "special relationship" with a reporting issuer;
(b) the respondent(s) purchased or sold securities of that reporting issuer;

1. *Holtby, Re*, 2013 ABASC 45 (Alta. Securities Comm.).
2. *Azeff, Re*, released March 24, 2015 (Ont. Sec. Comm), at paras. 48 and 343, online: http://www.osc.gov.on.ca. Note that the Chair of the Panel, Alan Lenczner, is counsel at Lenczner Slaght LLP. The authors of this paper were not involved in any way in the proceeding or decision making in *Azeff*.
3. 2012 LNONOSC 176, 35 O.S.C.B. 2809, 2012 CarswellOnt 2256 at para. 31 (Ont. Sec. Comm.), affirmed 2013 ONSC 3192, 229 A.C.W.S. (3d) 592, 2013 CarswellOnt 8465 (Ont. Div. Ct.).

(c) the trade(s) was made with knowledge of a material fact or material change; and
(d) the material information had not been generally disclosed to the public.[4]

Similarly, for the offence of tipping, the following elements must be established by OSC Staff:

(a) at the material time, the respondent(s) was in a "special relationship" with a reporting issuer;
(b) the respondent(s) informed another person or company of a material fact or material change with respect to that reporting issuer;
(c) this disclosure was not made in the necessary course of business; and
(d) the material information had not been generally disclosed to the public.[5]

In administrative proceedings, the standard of proof is on a balance of probabilities, that is, the trier of fact must decide whether there was "clear, convincing and cogent" evidence that the alleged events were more likely than not to have occurred.[6]

In many cases involving securities law, circumstantial evidence is the only sort of evidence available, particularly where knowledge or intent forms part of the offence or cause of action. This evidence is not to be excluded or disregarded by reason of being circumstantial. It must be treated as any other kind of evidence. The weight accorded to it depends upon the strength of the inference that can be drawn from it.[7] If it is relevant, it will be received and considered. Moreover, in some cases, relevant circumstantial evidence will be decisive.[8]

With respect to drawing proper inferences, only those which can be reasonably and logically drawn from a fact or group of facts established by the evidence may be relied upon. A trier of fact must be careful to distinguish between an inference and speculation. There can be no inference without objective facts from which to infer the

4. R.S.O. 1990, c. S.5, s. 76(1).
5. *Ibid.*, s. 76(2). Note that, insider trading and tipping are also offences under s. 382.1 of the *Criminal Code*, R.S.C., 1985, c. C-46.
6. *Suman*, *supra* note 3, at para. 31 (Ont. Sec. Comm.); *Azeff*, *supra* note 2, at para. 42.
7. Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada Inc., 2014), s. 2.86.
8. *Kusumoto, Re*, 2007 ABASC 40, 35 B.L.R. (4th) 297, 2007 CarswellAlta 1306 (Alta. Securities Comm.) at para. 74; *Azeff*, *supra* note 2, at paras. 48-49.

fact or event that the party seeks to establish. The trier of fact is not permitted to assume facts that have not been proven. Moreover, the facts must be sufficiently linked to the inferences sought to be drawn.[9] Neither mere possibility nor suspicion is sufficient to satisfy the required standard of proof; nor can an inference be made where it is objectively unreasonable or illogical.[10]

The party relying upon the circumstantial evidence is not required to prove that the inferences they seek to draw are the *only* inferences that can be drawn from the evidence.[11] As discussed in further detail below, this approach is different from the use of circumstantial evidence in criminal cases, where the existence of an alternative explanation sufficient to create a reasonable doubt renders the circumstantial evidence incapable of supporting a conviction.[12] However, in the civil context, where the circumstantial evidence is consistent with either an improper intent or an innocent intent, it would be insufficient to conclude that two alternative inferences are equally plausible and then to infer the improper intent. The evidence would have to clearly and cogently support the inference of improper intent.[13]

Therefore, in assessing circumstantial evidence put forward by OSC Staff, as well as the inferences sought to be drawn, the Commission must focus on the standard of proof borne by OSC Staff. It is not for the respondent to provide clear, cogent and convincing evidence of an innocent explanation for circumstantial facts tendered by OSC Staff in support of the offences of insider trading and tipping. Rather, that standard must be met by OSC Staff alone.

2. The Suman Factors

Suman arose out of allegations that Shane Suman, who worked in the IT Department of MDS Sciex, communicated an undisclosed material fact to his wife, Monie Rahman. The material fact was that MDS Inc. was proposing to acquire Molecular Devices Corporation ("Molecular"), a public company listed on NASDAQ in the United States. Staff alleged that during the relevant time, Mr. Suman and Ms. Rahman purchased securities of Molecular with knowledge of

