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Citation: Canada Cannabis Corporation (Re), 2021 ONSEC 13

Date: 2021-05-18

File Nos.: 2019-34 and 2020-13

**IN THE MATTER OF  
CANADA CANNABIS CORPORATION, CANADIAN CANNABIS CORPORATION,  
BENJAMIN WARD, SILVIO SERRANO, and PETER STRANG**

**REASONS FOR DECISION**

**Hearing:** June 10 and July 24, 2020

**Decision:** May 18, 2021

**Panel:** Raymond Kindiak Commissioner and Chair of the Panel

**Appearances:** Simon Bieber For Silvio Serrano  
Robert Stellick

William Jones For Canada Cannabis Corporation  
and Canadian Cannabis Corporation

Melissa MacKewn For Benjamin Ward  
Michael Byers

James Camp For Peter Strang

Frank Addario For Staff of the Commission  
Lynda Morgan  
Robert Gain

Nader Hasan For Amicus Curiae

**TABLE OF CONTENTS**

I. OVERVIEW ..... 1

II. PRELIMINARY ISSUE - SEALED MATERIALS FILED, BUT NOT SERVED ..... 1

III. ISSUES WITH RESPECT TO STAFF’S PROPOSED PROCESS..... 2

IV. ANALYSIS..... 3

    A. Confidential Phase..... 3

        1. Authority to Hold a Confidential Phase ..... 3

        2. Conduct of the Confidential Phase ..... 3

        3. No Respondent Attendance at the Confidential Phase ..... 4

    B. Appointment of Amicus Curiae ..... 5

        1. Authority to Appoint Amicus ..... 5

        2. Scope of Amicus’ Retainer..... 6

V. CONCLUSION..... 6

## REASONS FOR DECISION

### I. OVERVIEW

- [1] Enforcement Staff of the Ontario Securities Commission (**Staff**) provided disclosure in this enforcement proceeding against Canada Cannabis Corporation, Canadian Cannabis Corporation, Benjamin Ward, Silvio Serrano and Peter Strang (the **Respondents**), that included transcripts of the compelled interview of Ward. The transcripts Staff disclosed are redacted, and the redactions are labelled "By Confidential Order of the Commission". One of the Respondents, Serrano, seeks, among other things, that the Office of the Secretary of the Commission, or alternatively Staff, be required to provide the order by which Ward's transcripts were redacted (the **Confidential Order**), and any written decision or reasons (the **Confidential Reasons**) (together, the **Confidential Decisions**) in support of the Confidential Order (the **Motion**). To the extent that the terms of the Confidential Order preclude the relief sought by Serrano, he seeks that the Confidential Order be varied or revoked (the **Application**).
- [2] At the outset of the hearing of the Motion and the Application, Staff submitted that it is legally prohibited from identifying information relating to the Confidential Order, including the existence of any decision or reasons of the Commission and any related materials filed. Staff argued that it was also legally prohibited from explaining why it was so prohibited.
- [3] Given these limitations, Staff proposed a procedural process to address the issues raised on the Motion and Application. The proposed process provided for a portion of the hearing to be conducted *in camera* and *ex parte*, meaning it would be confidential and heard in the absence of both the public and the Respondents. Staff argued that this would allow them to make meaningful submissions to the Panel, which they would be otherwise unable to do. Staff's proposed process was supplemented by Serrano's proposal for the appointment of an *amicus curiae* (**Amicus**), to which Staff agreed.
- [4] For the following reasons, I issued an Order on August 5, 2020<sup>1</sup> (the **Procedural Order**), providing for a portion of the hearing of the Motion and Application to be held *in camera* and *ex parte* (the **Confidential Phase**), as well as appointing Nader Hasan of Stockwoods LLP as Amicus.

### II. PRELIMINARY ISSUE - SEALED MATERIALS FILED, BUT NOT SERVED

- [5] In response to the Motion and Application, Staff proposed to file under seal the Confidential Decisions, early in the hearing process, without providing them to the Respondents. Before the hearing of the Motion and Application could commence, I asked the parties: Should the Panel review Staff's sealed materials without them being provided to the Respondents? If so, when?
- [6] Staff submitted that my early review of the Confidential Decisions was necessary and would assist with determining the appropriate next procedural steps in the proceeding. The individual Respondents<sup>2</sup> agreed that I ought to review the

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<sup>1</sup> (2020) 43 OSCB 6387

<sup>2</sup> The corporate respondents, Canada Cannabis Corporation and Canadian Cannabis Corporation, did not have counsel present for this day of the hearing and did not make submissions on this preliminary issue.

