COURT FILE NO.: 557/99
DATE: 20020624

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

FARLEY, THEN AND LINHARES DE SOUSA JJ.

B E T W E E N:	)	
	)	
MARCHMENT & MACKAY, CHARLES LORNE ORNSTEIN and AMIT JAMES SOFER	)	*Edward L. Greenspan, Q.C. and Michael W. Lacy,* for the Appellants
	)	
Appellants	)	
- and -	)	
	)	
ONTARIO SECURITIES COMMISSION	)	*David A. Hausman and Scott Rollwagen,* for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD:** June 24, 2002

BY THE COURT

[1] In their factum the appellants have raised the following issues in this appeal, non-disclosure of investigator notes, non-production of s.11 *Securities Act* evidence, introduction of irrelevant and prejudicial evidence regarding the nature of securities sold by Marchment; reconsideration of bias argument; irrelevant evidence of "proposed witnesses"; evidence related to matters after August 2, 1996 being the date of the issue of the Amended Statement of Allegations and Notice of Hearing; CTM Café evidence; failure to adjourn the hearing to accommodate the trial schedule of counsel for the appellant Ornstein; and penalty.

[2] However, during the appeal, counsel for the appellants advised that the following issues were abandoned in their Amended Notice of Appeal - Grounds 1, 6, 8 and 9 which included the non-production of s.11 evidence and the CTM Café evidence.

NON-DISCLOSURE OF INVESTIGATOR'S NOTES

[3] The appellants submit that the Commissioner erred in refusing the appellants' request to order the production of the notes of the interviews and examinations conducted by its investigators. The nine customer witnesses and the employee of Marchment who testified against the appellants had signed statements which were disclosed to the appellants. The Commission took the position that it had fully discharged its disclosure obligations to the appellants by disclosing the signed statements of its witnesses pursuant to their interpretation of Rule 3.4 of the *Commissioner's Rules of Practice*. The relevant portion of Rule 3.4 reads as follows:

> The party making the allegations shall provide particulars of the allegations and disclose to the party against whom the allegations are made all documents and things in the party's possession and control relevant to the allegations including:
>
> (a) all signed witness statements or if these do not exist transcripts or notes of witness interviews, or if none of the foregoing exist, statements of the evidence that each witness is expected to give.

[4] The Commissioner however did not have the advantage of the very recent decision of the Court of Appeal in *Deloitte & Touche LLP v. Ontario Securities Commission*, (unreported released June 13, 2002), wherein Mr. Justice Doherty addressed the standard of relevance described by the Supreme Court of Canada in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.), insofar as it relates to Staff disclosure obligations in proceedings under the *Securities Act*. At paras. 40 and 41, he stated the following:

> 40. Relevant material in the *Stinchcombe* sense includes material in the possession or control of Staff and intended for use by Staff in making its case against the Philip respondents. Relevant material also includes material in Staff's possession which has a reasonable possibility of being relevant to the ability of the Philip respondents to make full answer and defence to the Staff allegations. This latter category includes material that the Philip respondents could use to rebut the case presented by Staff; material they could use to advance a defence; and material that may assist them in making tactical decisions. *Stinchcombe* at p.12, *R. v. Egger*, [1993] 2 S.C.R. 451 at p. 467; *R. v. Chaplin*, [1995] 1 S.C.R. 727 at p. 742, *R. v. Dixon*, [1998] 1 S.C.R. 244 at p. 257-58.
>
> 41. In deciding whether material in its possession could reasonably be relevant to the Philip respondents, Staff was obliged to take a generous view of relevance. Staff was not privy to defence strategies or tactics, or to material in the possession of the Philip respondents, which could alter the significance of documents in Staff's possession. As Cory J. said in *Dixon, supra*, at p. 258:

> The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial.

[5] Mr. Greenspan submits that the notes of the investigators may have contained either omissions or inconsistencies upon which the witnesses could have been cross-examined. The ruling of the Commission has accordingly deprived the appellants of their right to full answer and defence on the basis of potentially relevant material which may have been withheld from them. We observe that, had the witness statements been unsigned, the Commission would ironically have fully complied with Mr. Greenspan's request pursuant to Rule 3.4. In Mr. Greenspan's submission it was incumbent upon the Commission to view the materials to determine if they were relevant and in failing to do so the Commission has deprived the appellants in a disciplinary proceeding of procedural fairness and natural justice in circumstances were "a high standard of justice" is required (see *Howe and Institute of Chartered Accountants* (1994), 19 O.R. (3d) 483).

[6] The appellants rely on the scope of disclosure flowing from the duty of fairness articulated by Trafford J. in *R. and Markandey,* [1994] OJ No. 484 where he states that: "minimally this should include copies of all witness statements and notes of the investigators".