9. *Suman*, *supra* note 3 at paras. 293-300; *Azeff*, *ibid.* at para. 48.
10. *Rankin, Re* (2011), 39 Admin. L.R. (5th) 77, 2011 CarswellOnt 12322, 34 O.S.C.B. 11797 (Ont. Sec. Comm.), affirmed 2013 ONSC 112, 46 Admin. L.R. (5th) 159, (*sub nom.* Rankin v. Ontario Securities Commission) 113 O.R. (3d) 481 (Ont. Div. Ct.).
11. *Suman*, *supra* note 3 at para. 308.
12. *R. v. Andrews* (June 14, 1991), Paris Prov. J., [1991] O.J. No. 2708 (Ont. C.J.) at paras. 15-17.
13. *Podorieszach, Re*, 2004 LNABASC 151 (Alta. Sec. Comm.) at para. 78.

the proposed acquisition. These trades were conducted several days before the proposed acquisition was publically announced.[14] The key issues in dispute were whether Mr. Suman learned of the proposed acquisition through his IT role at MDS Sciex, whether he informed Ms. Rahman of it, and whether Mr. Suman and Ms. Rahman purchased the Molecular securities with knowledge of the proposed acquisition. Notably, Molecular was not a "reporting issuer" as defined by the Act. Staff therefore alleged that the trading was contrary to the public interest.[15]

In its analysis, the OSC outlined the appropriate standard of proof in administrative proceedings, as well as the proper use of circumstantial evidence.[16] Relying upon a decision of the U.S. Court of Appeal, it then went on to consider the following six factors, which it found created a "compelling inference" of knowledge of material non-public information:

(a) the tippee's access to the information;
(b) the relationship between the tipper and the tippee;
(c) the timing of the contact between the tipper and the tippee;
(d) the timing of the trades;
(e) the pattern of the trades, including their uncharacteristic size; and
(f) any attempts to conceal the trades or the relationship between the tipper and the tippee.[17]

Based on these factors, the OSC found that Mr. Suman had the ability and opportunity to acquire knowledge of the proposed acquisition though his IT role at MDS Sciex. In particular, it found that in his IT role, Mr. Suman had the ability and opportunity to view emails relating to the proposed acquisition.[18] There was, however, no direct evidence that Mr. Suman actually viewed the impugned emails.[19]

In particular, the circumstantial evidence put forward by OSC Staff included:

(a) Mr. Suman's ability and opportunity to view emails relating to the proposed acquisition;[20]

14. *Suman*, *supra*, note 3 at para. 2.
15. *Ibid.* at paras. 3-4.
16. *Ibid.* at paras. 288-300.
17. *Ibid.* at para. 302.
18. *Ibid.* at para. 134. Note, however, that there was no direct evidence that Mr. Suman actually viewed the impugned emails (para. 132).
19. *Ibid.* at para. 132.
20. *Ibid.* at para. 134.

(b) the timing and length of a phone call between Mr. Suman and Ms. Rahman, as well as the respondents' evidence that they decided to purchase Molecular securities during this phone call;[21]
(c) internet searches conducted by Mr. Suman at material times of terms, such as "monument inc.",[22] and websites relating to the insider trading charges laid against Martha Stewart;[23]
(d) the timing of the respondents' purchase of Molecular securities, the new analytic approach the respondents' claimed to apply to the trade, and the "unprecedented" size of the respondents' profit;[24]
(e) a large number of calendar fragments on Mr. Suman's computer relating to the proposed acquisition;[25]
(f) Mr. Suman's denial during his first interview with OSC Staff that he had purchased Molecular securities;[26] and
(g) Mr. Suman's installation and use of a computer program which permanently wipes data and information from a computer after being warned by OSC Staff to not delete data on his office computer.[27]

On this basis, the OSC found that Mr. Suman contravened s. 76(2) of the Act by informing Ms. Rahman of the proposed acquisition, and that the respondents' purchase of the Molecular securities was contrary to the public interest.[28] In particular, it found that Mr. Suman had the ability and opportunity to acquire knowledge of the proposed acquisition though his IT role at MDS Sciex. It further found that the respondents' well-timed, highly uncharacteristic, risky and highly profitable purchases of the Molecular securities constituted a fundamental shift in the nature of the respondents' trading that was not satisfactorily explained.[29] In reaching this conclusion, the OSC emphasized the respondents' pattern of trading, the timing of their trades, the timing of Mr. Suman's communication with Ms. Rahman, and Mr. Suman's attempt to conceal the impugned trades.[30]

21. *Ibid.* at para. 168.
22. *Ibid.* at paras. 158-59.
23. *Ibid.* at paras. 210-216.
24. *Ibid.* at paras. 204-205.
25. *Ibid.* at para. 235.
26. *Ibid.* at para. 251.
27. *Ibid.* at para. 278.
28. *Ibid.* at para. 352.
29. *Ibid.* at paras. 341-42.
30. *Ibid.* at paras. 342-45.

The OSC's decision in *Suman* was upheld by the Divisional Court in a brief oral judgment delivered by Justice Harvison Young. On appeal, Mr. Suman and Ms. Rahman argued that it was unreasonable for the Commission to conclude that Mr. Suman knew of the proposed acquisition in the absence of a finding of fact that he had actually viewed the emails disclosing the fact of the proposed acquisition, as opposed to merely having had the opportunity to view these emails.[31] Relying upon the OSC's findings relating to the timing of the appellants' trades, their pattern of trading, the timing of their communications, and Mr. Suman's attempt to conceal the trades, the court held that the inference that Mr. Suman knew of the proposed acquisition was reasonable.

