



Capital
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Citation: *Canada Cannabis Corporation (Re)*, 2023 ONCMT 41

Date: 2023-11-13

File No. 2019-34

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

REASONS AND DECISION

Adjudicators: Russell Juriansz (chair of the panel)
James Douglas
Cathy Singer

Hearing: By videoconference, June 14, 15, and August 15, 2023

Appearances: Robert Stellick	For Silvio Serrano
James Camp	For Peter Strang
Johanna Braden	For Staff of the Ontario Securities
Brian Weingarten	Commission
Nader R. Hasan	For Amicus Curiae
Stephen Aylward	

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REASONS AND DECISION

1. OVERVIEW

- [1] The respondent, Silvio Serrano, brought a motion for the following relief:
- a. an order compelling Staff of the Ontario Securities Commission to disclose to the respondents unredacted transcripts of Benjamin Ward's compelled interviews and the unredacted confidential order of then Commission Vice-Chair Vingoe dated February 21, 2020 (the **Confidential Order**) that ordered portions of those transcripts be redacted;
 - b. an order varying or setting aside the Confidential Order if necessary to obtain such disclosure; and
 - c. in the alternative, an order staying this enforcement proceeding against him.
- [2] We find that the full unredacted transcripts meet the test for disclosure and that Serrano requires them in order to make full answer and defense. However, the Confidential Order prevents Staff from making full disclosure and we decline to either vary the Confidential Order or issue a competing order. In the circumstances, we find the impairment of Serrano's ability to make full answer and defence leads to an abuse of process and we stay this proceeding against Serrano for the reasons set out below.

2. BACKGROUND

- [3] The following chronology demonstrates the long and tortuous history of this proceeding:
- a. **June 11, 2017** — the Commission made an order under s. 11 of the *Securities Act*¹ (the **Act**) authorizing an investigation into matters relating to the corporate respondents, Benjamin Ward and another individual;

¹ RSO 1990, c S.5

- b. **June 27, June 28 and August 14, 2018** — Staff examined Ward pursuant to a s. 13 summons;
- c. **September 13, 2019** — Staff filed a Statement of Allegations pursuant to ss. 127 and 127.1 of the *Act* naming Serrano, along with Canada Cannabis Corporation, Canadian Cannabis Corporation, Benjamin Ward and Peter Strang, as respondents;
- d. **February 21, 2020** — Vice-Chair Vingoe, sitting alone, made the Confidential Order that certain portions of the compelled interview of Ward be kept confidential. He also ordered that the Confidential Order, the Confidential Reasons, and all materials filed in connection with the Confidential Order be kept confidential;
- e. **April 7, 2020** — Staff disclosed redacted versions of the Ward transcripts to the respondents with the redactions labelled “By Confidential Order of the Commission”. This was the first that the moving party had heard there was a Confidential Order;
- f. **April 29, 2020** — Serrano brought a motion and an application before the Commission in its adjudicative capacity (before the creation of the Capital Markets Tribunal). The motion sought disclosure of the Confidential Order and Confidential Reasons, all material filed on any motion to redact the transcripts, the statutory basis authorizing Staff and/or the Commission to redact the transcripts, the statutory basis on which the Confidential Order was sought and made, and all information contained in or related to the Confidential Order that was not proscribed by its terms. The application sought a variation or revocation of the Confidential Order if necessary to grant the relief sought in the motion;
- g. **June 10 and July 24, 2020** – at a hearing to determine the procedure that the motion and application would follow, Staff took the position it was legally prohibited from identifying information relating to the Confidential Order and Confidential Reasons. Furthermore, Staff argued that it was legally prohibited from explaining why it was prohibited;
- h. **August 5, 2020** – a one-member panel of the Commission issued a procedural order, for reasons to follow, providing that the hearing would

proceed in four phases: (i) First Non-Confidential Phase, (ii) Appointment of *amicus curiae* (a “friend of the Tribunal” appointed to represent the interests of justice and to assist with the panel’s determination of the issues raised in the motion and application), (iii) Confidential Phase in the absence of the public and the respondents and (iv) Second Non-Confidential Phase;