Confidential Order, but disagreed about the appropriate timing of my review of the Confidential Reasons:

- a. Serrano opposed my early review of the reasons, submitting that it should be apparent from the Confidential Order alone whether any of the issues raised in the Motion could be resolved at the outset of the hearing. This might allow for the Respondents to have the benefit of additional information about the Confidential Decisions when making submissions about the next appropriate procedural steps.
- b. Strang also opposed my early review of the reasons, arguing that every party should receive the maximum amount of information possible at every stage. He submitted that I should make an immediate determination, based on the face of the Confidential Order alone, about whether any issues raised in the Motion could be resolved, including whether any of the requested information could be disclosed to the Respondents.
- c. Ward favored my early review of the reasons, arguing that I couldn't determine whether to vary the Confidential Order without understanding the reasons for it.

[7] At the end of the first hearing day, the Respondents opposing the Panel's early review of the Confidential Reasons indicated that they would no longer oppose the Panel's review.

[8] It was appropriate and necessary that I receive and review both the Confidential Decisions, under seal, and that I should do so early in the hearing process. It was apparent that the ultimate determination of the substantive issues raised in the Motion and Application would require the Panel to review the Confidential Decisions, sooner or later. It was also apparent that no prejudice would arise from my early review, whereas procedural inefficiencies appeared likely if I were to delay my review of the Confidential Decisions.

[9] Staff subsequently filed the Confidential Decisions without disclosing them to the Respondents. The Confidential Decisions do not form part of the adjudicative record, were not marked as exhibits, and were ordered to be confidential from the public pursuant to the *Tribunal Adjudicative Records Act*,<sup>3</sup> and the *Ontario Securities Commission Rules of Procedure and Forms*<sup>4</sup> as part of the Procedural Order.

### **III. ISSUES WITH RESPECT TO STAFF'S PROPOSED PROCESS**

[10] Given the sensitivity surrounding the Confidential Decisions, it is necessary to determine the appropriate process for the hearing of the Motion and Application. The issues before me with respect to Staff's proposed process are:

- a. Should Staff be permitted to make confidential submissions on an *ex parte* basis during a 'Confidential Phase' of the proceeding?

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<sup>3</sup> 2019, SO 2019, c 7 Sch 60 (**TARA**).

<sup>4</sup> (2019) 42 OSCB 9714 (the **Commission's Rules**).

- b. If Staff is permitted to make confidential submissions on an *ex parte* basis, should an Amicus be appointed to represent the interests of the absent parties?

[11] I address each of these issues in turn.

#### **IV. ANALYSIS**

##### **A. Confidential Phase**

###### **1. Authority to Hold a Confidential Phase**

[12] I asked the parties to address the following preliminary questions regarding the Confidential Phase proposed by Staff: What is the Panel's authority to allow this procedure and is there precedent for it? Does any authority expressly prohibit it?

[13] The Respondents argued that the Commission either does not have the authority to order a Confidential Phase or that the Commission's authority is unclear:

- a. Serrano argued the Commission's authority is unclear as the *Commission's Rules* and the *Statutory Powers Procedures Act*<sup>5</sup> does not appear to provide the Commission with the jurisdiction to order a confidential hearing in the absence of parties to that proceeding. He argued that Staff should have to articulate a clear basis on which the Commission can proceed with the Confidential Phase before it is ordered.

- b. Strang and Ward argued that the Commission lacks the jurisdiction to order a Confidential Phase. Both argued that the Commission has no jurisdiction to exclude the Respondents from any portion of this proceeding absent a compelling justification from Staff.

[14] Staff argued that the Commission is the master of its own procedure. In the absence of specific rules laid down by statute, the Commission is empowered to control its own procedure, subject to requirements of natural justice and common law.<sup>6</sup> Staff argued that the *SPPA* expressly recognizes the Commission's authority to determine its own procedure, by empowering it to make orders and rules governing its procedure.<sup>7</sup>

[15] No legislation and none of the *Commission's Rules* appear to specify a required procedure for a hearing relating to a party's request for a Confidential Order in Staff's possession, or for a request to revoke or vary a Confidential Order. In the absence of legislation governing the procedure for the requests made in the Motion and the Application, the Commission's inherent authority over its own procedure governs.