While the court did not expand further on its reason for rejecting the appellants' position, this decision appears to stand in contrast to that of the Alberta Court of Appeal[32] in which the court overturned several findings of insider trading and tipping against multiple individuals, in part, on the basis that a generalized finding of opportunity was not in itself sufficient to support a legal inference that an offence had been committed under the Alberta *Securities Act*.

It is this principle that the OSC has more recently applied in *Azeff*, which involved allegations of tipping against a corporate lawyer, Mitchell Finkelstein. On the issue of Mr. Finkelstein's knowledge of certain impugned transactions, the Commission declined to accept OSC Staff's position that knowledge of Mr. Finkelstein's law firm should be imputed to Mr. Finkelstein, despite Mr. Finklestein's opportunity to view such information. The Commission held that this finding would require it to rely upon improper speculation.[33]

3. Lessons from Other Areas of Law – Criminal Law, Fraudulent Conveyance, and Civil Conspiracy

The benefit of the holistic approach is evidenced by the approach to circumstantial evidence applied in the criminal context as well as in both fraudulent conveyance and civil conspiracy cases.

In the criminal context, the guiding principle for the application and use of circumstantial evidence is that the only rational inference that may be drawn from such evidence is proof of the accused's guilt beyond a reasonable doubt.[34] In reaching this conclusion, the trier of

31. *Supra* note 3 (Div. Ct.) at para. 2.
32. *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273, 376 D.L.R. (4th) 448, [2014] 11 W.W.R. 314 (Alta. C.A.).
33. *Azzeff*, *supra* note 2, at para. 83.
34. *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, 307 D.L.R. (4th) 577 (S.C.C.) at para. 33.

fact must assess the evidence as a whole. It is an error in law to assess each fact separately by applying the requisite standard of proof to each piece of circumstantial evidence. Rather, each fact must be related to the others in assessing whether the evidence as a whole proves, beyond a reasonable doubt, that the accused is guilty of the alleged offence.[35]

Therefore, where any rational inference other than guilt can be drawn from the circumstantial evidence, the accused must be acquitted. This approach focuses the analysis on the high standard borne by the Crown, rather than the accused's explanation for the relevant conduct.[36]

By contrast, in the administrative context, a prosecutor is not required to establish that the only inference that may be drawn from the circumstantial evidence is proof of the unlawful conduct. He or she is required to provide clear, cogent and convincing evidence of the offence in question. Where an innocent inference is equally probable, the trier of fact is not permitted to simply prefer an inference of unlawful conduct unless the prosecutor has met the above standard of proof.[37] As in the criminal context, the focus of the analysis must be on whether the required standard of proof is established by the evidence as a whole, not on the impact (or lack thereof) of each separate fact.

It is through this lens that the application of pre-determined factors, such as the *Suman* factors, must be assessed. In fraudulent conveyances cases, these types of factors are carefully applied as guiding principles, without detracting from an analysis of the specific elements of the cause of action in light of the evidence as a whole. Whereas in civil conspiracy cases, the courts have developed an analytical approach that rests on the facts of each case, without the use of any pre-determined factors.

In particular, in a claim for fraudulent conveyance, the plaintiff must establish that the transfer in question was completed with "intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures".[38] Direct evidence of this element of a cause of action is rarely available. As such, courts have allowed fraud or fraudulent

35. *R. v. Stewart* (1976), [1977] 2 S.C.R. 748 at 749, 71 D.L.R. (3d) 449, 31 C.C.C. (2d) 497 (S.C.C.)
36. *R. v. Robert* (2000), 143 C.C.C. (3d) 330, 31 C.R. (5th) 340, [2000] O.J. No. 688 (Ont. C.A.) at para. 17.
37. *Podorieszach*, *supra* note 13 at para. 78.
38. *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, s. 2.

intent to be established on the basis of circumstantial or inferential evidence.[39]

The courts have developed a series of "badges of fraud" which serve to raise an inference of fraud on the part of the defendant. The "badges of fraud" include, among other things that:

1. the conveyance was general in nature;
2. the transaction was secret;
3. the transfer was made pending a writ;
4. the consideration is grossly inadequate;
5. there is unusual haste to make the transfer;
6. some benefit is retained under the settlement by the settlor; and
7. a close relationship exists between parties to the conveyance.[40]

Although the primary burden of proving the elements of the cause of action on a balance of probability remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances, there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent.[41]

Each case must "stand on its own facts".[42] A court is not required to draw the inference of fraudulent intent from the "badges of fraud" pleaded by the plaintiff. It may dismiss an action in fraudulent conveyance on the basis that the surrounding circumstances, taken as a whole, explain away the plaintiff's evidence.[43]

While some of the traditional "badges of fraud" are similar to the *Suman* factors, courts have provided clear guidance on their appropriate use and application. In the context of insider trading and tipping, the risk remains that the law will develop in such a way that the legal test for these offences will incorporate the *Suman* factors in a manner which creates an overly onerous burden in some cases and improperly lowers the burden in others.