- i. **May 18, 2021** – more than nine months later, the reasons for the August 5, 2020, procedural order were issued;²
- j. **May 19 and July 5, 2021** – a differently constituted three-member panel of the Commission heard the motion on May 19 and July 5, 2021;
- k. **April 28, 2022** — the panel dismissed a challenge to its composition and partially granted Serrano’s motion and application. It ordered that the respondents be provided with redacted copies of the Confidential Order and the Confidential Reasons;³
- l. **April 29, 2022** – the *Securities Commission Act, 2021*⁴ was proclaimed into force, establishing the Tribunal as an independent division of the Commission;
- m. **September 27, 2022** — Serrano served this motion, which, as noted, seeks disclosure of unredacted transcripts of Ward’s interviews and unredacted copies of the Confidential Order and Confidential Reasons or a stay of the proceeding against him;
- n. **November 4, 2022** — the Tribunal approved a settlement of the proceeding against the corporate respondents and Ward;⁵
- o. **January 27, 2023** – the Tribunal issued an order setting out the procedure to be followed for the hearing of this motion. The reasons for that decision are outlined in section 3.1 below; and

² *Canada Cannabis Corporation (Re)*, 2021 ONSEC 13

³ *Canada Cannabis Corporation (Re)*, 2022 ONSEC 9

⁴ SO 2021, c 8, Sched 9

⁵ *Canada Cannabis Corporation (Re)*, 2022 ONCMT 34

p. **June 14, 15 and August 15, 2023** – the Tribunal heard the motion in public and confidential phases.

- [4] Any submissions made or filed in the confidential portion of this motion shall remain confidential except to the extent we believe that references to them in these reasons do not compromise the interests that the Confidential Order and Confidential Reasons are designed to protect. However, even with the constraints imposed by the confidentiality of certain submissions, we believe that our reasons provide the parties and the public with sufficient information to understand the basis for our decisions.

3. PRELIMINARY ISSUES

3.1 Procedure on this motion

- [5] When we issued our order dated January 23, 2023,⁶ ruling how this motion should proceed, we indicated we would provide reasons for that order together with the reasons on the motion itself.
- [6] Given the manifest confidentiality issues involved, we ordered that the procedure for the hearing of this motion largely mirror the procedure ordered for the hearing of Serrano’s earlier motion and application for disclosure of the Confidential Order and Confidential Reasons. All parties, except the corporate respondents and Ward, who had by that time settled the proceeding against them, made submissions on the proper procedure to follow for hearing the motion. Staff proposed we follow the procedure on the earlier motion and application, while Serrano and Strang opposed, arguing that all aspects of the motion should be heard in the presence of all respondents and the public.
- [7] After reviewing the Confidential Order, Confidential Reasons and unredacted Ward transcripts, and considering the parties’ submissions, we concluded that the procedure ordered to be followed on the earlier motion achieved the necessary result of preserving the confidentiality of the material at stake on the motion before us, pending any further order we might make. In the circumstances, acceding to the procedure advocated by Serrano and Strang

⁶ (2023) 46 OSCB 880

would have been tantamount to granting the relief sought by Serrano before hearing or deciding the merits of the motion. The terms of our order were intended to ensure procedural fairness to all parties while respecting, for the time being, the confidentiality proscriptions of the Confidential Order.

- [8] Our order therefore provided that the hearing of the motion would proceed in three phases, a First Non-Confidential Phase, a Confidential Phase in the absence of Serrano, Strang and the public, and a Second Non-Confidential Phase. It further provided for the appointment of *amicus* to represent the interests of justice. The order permitted all parties to be present and to make submissions at the First Non-Confidential Phase and the Second Non-Confidential Phase. We ordered the Confidential Phase to proceed *in camera*, with only Staff and *amicus* in attendance. Staff, *amicus*, Serrano and Strang participated in the hearing, although Strang filed no notice of motion, motion record or other materials and largely relied upon the submissions of Serrano and *amicus* in support of his request that any relief granted to Serrano should also be granted to him.
- [9] We did not invite the corporate respondents or Ward to participate in the hearing of the motion and none of them made a request to do so. However, we requested that Ward be provided with notice through his counsel of the scheduled hearing dates.

3.2 Strang's request for relief

- [10] Only Serrano brought a motion seeking the relief set out above. At a preliminary attendance on October 19, 2022, the Tribunal ordered that Strang shall serve and file his motion for disclosure and a stay by November 10, 2022.⁷ Strang failed to file any motion. At the hearing of this motion, Strang adopted Serrano's submissions and stated he was seeking the same relief. Staff objected to this request as he had failed to file any materials and submitted that if a stay were to be ordered, Staff should be provided an opportunity to decide whether it will continue the proceeding against Strang or respond to any future motion brought by Strang, based on the reasoning in our decision.