###### **2. Conduct of the Confidential Phase**

[16] Deciding that the Commission had the authority to conduct the Confidential Phase, I then considered how I ought to do so.

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<sup>5</sup> RSO 1990, c S.22 (*SPPA*).

<sup>6</sup> *Prasad v Canada (Minister of Employment & Immigration)*, [1989] 1 SCR 560 at para 46; *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 33; *Hollinger Inc (Re)*, 2006 ONSEC 2, (2006) 29 OSCB 847 at para 20; *Re ATI Technologies Inc (Re)*, 2005 ONSEC 7, (2005) 28 OSCB 9667 at para 19; *Re Costello*, [2004] OJ No 2972 at paras 30, 67 and 86 (Ont Div Ct).

<sup>7</sup> *SPPA*, s 25.0.1 and s 25.1.

- [17] Staff argued that an *ex parte, in camera* hearing was necessary in the unique circumstances of this matter, and would still maximize the Respondents' participatory rights. Without recourse to the Confidential Phase, Staff also argued that it cannot address Serrano's allegations of Staff misconduct, which Serrano alleges with respect to the Confidential Order and in Staff's seeking and obtaining the adjournment of the Second Attendance. Staff submitted that such allegations of misconduct have a bearing on the integrity of Commission proceedings.
- [18] The Respondents argued that Staff must articulate a clear basis on which the Commission can proceed with a portion of the hearing in the absence of the Respondents. They argued that, if the Commission has jurisdiction to exclude parties from a portion of the hearing, then that jurisdiction must be used sparingly and for good reason. I agree and find that the unique circumstances of this matter satisfy these requirements.
- [19] In determining the proper conduct of the Confidential Phase, I considered the balancing of the parties' interests. In addition to the appointment of Amicus, discussed in detail below, the Procedural Order provides safeguards to mitigate against procedural unfairness and to maximize the Respondents' participatory rights as much as possible in the current circumstances:
- a. the Respondents are entitled to participate in public portions of the hearings (the First Non-Confidential Phase and the Second Non-Confidential Phase), which will be held both before and after the hearing of the Confidential Phase; and
  - b. the Respondents are entitled to file confidential written submissions for use at the Confidential Phase, to be considered alongside those filed by Staff and Amicus.

### **3. No Respondent Attendance at the Confidential Phase**

- [20] The final consideration for the Confidential Phase was whether Ward, unlike the other Respondents, should be allowed to attend and/or be represented. In their proposed procedure, Staff submitted that Ward should be entitled to participate at the hearing of the Confidential Phase.
- [21] Staff and Ward argued that Ward should be entitled to participate in all or part of the Confidential Phase because he has access to and knowledge of the redacted portions of his own transcripts. Ward added that he is clearly an affected party.
- [22] Serrano and Strang, along with the corporate respondents, opposed Ward's participation in the Confidential Phase. They argued that procedural fairness requires all Respondents to be treated alike. While Ward may know about the redacted parts of the transcript, he should not be privy to the submissions that Staff and the Amicus will make during the Confidential Phase. If Ward were permitted to attend the Confidential Phase, he may receive information about the proceeding not available to the other Respondents, which may risk providing Ward with an unfair advantage in his ultimate defence of the enforcement proceeding. I agree with these submissions, and ordered that the Confidential Phase would be heard in the absence of both the public and all Respondents, including Ward, unless expressly authorized by the Panel.

## **B. Appointment of Amicus Curiae**

- [23] The purpose of Amicus is to ensure that each party's interests and perspectives are represented during a portion of a proceeding where they are not in attendance or are not adequately represented. Amicus has no solicitor-client relationship with the parties, and instead serves as counsel to the decision-maker, appointed to assist the decision-maker in determining the best outcome in the interests of justice.
- [24] I asked the parties for submissions on several preliminary issues related to the appointment of Amicus, including:
- a. what is the Panel's authority to appoint Amicus and is there precedent for it? Does any authority expressly prohibit it?
  - b. if an Amicus is appointed, what will be the scope of the Amicus' retainer?
    - i. will Amicus' submissions only be permitted during the Confidential Phase, or also during the First and Second Non-Confidential Phase?
    - ii. what will be the permissible role of Amicus during the Confidential Phase? Should Amicus be given an opportunity to file confidential written submissions?
    - iii. what materials should be provided for Amicus' preparations? How long does the Amicus require to prepare for the hearing and what is the availability of the proposed Amicus?
- [25] All parties except Ward supported the appointment of Amicus should the Confidential Phase be ordered, as the appointment would assist in addressing the fairness concerns inherent in excluding the Respondents from a portion of the proceeding. Ward submitted that, until the positions of all parties are made clear, the appointment of Amicus was premature.