39. *Brown v. Spagnuolo*, 2012 ONSC 2141, 213 A.C.W.S. (3d) 56, [2012] O.J. No. 1613 (Ont. S.C.J.) at para. 18.
40. *Bank of Montreal v. Peninsula Broilers Ltd.* (2009), 177 A.C.W.S. (3d) 405, 2009 CarswellOnt 2906, [2009] O.J. No. 2129 (Ont. S.C.J.) at para. 91; *Solomon v. Solomon* (1977), 79 D.L.R. (3d) 264, 16 O.R. (2d) 769, [1977] O.J. No. 2349 (Ont. S.C.) at paras. 18-19.
41. *Fancy, Re* (1984), 8 D.L.R. (4th) 418, 46 O.R. (2d) 153, 51 C.B.R. (N.S.) 29 (Ont. Bktcy.).
42. *Bank of Montreal v. Peninsula Broilers Limited*, *supra*, note 40 at para. 84.
43. *Ibid.* at para. 81.

With respect to civil conspiracy, these allegations require proof of, among other things, an agreement between two or more individuals to cause injury to the plaintiff.[44]

Proof of this agreement is again generally based on circumstantial evidence.[45] However, unlike cases involving allegations of fraudulent conveyance, courts do not generally rely on specific indicia or "badges" in order to determine whether this agreement has been proven. Instead, the analysis is limited to particular facts of the case and the inferences that can be drawn from the circumstances surrounding those facts.[46]

Drawing upon the approach in criminal law, as well as in fraudulent conveyances and the civil conspiracy cases, it is evident that, while lists of factors or "badges of intent" may be helpful, they are by no means necessary. The trier of fact must at all times be alive to the overall weighing exercise that is fundamental to the treatment of circumstantial evidence within insider trading and tipping cases. The *Suman* factors may serve as a useful guide in that exercise, but the inquiry cannot end there. A step back must be taken to assess the evidence as a whole and what it establishes.

4. The Treatment of Circumstantial Evidence by Securities Commissions prior to Re Suman

In order to appreciate the significance of the *Suman* Factors, it is necessary to review how circumstantial evidence was applied by security commissions prior to the decision in *Suman*, particularly in relation to establishing knowledge or intent on the part of the respondent. As discussed in further detail below, the absence of

44. *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, [1983] S.C.J. No. 33 (S.C.C.); *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 334 D.L.R. (4th) 714, 87 B.L.R. (4th) 1 (Ont. C.A.) at paras. 24-26.

45. See *Capital Estate Planning Corp. v. Lynch*, 2011 ABCA 224, 337 D.L.R. (4th) 523, 9 C.P.C. (7th) 265 (Alta. C.A.) at para. 81.

46. See *Kent v. Martin*, 2013 ABQB 436, 567 A.R. 237, [2013] A.J. No. 863 (Alta. Q.B.) (successful summary judgment motion where court found that, while there was ample evidence from which it could be inferred that the defendants knew about or acquiesced to the conduct in question, there were no facts on which an agreement could be inferred). See also *Recovery Production Equipment Ltd. v. McKinney Machine Co.* (1995), 220 A.R. 1, 1995 CarswellAlta 1161, [1995] A.J. No. 1705 (Alta. Q.B.), affirmed 1998 ABCA 239, 183 W.A.C. 24, [1998] A.J. No. 801 (Alta. C.A.) (court's analysis restricted to the particular facts of the case and whether the elements of the tort had been proven on a balance of probabilities. It did not consider any particular type of evidence or categories that suggested that the cause of action had been established).

specific factors arguably allowed for a broader consideration of the evidence as a whole and a more nuanced assessment of the extent to which such evidence met the requisite standard of proof.

For example, in *Podorieszach, Re*, the Alberta Securities Commission ("ASC") alleged that the respondents purchased common shares of Anthony Clark International Insurance Brokers Ltd. ("ACL") at a price higher than the previous trade price on the Toronto Stock Exchange (the "TSE") and caused their purchases to be the last trade of the day on the TSE. It was further alleged that the respondents made these purchases when they knew or reasonably ought to have known that the purchases created or may have resulted in an artificial price for the ACL shares, and that in so doing, they each contravened s. 93(b) (Prohibited Transactions) of the Alberta *Securities Act* and the public interest.[47]

The ASC recognized that a consideration of allegations of improper trading activity more often than not turns on circumstantial evidence. In such cases, the ASC begins by considering factual evidence, such as unusual trading patterns or an unusual change in the reported price. It then considers whether it is reasonable to infer from those facts the requisite intent or knowledge.[48]

In assessing the respondents' explanation for the impugned trading activities, the ASC considered the timing of the trades, the respondents' trading practices, the economic sensibility of their approach and the respondents' interest in the success of the ACL shares.[49]

While some of the circumstances that the ASC considered in this case are similar to those outlined in the *Suman* factors, the ASC did not specifically rely upon previous case law or indicia of intent in order to assess the evidence. Rather, the ASC relied upon general principles of law and the specific requirements of its governing statute in order to determine whether the alleged breaches had been proven. This approach is preferable to the one adopted by the OSC in *Suman* as it allows for greater flexibility with respect to the application of the evidence to the requirements of the statute. Moreover, it allows the trier of fact to focus on the elements of the offence outlined by the legislature, thereby avoiding any risk of increasing the burden of proof relating to these and other similar securities-related offences.