⁷ (2022), 45 OSCB 9145

[11] While our reasoning on this motion may well apply to both parties, our order is limited to Serrano as his is the only motion before us.

4. ISSUES

[12] The issues on this motion are:

- a. Is Serrano entitled to disclosure of the confidential materials?
- b. Does the Confidential Order prevent Staff from fully complying with its disclosure obligations in this proceeding?
- c. Do we have jurisdiction to vary the Confidential Order, and if so, should we do so?
- d. If full disclosure cannot be provided, should we stay the proceeding against Serrano?

5. ANALYSIS

5.1 Is Serrano entitled to disclosure of the confidential materials?

[13] All parties agreed that we have the power to control our processes and procedures under s. 25.0.1 of the *Statutory Powers Procedure Act (SPPA)*.⁸ The parties also agreed that, in the ordinary course, this power would allow us to make an order for production by Staff, if relevant and not otherwise privileged, of the transcripts and other documents of which Serrano seeks disclosure.

[14] The disclosure obligation of Staff is similar to that which applies to the Crown in criminal proceedings as set out in *R. v. Stinchcombe*.⁹

[15] Rule 27(1) of the *Capital Markets Tribunal Rules of Procedure and Forms* requires Staff to:

- a. provide to every other party copies of all non-privileged documents in Staff's possession that are relevant to an allegation;

⁸ RSO 1990, c S.22

⁹ 1991 CanLII 45 (SCC); *Cormark Securities Inc (Re)*, 2023 ONCMT 23 at para 16

- b. identify to every other party all other things in Staff's possession that are relevant to an allegation; and
- c. where inspection of an original document or thing identified in (a) or (b) is requested by a party, make the document or thing available for inspection.

[16] This Tribunal has stated:

Respondents have the right to disclosure of all information that might be relevant to defending the proceedings against them. Information is not to be withheld if there is a reasonable possibility that the non-disclosure of the information will impair the right of the party to make full answer and defence, unless the non-disclosure is justified by the law of privilege.¹⁰

[17] In this case, we are satisfied there is a reasonable possibility that the non-disclosure of many of the redactions in the Ward transcripts will significantly impair the right of the respondents to make full answer and defence. The respondents could reasonably use the redacted information in making important decisions that would affect the conduct of their defence. There is no suggestion that the law of privilege justifies nondisclosure. While there may be cases where non-disclosure of potentially relevant information may not impair a respondent's right to a fair hearing, this is not such a case. Many of the redactions are clearly relevant.

[18] This Tribunal should order that the relevant redactions be disclosed to the respondents in order to ensure that the proceeding before it is being conducted justly. However, the making of such an order would be unacceptable for the reasons outlined below.

¹⁰ *Bridging Finance Inc (Re)*, 2023 ONCMT 8 at para 12

5.2 Does the Confidential Order prevent Staff from complying with its disclosure obligations?

[19] While the Tribunal should order Staff to disclose the redactions, Staff would not be able to comply with such an order without breaching the Confidential Order.

[20] The Confidential Order is unambiguous. It orders that the “unredacted Transcript that discloses the Compelled Information shall be kept confidential...”.

Considering the Confidential Reasons do not change the unequivocal effect of the Confidential Order. The Confidential Reasons contemplate the possibility that the respondents might “decide whether they should initiate a motion to obtain access to the confidential [...] materials or otherwise take issue with the redactions.” The Confidential Reasons also state, “If such a motion is made, a panel can decide at that time how best to balance the interests at stake in connection with any such motion seeking disclosure.” However, the panel ends that discussion by observing that subsequent requests for disclosure “could ultimately affect whether Staff decides, in its sole discretion, to continue the proceedings against some or all of the respondents at all.” Notwithstanding this discussion, the panel issued the Confidential Order, and, as we have noted, it clearly and definitively prohibits disclosure of the redacted information.

[21] We conclude that the Confidential Order prevents Staff from disclosing the redacted information.

5.3 Do we have jurisdiction to vary the Confidential Order, and should we do so?

[22] We received extensive submissions about whether we have the jurisdiction to vary or vacate the Confidential Order to permit disclosure of the redacted material. Given the express terms of the Confidential Order, varying it to allow disclosure would amount to vacating it.