### **1. Authority to Appoint Amicus**

- [26] Prior to this proceeding, Amicus has never been appointed at the Commission. Despite the novelty of Amicus participating in Commission proceedings, all parties agree that I have the authority to appoint Amicus and that no authority expressly prohibits the use of Amicus at the Commission. The Commission has the ability to govern its own procedure and practices under the *SPPA*.<sup>8</sup>
- [27] In the criminal context, Amicus are appointed regularly. Appointments have also been made before other administrative tribunals.<sup>9</sup> The precise role of Amicus may be set by the court or tribunal that makes the appointment and may be shaped by the needs of the particular case.<sup>10</sup>
- [28] The Commission has the authority to appoint Amicus and the appointment of Amicus in this proceeding is necessary in order to address the inherent fairness concerns created by the Confidential Phase. The parties and the public must be assured that where important rights are at stake, counsel will be present to represent the interests of justice.

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<sup>8</sup> *SPPA*, s 25.0.1.

<sup>9</sup> *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43; *Bon Hillier v Milojevic*, 2010 ONSC 4514 (**Bon Hillier**).

<sup>10</sup> *Bon Hillier* at para 46.

- [29] Through the appointment of Amicus, the Commission can better balance the need to protect the confidentiality of the Confidential Decisions with the Respondents' right to participate in the proceeding. The appointment of Amicus is accordingly necessary to assist the Commission in arriving at a full and fair determination of the complex issues raised in the Motion and the Application.
- [30] Nader Hasan is an appropriate choice for this appointment. He is an experienced criminal, regulatory and constitutional lawyer. He is independent of this proceeding, has cleared conflicts of interest, and is willing to act as Amicus. Hasan attended part of the hearing of the preliminary procedural issues and shared details of his background and experience as an Amicus before various courts and tribunals.
- [31] The Commission will pay all reasonable fees and disbursements incurred by Hasan in discharging his role as Amicus and the terms of such payment will be reflected in a retainer agreement between Amicus and the Commission.

## **2. Scope of Amicus' Retainer**

- [32] Staff and counsel for Serrano prepared a draft order outlining the potential scope of Amicus' retainer. The draft order provided Amicus with broad powers. The draft order also named Hasan as Amicus. Hasan indicated that he contributed to the creation of the draft order. The draft order, among other things, allowed the Amicus to:
- a. participate in the First Non-Confidential Phase;
  - b. have access to the Confidential Decisions;
  - c. communicate with the Respondents to understand their positions, with limits on those communications once Amicus obtains the Confidential Decisions;
  - d. represent the interests of justice during the Confidential Phase; and
  - e. with leave of the Panel, make submissions at the Second Non-Confidential Phase.
- [33] Ward and Strang submitted that the draft order was too broad and permissive in scope and did not provide enough detail with respect to the proper payment of Amicus' fees, permissible communications with the Respondents and what materials would be made available to Amicus.
- [34] The terms of the Procedural Order outline the scope of Amicus' duties during the Confidential Phase and Second Non-Confidential Phase. The terms imposed in the Procedural Order are necessarily broad as to allow Amicus to fully and effectively participate in the proceeding. Amicus will be able to present issues, argument and evidence and may read, hear, challenge and respond to evidence and submissions made by Staff or the Respondents in their confidential filings. Amicus must not reveal the Confidential Decisions or any information at issue in the Confidential Phase to the Respondents.

## **V. CONCLUSION**

- [35] For the reasons set out above, I issued the August 5 order providing, among other things, that the hearing of the Motion and Application will consist of four phases: (i) First Non-Confidential Phase, (ii) Appointment of Amicus, (iii)

Confidential Phase in the absence of the public and the Respondents and (iv)  
Second Non-Confidential Phase.

Dated at Toronto this 18th day of May, 2021.

*"Raymond Kindiak"*

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Raymond Kindiak