Kusumoto (Re) arose out of allegations that Mr. Kusumoto (and others) breached reporting obligations applicable to "control

47. *Podorieszach*, *supra* note 13 at para. 3.
48. *Ibid.* at para. 76.
49. *Ibid.* at paras. 131-44.

persons and insiders".[50] This case turned on Mr. Kusumoto's knowledge of the trading activities of the other respondents. The ASC found that Mr. Kusumoto's physical proximity, shared administrative support, and formal position within a company also accused of breaching the Alberta *Securities Act* suggested that, even if Mr. Kusumoto was not an active participant in the impugned trading activities, he was at least well informed as to what the other respondents were doing.[51] However, the ASC ultimately found that the evidence fell short of demonstrating persuasively that Mr. Kusumoto was a knowing joint actor with the other respondents. In particular, this finding would have required the ASC to make unproven assumptions relating to Mr. Kusumoto's relationship with the other respondents and his approach as a manager.[52] Overall, while the evidence did not disprove the allegations, neither did it prove that the alternative theories were implausible.[53]

Notably the ASC's concern with the evidence in this case was not that it was largely circumstantial, but that it was insufficient and did not allow for the proper drawing of inferences with respect to Mr. Kusumoto's state of knowledge. Again, the ASC did not consider specific indicia of intent. Rather, it assessed the evidence before it in relation to the alleged breaches. In this case, the requirements of the legislation were themselves sufficiently onerous to ensure that ASC Staff's allegations could not be established without appropriate evidence.

These same principles are also applied in the criminal context. For instance, in *R. v. Landen*,[54] the accused, Mr. Landen and Mr. Diamond, faced charges of insider trading. Mr. Landen was also charged with tipping. It was alleged that Mr. Landen being a person in a special relationship with Agnico-Eagle Mines, a gold mining enterprise, Mr. Diamond of a material change that had not been generally disclosed. It was further alleged that this information was not shared in the ordinary course of business and that Landen and Diamond traded in securities of Agnico with that knowledge.

Mr. Landen was convicted of insider trading. The remaining charges were dismissed. The court was left with a reasonable doubt about the allegations of tipping, and possession of insider information on the part of Mr. Diamond. Mr. Landen denied giving information to Mr. Diamond, and Mr. Diamond denied receiving

50. *Kusumoto*, *supra* note 8 at para. 1.
51. *Ibid.* at para. 90.
52. *Ibid.* at para. 92.
53. *Ibid.* at paras. 93-95.
54. 2008 ONCJ 4416.

such information. He provided a credible account of the circumstances of his personal life and history as a trader, which supported an innocent explanation.

Again, the type of evidence considered in this case was similar to that described in the *Suman* factors. In particular, the court considered the timing of the impugned trades, the timing of communications between Mr. Landen and Mr. Diamond, the relationship between Mr. Diamond and Mr. Landen, and the pattern of trading activity.[55] The key to the court's analysis was not, however, the presence of specific factors or indicia, but the extent to which the evidence as a whole satisfied the requisite standard of proof and established the statutory requirements of the offence.

The benefit of this approach is particularly evident in *R. v. Woods*,[56] an appeal from a conviction of insider trading and a cross-appeal from the sentence. The proceedings arose out of the appellant's sale of the securities of a company of which he was a director and for whom he claimed to be attempting to raise desperately needed funds at the material time. However, the sales were not directly for the appellant's account. Rather, he had simply been instrumental in arranging short sales for the company. The trial judge convicted the appellant and ordered him to pay a fine of $15,000. The appellant contended that the judge erred in concluding that he possessed material information at the material times and that he qualified as a "seller" within the provisions of the Act.

The Ontario Court of Justice (General Division) (as it was then named, now the Superior Court of Justice) ultimately upheld the trial judge's findings. With respect to the appellant's possession of material information, the court focused on the timing of the impugned short sales in relation to public information about the financial health of the company in order to conclude that the accused possessed insider information at the material time.[57] Notably, neither the trial judge nor the appellate court considered any pre-determined factors or badges of intent prior to convicting the accused of insider trading. This case, therefore, demonstrates that the offence of insider trading can be established without the presence of the *Suman* factors (or similar indicia), suggesting that reliance on such factors unnecessarily complicates the analysis and risks creating a more onerous legal test than was otherwise intended by the legislature.

55. *Ibid.*, at paras. 105-148.
56. [1994] O.J. No. 392, (*sub nom.* R. v. Plastic Engine Technology Corp.) 88 C.C.C. (3d) 287, 3 C.C.L.S. 1 at para. 28 (Ont. Gen. Div. [Commercial List]), leave to appeal refused (1994), 89 C.C.C. (3d) 499 (C.A.).
57. *Ibid.*

5. The Treatment of Circumstantial Evidence by Securities Commissions following Suman (Re)

Since its release, the OSC's approach in *Suman* to the application and use of circumstantial evidence has been referred to in four main cases: *Somji*; *Holtby* (varied on appeal); *Hagerty*; and *Azeff*.