[23] The parties disputed whether s. 144.1 of the *Act*, considered together with Ontario Regulation 43/22 issued under the *Securities Commission Act, 2021*, enables us to vacate an order that the predecessor statutory tribunal issued before the creation of this Tribunal.

[24] We do not need to review the parties' submissions or decide our jurisdiction, as we would not vacate the Confidential Order even if we had jurisdiction to do so.

[25] Other than the passage of time, there has been no substantive change in the basis on which the Vice-Chair issued the Confidential Order. Assuming we had the necessary jurisdiction, we are not persuaded we should take a different view of the record that was before the Vice-Chair. No new material facts have come to light that would undermine the Vice-Chair's reasoning or the conclusion he reached.

5.4 If Staff cannot provide full disclosure, should we stay the proceeding against Serrano?

5.4.1 The test for a stay

[26] A stay of proceedings is the most drastic remedy a tribunal can order. A stay is warranted only in those exceptional cases in which:

- a. there is prejudice to a party's right to a fair hearing or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the proceeding, or by its outcome;
- b. there is no alternative remedy capable of redressing the prejudice; and
- c. where there is still uncertainty over whether a stay is warranted, the interests in favour of granting a stay must outweigh the interest that society has in having a final decision on the merits.¹¹

[27] The main category of cases in which a stay is warranted is where the party's right to a fair hearing has been prejudiced and whether that prejudice will be carried forward through the conduct of the proceeding. There is a residual category in which a stay is warranted because proceeding would be offensive to societal notions of fair play and decency and would be harmful to the integrity of the justice system.

¹¹ *R v Babos*, 2014 SCC 16 (***Babos***) at para 32

5.4.2 Discussion

- [28] We have concluded that the respondents are entitled to disclosure of the relevant redacted material and that we would not vary the Confidential Order, assuming we had jurisdiction to do so. The Vice-Chair anticipated his order might prevent complete disclosure and commented that the result might be that Staff would decide not to continue the proceeding against some respondents. Staff, however, remains steadfast in its intention to proceed against the remaining respondents.
- [29] In a routine case the Tribunal would order Staff to provide the required disclosure. We briefly considered making such an order, which would place Staff in the position that it would have to decide not to proceed to avoid breaching the Confidential Order. While this would avoid the drastic remedy of an ordered stay, it would result in two contradictory orders in the same proceeding — one requiring Staff to keep the redacted material confidential and the other requiring Staff to disclose the redacted material to the respondents. Having two contradictory orders in the same proceeding would result in harm to the administration of justice and would bring the integrity of this Tribunal's process into disrepute. It would undermine society's faith in the soundness and fairness of the adjudicative process under the *Act*. The result would be an abuse of process that would warrant a stay of the proceeding under the separate residual category of abuse.¹²
- [30] The resolution of this predicament is a stay of the proceeding against Serrano. We appreciate that a stay of a proceeding is a most drastic remedy of last resort¹³ and that the public has a great interest in having serious allegations determined on the merits. However, requiring Serrano to proceed without disclosure of the redacted material would cause him actual prejudice. That actual prejudice would be manifested, perpetuated, and aggravated when carried

¹² *Babos* at para 35

¹³ *R v O'Connor*, 1995 CanLII 51 (SCC) at para 77

forward to the hearing of the merits. The ongoing unfairness to Serrano justifies a stay of the proceeding against him.¹⁴

5.5 There is no alternative remedy

[31] There is no alternative remedy capable of resolving the situation. There is no uncertainty that a stay of proceedings is warranted to prevent manifest prejudice to Serrano and to protect the integrity of the adjudicative process. However, if we were to reach the third stage of the test for a stay,¹⁵ we would conclude that the public interest in having the allegations against Serrano determined is outweighed by the need to preserve the fairness and integrity of the Tribunal's process.

6. CONCLUSION

[32] For these reasons, we will issue an order that this proceeding be stayed against the moving party, Serrano.

Dated at Toronto this 13th day of November, 2023

"Russell Juriansz"

Russell Juriansz

"James Douglas"

James Douglas

"Cathy Singer"

Cathy Singer

¹⁴ *Babos* at para 34

¹⁵ *Babos* at para 31