Ontario

Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *Miller Bernstein LLP (Re)*, 2023 ONCMT 18
Date: 2023-05-10
File No. 2023-2

IN THE MATTER OF
MILLER BERNSTEIN LLP

REASONS FOR DECISION

(Rule 17 of the Capital Markets Tribunal Rules of Procedure and Forms)

Adjudicators:	James Douglas (chair of the panel) Timothy Moseley	
Hearing:	By videoconference, March 10, 2023	
Appearances:	Sarah McLeod	For Staff of the Ontario Securities Commission
	Robert Staley Nathan Shaheed	For Miller Bernstein LLP

REASONS FOR DECISION

1. OVERVIEW

[1] Miller Bernstein LLP applied under Rule 17 of the Capital Markets Tribunal *Rules of Procedure and Forms* (the ***Rules of Procedure***) for relief from the common law "implied undertaking rule" in respect of certain interview transcripts and materials that Staff of the Ontario Securities Commission (**Staff**) received on a voluntary basis and disclosed to Miller Bernstein during an investigation. We explain the implied undertaking rule below; broadly speaking, it is an implicit promise to a court or tribunal by the parties to a proceeding not to make collateral use of material disclosed in the proceeding without leave of the adjudicative body.

[2] Miller Bernstein and Staff both asked that this application for relief from the rule, and any materials filed in connection with it, be kept confidential.

[3] The Tribunal convened a hearing with the parties to decide the issue of confidentiality and address other procedural matters. At the hearing on March 10, 2023, we denied the parties' request for confidentiality, for reasons to follow.[1] These are our reasons for that decision.

[4] Hearings before the Capital Markets Tribunal are to take place in public unless a panel orders otherwise. Under Rule 22(2) of the *Rules of Procedure* a panel may order that all or part of a hearing take place in the absence of the public where matters involving public security or intimate financial or personal matters may be disclosed, or where a confidential hearing is required by law.

[5] The parties failed to demonstrate that any of the Rule 22(2) criteria were met on this application. Neither are we convinced that the implied undertaking rule necessitates a confidential hearing in these circumstances.

[1] *Miller Bernstein LLP (Re)*, (2023) 46 OSCB 2123

2. ANALYSIS

2.1 Does the Application Meet the Criteria for a Confidential Hearing?

[6] There is a presumption that hearings will be open to the public.[2] Confidentiality orders are therefore not to be made lightly.

[7] Miller Bernstein filed no evidence in support of an order under Rule 22(2) and conceded in oral argument that this application does not fit neatly into any of the rule's criteria. Miller Bernstein advised the Panel that it sought confidentiality for its application out of an abundance of caution due to similarities with an application for authorization to disclose under s. 17 of the *Securities Act (*the ***Act***)[3]. Section 17 applications are typically held in the absence of the public due to the confidential nature of Part VI investigations and the disclosure restrictions in s. 16 of the *Act.*

[8] Without citing any authority directly on point, Miller Bernstein argued that the same principles that require s. 17 applications to be confidential may apply to its application for relief from the implied undertaking rule. Miller Bernstein expressed a concern that simply bringing the application without a confidentiality order might be seen to violate the rule from which it seeks relief or otherwise make the application unnecessary. However, in the end, Miller Bernstein conceded that seeking a confidentiality order in this application was more a matter of prudence, based on observation of past practice in other cases, rather than preference.

[9] Staff supported Miller Bernstein's request for a confidentiality order but similarly filed no evidence to demonstrate that one or more of the criteria under Rule 22(2) was satisfied in the circumstances. Staff submitted that we should follow the s. 17 application precedents even though s. 17 is not engaged in this application, and even though Staff were unable to cite any authority directly on point. Staff argued that the language of Rule 22(2)(b) was broad enough to give the panel the discretion to order confidentiality in these circumstances. Lastly, Staff echoed the concern expressed by Miller Bernstein that the mere bringing of

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[2] *Capital Markets Tribunal Rules of Procedure and Forms*, r 22(1); *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 9

[3] *Securities Act*, RSO 1990, c S.5

an application for relief from the implied undertaking rule without a confidentiality order could violate the rule and render the application unnecessary. Staff ultimately conceded that this concern could be adequately addressed by appropriate terms in an order denying confidentiality.

[10] As previously stated, neither party provided us with any authority directly on point in support of a confidentiality order in the circumstance of this case. The parties relied on *Inspektor*, *X and A Co,* and *Y.* Each of these cases is distinguishable on the facts from the case before us. In *Inspektor* and *Y* the applicants applied under s. 17 for authorization to disclose compelled evidence, as well as voluntary evidence subject to the implied undertaking rule, for use in a collateral civil proceeding.[4] In *X and A Co* only compelled evidence was at issue.[5]

[11] The parties were unable to provide us with precedent case law that was analogous to the situation we are dealing with in this application, namely a request for relief solely from the implied undertaking rule. The fact that the above cases proceeded confidentially is not persuasive to us that similar relief should be granted here, as those cases all involved compelled evidence to which s. 16 of the *Act*[6] applied.