None of the above decisions apply the *Suman* factors as mandatory elements of insider trading. In some instances, the repeated reliance on these factors demonstrates the risk that, improperly applied, the *Suman* factors may lead the trier of fact away from an analysis of the evidence as a whole and into a checklist which might in one case not otherwise satisfy the burden of proof or make it unduly onerous in another.

Somji[58] involved allegations of tipping against Nizar Somji. Staff asserted that Mr. Somji informed either his sister or his brother-in-law of certain non-public material information relating to a company of which Mr. Somji was a Director and its President and Chief Executive Officer. Before the matter came to a hearing, the allegations against Mr. Somji's sister were withdrawn, and the allegations against his brother-in-law were resolved by settlement agreement with Staff. The hearing was therefore limited to the allegations against Mr. Somji.[59]

With respect to circumstantial evidence, the ASC confirmed that it is not precluded from relying exclusively on circumstantial evidence in order to find that the offences of insider trading or tipping had been established. In this regard, the Commission relied upon the findings in *Suman* relating to general principles applicable to circumstantial evidence.[60] However, the Commission rejected Mr. Somji's submission that the *Suman* factors must all be present in order for the offence of insider trading or tipping to be established.

Nonetheless, the ACS's analysis reveals that many of the same factors were considered. In particular, the Commission considered:

(a) the typical pattern of trading for Mr. Somji's sister and brother-in-law;
(b) the relationship between Mr. Somji, his sister and his brother-in-law;
(c) the timing of the trades; and
(d) the timing of the contact between Mr. Somji and his sister.[61]

58. 2012 ABASC 444 (Alta. Securities Comm.).
59. *Ibid.* at paras. 1-4.
60. *Ibid.* at para. 32.
61. *Ibid.* at paras. 46, 49 and 58.

The Commission ultimately found that the allegations against Mr. Somji had not been proven. Particular reliance was placed on Mr. Somji's own experience as a businessman and his credibility as a witness, as well as information that was available to the public at the time of the impugned trades.[62]

In *Hagerty*,[63] the ASC again turned to the decision in *Suman* to assist in assessing the circumstantial evidence put before it. This case involved allegations of insider trading against two individuals, Sherry Hagerty and Gary Hagerty. These allegations centred on a purchase by Mr. Hagerty of shares of a public issuer while the company was engaged in confidential discussions about a potential business combination. In support of these allegations, the ASC received documentary evidence, heard testimony from five witnesses and received written and oral submissions from all of the parties. Notably, the ASC made a point of emphasizing that it was considering the evidence as a whole, not just the presence of the *Suman* factors. In particular, it held that:

> [i]n sum, having regard to the totality of the evidence, *and* our analysis of the several factors just canvassed [*i.e.* the *Suman* factors] (whether considered individually or collectively), we are unable to draw the key inference of knowledge asked of us by Staff.[64]

While the ASC's approach in this case is in line with that advocated for in this paper, its reliance upon the *Suman* factors (seemingly as a separate analysis than that applied to the "totality" of the evidence), suggests that the risks associated with the strict application of these factors remains a live issue in this area of law.

Counsel should remain alive to the application of *Suman* factors by securities commissions and advocate for their application as guiding principles, not a mechanistic list of requirements.

This conclusion is supported by the decision of the Alberta Court of Appeal in relation to *Holtby* and the OSC in *Azeff*. *Holtby* arose out of allegations against nine individuals of insider trading and tipping in relation to securities of Eveready Inc. For our purposes, the ASC's analysis is only relevant insofar as it addresses the proper use of circumstantial evidence to establish knowledge of material non-public information. Here, the ASC relied upon the following finding in *Suman*:

> Knowledge of an undisclosed material fact may be properly inferred based on circumstantial evidence that includes proof of the ability and

62. *Ibid.* note 6 at paras. 42 and 62
63. 2014 ABASC 237 (Alta. Securities Comm.).
64. *Ibid.*, at para. 185 (emphasis added).

> opportunity to acquire the information combined with evidence of well-timed, highly uncharacteristic, risky and highly profitable trades.[65]

While the ASC did not specifically refer to the *Suman* factors, this quotation provides a brief summary of the type of evidence considered therein. Moreover, in determining that the respondents had the requisite knowledge to establish insider trading and tipping, the ASC considered the relationship between the tipper and the tippee, the timing of the contact between the tipper and the tippee, the timing of the impugned trade, and the pattern of trading that was generally characteristic of the individuals involved.[66]

Notably, however, several of the ASC's findings of insider trading were overturned by the Alberta Court of Appeal on the basis that the circumstantial evidence relied upon by the ASC did support an inference of guilt. For instance, with respect to the circumstantial evidence of some of the opportunity that some of the respondents had to inform others of material non-public information, the court held that such evidence does not, by itself, "prove anything more than opportunity". It further held that evidence of multiple meetings and communications during the relevant period did not change the fact that "opportunity is still no more than opportunity".[67] Therefore, where the ASC relied upon evidence of a golf course meeting to support a finding that one of the respondents had unlawfully encouraged another to purchase the impugned securities, the court held that "without having some finding about what was said at the golf course meeting", it was not possible to draw a reasonable inference with respect to the alleged conduct.[68]

This conclusion was based on the general principle that:

> The process of drawing inferences from facts established by the evidence is not without limits. As was said in *R. v. Cavanagh*, 2013 ONSC 5757 at para. 74: ". . . there comes a time where the underlying facts may be so remote that there are just too many steps or leaps in the chain of reasoning to say that a particular inference can be reasonably drawn."[69]

Azeff provides a good example of how these principles may be applied in conjunction with the *Suman* factors. OSC Staff alleged that, on six separate occasions, Mr. Finkelstein tipped his friend, an investment advisor, and that as a result four investment advisors

65. *Holtby*, *supra* note 1 at para. 467; *Walton v. Alberta (Securities Commission)*, *supra* note 32.
66. *Ibid.* at paras. 637-38.
67. *Walton v. Alberta (Securities Commission)*, *supra* note 32 at para. 31.
68. *Ibid.* at para. 79.
69. *Ibid.* at para. 28.

engaged in insider trading or tipping, purchasing shares for others while in possession of material non-public information.[70] The respondents acknowledged the relationship, communications, and trading, but denied disclosing, receiving or using undisclosed material facts.[71]

Rather than apply the *Suman* factors as pre-determined requirements, the Commission characterized them as a non-exhaustive list of the type of circumstantial evidence that can be indicia of tipping and insider trading (in much the same vein as the "badges of fraud" discussed above).[73] The Commission further held that the list is neither exhaustive nor is not necessary that all indicia be established in every case. Rather,

> [i]nsider trading and tipping cases are established by a mosaic of circumstantial evidence which, when considered as a whole, leads to the inference that it is more likely than not that the trader, tipper or tippee possessed or communication material non-public information.[72]

The Commission also refused to view the alleged transactions as a pattern (and therefore similar fact evidence tending to prove the transactions themselves) and instead determined that it was required to adjudicate each transaction separately.[73]

In other words, as in criminal cases, the focus of the trier of fact's analysis must remain with the burden of proof borne by the prosecutor in insider trading and tipping case. If the circumstantial evidence does not provide clear, convincing and cogent evidence of the unlawful conduct in question, it cannot be relied upon to support a finding of guilt.

6. Conclusion

The *Suman* factors are not in themselves problematic. As demonstrated by the fraudulent conveyances cases and *Azeff*, a list of predetermined, non-exhaustive factors may be useful for guiding the trier of fact in his or her analysis of the evidence as a whole. Courts and administrative bodies must remain attuned to the general principles regarding the application and use of circumstantial evidence. Such evidence must be assessed as a whole with a view to whether the legal elements of the offence or cause of action have been established in accordance with the requisite standard of proof. In the case of

70. *Azeff*, *supra* note 2 at para. 1.
71. *Ibid.* at para. 6.
73. *Ibid.* at paras. 44-47.
72. *Ibid.* at para. 47.
73. *Ibid.* at paras. 9-10.

insider trading and tipping, that standard is clear, convincing and cogent evidence that proves on a balance of probabilities that the respondent is guilty of the offence. Care must be taken that the *Suman* Factors are not applied in such a way that they create an overly onerous burden in some cases and improperly lower the burden in others.

List of Authorities

Legislation

1. *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29.
2. *Securities Act*, R.S.O. 1990, c. S.5.

Jurisprudence

3. *Azeff, Re* at paras. 48, 343 (Ont. Sec. Comm.), released March 24, 2015: available online at www.osc.gov.on.ca.
4. *Bank of Montreal v. Peninsula Broilers Ltd.*, 2009 CarswellOnt 2906, 177 A.C.W.S. (3d) 405, [2009] O.J. No. 2129 (Ont. S.C.J.).
5. *Brown v. Spagnuolo*, 2012 ONSC 2141, 213 A.C.W.S. (3d) 56, 2012 CarswellOnt 4288, [2012] O.J. No. 1613 (Ont. S.C.J.).
6. *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, 72 C.P.R. (2d) 1, [1983] 6 W.W.R. 385, 24 C.C.L.T. 111, 47 N.R. 191, 21 B.L.R. 254, 19 A.C.W.S. (2d) 352, 1983 CarswellBC 734, [1983] S.C.J. No. 33 (S.C.C.).
7. *Capital Estate Planning Corp. v. Lynch*, 2011 ABCA 224, 337 D.L.R. (4th) 523, 9 C.P.C. (7th) 265, 527 W.A.C. 244, 51 Alta. L.R. (5th) 67, 510 A.R. 244, 205 A.C.W.S. (3d) 669, 2011 CarswellAlta 1247, [2011] A.J. No. 820 (Alta. C.A.).
8. *Fancy, Re* (1984), 8 D.L.R. (4th) 418, 51 C.B.R. (N.S.) 29, 46 O.R. (2d) 153, 25 A.C.W.S. (2d) 322, 1984 CarswellOnt 137 (Ont. Bktcy.).
9. *Hagerty, Re*, 2014 ABASC 237 (Alta. Securities Comm.).
10. *Holtby, Re*, 2013 ABASC 45 (Alta. Securities Comm.) at para. 467, appeal allowed in part, *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273, 376 D.L.R. (4th) 448, [2014] 11 W.W.R. 314, 116 W.C.B. (2d) 85, 2 Alta. L.R. (6th) 46, 2014 CarswellAlta 1479, [2014] A.J. No. 909 (Alta. C.A.).
11. *Kent v. Martin*, 2013 ABQB 436, 567 A.R. 237, 232 A.C.W.S. (3d) 544, 2013 CarswellAlta 1487, [2013] A.J. No. 863 (Q.B.).