[12] We disagree with the suggestion by both parties that this application should nevertheless be treated like a s. 17 application. The oral evidence and documents at issue in this case were voluntarily provided to Staff during the course of its investigation. They were not compelled under s. 13 of the Act. Section 16 of the Act is not engaged. There is no ongoing investigation and any proceedings arising from the investigation concluded nearly twenty years ago.[7] Moreover, we were advised that the party who provided the voluntary evidence in question does not oppose the relief sought in the application, nor did he provide evidence or otherwise make submissions on the issue of confidentiality.

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[4] *Inspektor (Re)*, 2014 ONSEC 39 (***Inspektor***) at para 33; *Y (Re)*, 2009 ONSEC 29 (***Y***) at para 2

[5] *X and A Co (Re)*, 2007 ONSEC 1 (***X and A Co***) at para 1

[6] *Inspektor* at para 4; *Y* at paras 97-99; *X and A Co* at para 9

[7] *Buckingham Securities Corporation (Re),* (2005) 28 OSCB 7083; *Miller Bernstein & Partners LLP (Re)*, (2005) 28 OSCB 7082

[13] None of the criteria set out in Rule 22(2) have been met in support of the requested confidentiality order, nor are we satisfied that the procedures applicable on a s. 17 application should apply in relation to an application to the Tribunal for relief from the implied undertaking rule.

2.2 Would the Purpose of the Application be Defeated by a Public Hearing?

[14] While the panel is satisfied, as discussed above, that none of the criteria in Rule 22(2) have been strictly met on the evidence adduced in this application, and likewise that the application should not be treated as a s. 17 application, we acknowledge that, if the concern expressed by both Miller Bernstein and Staff as described in paragraphs [8] and [9] above has merit, some confidentiality relief might be procedurally necessary in order to preserve the integrity of the Tribunal's process and ensure that it is able to discharge its mandate.[8] However, having considered the issue raised by the parties, we are satisfied that the implied undertaking rule does not actually give rise to that concern.

[15] The implied undertaking rule was first formally adopted as part of the law of Ontario by the Court of Appeal in *Goodman v. Rossi*.[9] In *A Co. v. Naster*, the Divisional Court held that the implied undertaking rule applies to proceedings before administrative tribunals as well as the courts.[10] The Tribunal has considered *Naster* in past decisions and held that the implied undertaking rule applies to proceedings before it with respect to evidence collected on a voluntary basis.[11] However, the purpose of the implied undertaking rule is not to provide a cloak of confidentiality to proceedings, but to provide an element of privacy to the producing party and prevent the collateral use of material disclosed to the other party in the context of an investigation or proceeding.[12] The undertaking is to the court or tribunal before which the proceeding takes place and relief may be sought on motion before that body.[13]

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[8] *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 51
[9] *Goodman v Rossi*, [1995] OJ No 1906 (ON CA) (***Goodman v Rossi***) at para 17
[10] *A Co. v. Naster,* [2001] OJ No 4997 (Div. Ct) (***Naster***)
[11] *Inspektor* at para 28
[12] *Naster* at para 24
[13] *Goodman v Rossi* at para 60

[16] Both parties submitted that if this application were to be heard in public, the materials at issue may no longer be subject to the implied undertaking rule, thereby defeating the purpose of the application. Staff cited *Goodman v. Rossi* for the principle that an undertaking not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply once the document has been read to or by the court, or referred to, in open court, unless the court orders to the contrary.[14] However, there is no suggestion in *Goodman v. Rossi* that such principle applies to a motion for relief from the implied undertaking rule, and counsel for Miller Bernstein was clear that this was not his client's position. Accordingly, Miller Bernstein is not relieved of its undertaking to the Tribunal and would not be permitted to use the materials at issue in this application simply because they were referred to in the materials filed in support of or in the public hearing of the application.

[17] In our view, the parties have not demonstrated that the nature of the application itself demands that some degree of confidentiality should be granted in order to preserve the integrity of the process and allow the Tribunal to fulfill its mandate. Nevertheless, with the agreement of both parties, we were prepared to confirm in our order that, pending disposition of the application, the public nature of the hearing would not impact the applicability of the implied undertaking rule to the materials that are at issue.

3. CONCLUSION

[18] For these reasons we denied the parties' request that this application be confidential, with the qualification that this ruling would not impact the application of the implied undertaking rule to the materials at issue.

Dated at Toronto this 10th day of May, 2023

"James Douglas"	*"Timothy Moseley"*
James Douglas	Timothy Moseley

[14] *Goodman v Rossi* at paras 50-51