12. *Kusumoto, Re*, 2007 ABASC 40, 2007 CarswellAlta 1306, 35 B.L.R. (4th) 297 (Alta. Securities Comm.).
13. *Podorieszach, Re*, 2004 LNABASC 151 (Alta. Sec. Comm.).
14. *R. v. Andrews* (June 14, 1991), Paris Prov. J., [1991] O.J. No. 2708 (Ont. C.J.).
15. *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, 307 D.L.R. (4th) 577, 244 C.C.C. (3d) 289, 67 C.R. (6th) 1, 388 N.R. 334, 83 W.C.B. (2d) 701, 2009 CarswellQue 5997, [2009] S.C.J. No. 28 (S.C.C.).
16. *R. v. Landen*, 2008 ONCJ 4416.
17. *Rankin, Re* (2011), 39 Admin. L.R. (5th) 77, 2011 Carswell-Ont 12322, 34 O.S.C.B. 11797 (Ont. Sec. Comm.), affirmed 2013 ONSC 112, 46 Admin. L.R. (5th) 159, (*sub nom*. Rankin v. Ontario Securities Commission) 113 O.R. (3d) 481, 304 O.A.C. 184, 225 A.C.W.S. (3d) 571, 104 W.C.B. (2d) 1164, 2013 CarswellOnt 442, [2013] O.J. No. 259 (Ont. Div. Ct.), additional reasons 2013 ONSC 837, 226 A.C.W.S. (3d) 56, 2013 CarswellOnt 1930, [2013] O.J. No. 794 (Div. Ct.).
18. *R. v. Robert* (2000), 143 C.C.C. (3d) 330, 31 C.R. (5th) 340, 131 O.A.C. 136, 45 W.C.B. (2d) 359, 2000 CarswellOnt 608, [2000] O.J. No. 688 (Ont. C.A.).
19. *R. v. Plastic Engine Technology Corp*. (1994), 88 C.C.C. (3d) 287, 22 W.C.B. (2d) 582, 3 C.C.L.S. 1, 17 O.S.C.B. 1189, 1994 CarswellOnt 1080, (*sub nom*. R. v. Woods) [1994] O.J. No. 392 (Ont. Gen. Div. [Commercial List]), leave to appeal refused (1994), 89 C.C.C. (3d) 499, 3 C.C.L.S. 49, 17 O.S.C.B. 1739, 1994 CarswellOnt 1081, [1994] O.J. No. 651 (Ont. C.A.).
20. *Recovery Production Equipment Ltd. v. McKinney Machine Co*. (1995), 220 A.R. 1, 1995 CarswellAlta 1161, [1995] A.J. No. 1705 (Alta. Q.B.), addl reasons (1995), 220 A.R. 1 at 13, 1995 CarswellAlta 1160 (Alta. Q.B.), affd 1998 ABCA 239, 183 W.A.C. 24, 223 A.R. 24, 81 A.C.W.S. (3d) 153, [1998] A.J. No. 801, 1998 CarswellAlta 639 (Alta. C.A.).
21. *R. v. Stewart* (1976), [1977] 2 S.C.R. 748, 71 D.L.R. (3d) 449, 31 C.C.C. (2d) 497, [1976] 6 W.W.R. 644, 1 A.R. 455, 12 N.R. 201, 1976 CarswellAlta 132, 1976 CarswellAlta 160 (S.C.C.).
22. *Solomon v. Solomon* (1977), 79 D.L.R. (3d) 264, 16 O.R. (2d) 769, 24 C.B.R. (N.S.) 258, [1977] 2 A.C.W.S. 490, [1977] O.J. No. 2349, 1977 CarswellOnt 96 (Ont. S.C.).
23. *Somji, Re*, 2012 ABASC 444 (Alta. Securities Comm.).
24. *Suman, Re*, 2012 LNONOSC 176, 2012 CarswellOnt 2256, 35 O.S.C.B. 2809 (Ont. Securities Comm.), additional reasons (2012), 35 O.S.C.B. 11218, 2012 CarswellOnt 15350, affd 2013

ONSC 3192, 2013 CarswellOnt 8465, 229 A.C.W.S. (3d) 592 (Ont. Div. Ct.).

Secondary Sources

24. Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada Inc., 2014)