[7] Mr. Haussman submits that disclosure in this case has been extensive including the following items:

(a) all questionnaires returned to Staff by Marchment customers since January 1, 1993;

(b) all signed witness statements that Staff had obtained from individuals interviewed in connection with the investigation;

(c) where no signed witness statements were prepared, the handwritten notes of the interviewers;

(d) where witness statements were prepared but not signed by the witness, the witness's statement and the handwritten notes of the interviewer;

(e) client complaint files opened by Staff regarding Marchment relating to sales transacted after January 1, 1993; and

(f) all documents produced by witnesses interviewed by Staff (which include an audio-tape of a conversation between a Marchment customer and the respondent Jerry Saltsman).

[8] Mr. Haussman submits that given this extensive disclosure the Commission has provided adequate scope to the appellants in order to understand the case that they were required to meet and to test the evidence of the Commission's witnesses. Mr. Haussman further submits that Rule 3.4 is based upon the disclosure obligations formulated in *Stinchcombe* and that by providing the

signed statements of witnesses the Commission has precisely discharged its obligations. At pp. 15-6 of *Stinchcombe*, Sopinka J. stated the following:

> I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. (emphasis added)

[9] We cannot agree that Rule 3.4 mirrors *Stinchcombe* precisely because we note that Sopinka J. referred to all statements, not just the signed statements. No doubt, the reason for this is that he recognized, without explicitly saying so, that access to all statements could foster full answer and defence for the reasons advanced by Mr. Greenspan. What both Sopinka J. in *Stinchcombe* and Doherty J.A. in *Deloitte Touche, supra,* recognize is that the disclosure obligation is not discharged by providing signed statements, but by providing all relevant evidence.

[10] However, Mr. Haussman submits that, even if there was a failure in the disclosure obligation, there was no prejudice to the appellants. We agree with this submission. The case against the appellants was the testimony of ten witnesses who were strangers to each other and of various backgrounds. In circumstances where no collusion is alleged, these witnesses individually and cumulatively testified to a detailed and extensive pattern of similar conduct in sales practices that in our view constituted an overwhelming case against the appellants. In our view, it is highly improbable that had the appellants obtained the disclosure to which we agree they were entitled, the disclosure, if any, could have or would have any significant impact on the outcome of this case bearing in mind the disclosure that was in fact given. In the result, we would not give affect to this ground of appeal.

EVIDENCE CONCERNING NATURE OF THE SECURITIES SOLD

[11] In our view, it was entirely proper and indeed necessary for the Commission panel to understand the nature of the securities being sold by Marchment in order to evaluate whether the clients of Marchment were being dealt with in a proper and appropriate way as required by the *Securities Act*. The essential findings of the panel do not relate to the attributes of the securities being sold but rather as to the subject matter of the proceedings, namely, Marchment's selling practices.

[12] We also note that it was Marchment which put the substantive nature of the "products" in issue by calling the President of Stockguard to give evidence at the hearing and by calling valuation evidence respecting the securities sold. We see no merit in this issue raised by the appellants.

BIAS ARGUMENT

[13] The appellants asserted that Commissioner Meyer ought to have been disqualified from the Marchment hearing in light of her having participated in the *Manning* hearing. The only "connection" between these two hearings is that there were certain similarities found as to the selling practices of both firms, which firms dealt in securities which were of the same general investment quality. We do not see that there was any reasonable apprehension of bias shown regarding Commissioner Meyer keeping in mind the test of the objective reasonable and informed of all the circumstances observer. See also *Brousseau v. Ontario Securities Commission* (1989), 57 D.L.R. (4th) 458 (S.C.C.) where it was observed that it ought to be expected that a securities commission will have repeated dealings with parties regarding similar issues.

IRRELEVANT EVIDENCE OF "PROPOSED" WITNESSES

[14] Seven persons originally proposed to be called did not in fact testify. Exhibits 9-1 to 9-5 introduced in the wholesale marking of exhibits at the start of the hearing (Exhibits 9-1 to 9-24) contained documents relating to these seven "proposed" witnesses. In our view the more appropriate way of dealing with that would have been for the Commission panel to note that these exhibits were inappropriately marked and that that material formed no part of the hearing and was not relied on. We note that the panel in its reasons made no reference or reliance to those exhibits. In the circumstances of this case we see no prejudice to the appellants.

EVIDENCE RELATED TO MATTERS AFTER AUGUST 2, 1996

[15] An administrative tribunal is not bound by the precise terms of a statement of allegations provided that the respondent in a proceeding has notice of the evidence to be adduced at the hearing. This is not the equivalence of an information laid in criminal proceedings. It appears that full disclosure was made to the appellants with respect to such evidence and that they were not taken by surprise or otherwise prejudiced. We do not see that what was done here was contrary to *Re Trend Capital Services Inc. et al.* (1992), 15 OSCB 1711, affirmed sub nom *Applebaum v. Ontario Securities Commission*, [1993] OJ No. 649 (Div. Ct.); *Québec (Sa Majesté du Chef) v. Ontario Securities Commission*, [2001] 2 S.C.R. 132. The function of the Commission on any s.127(1) hearing is to restrain future conduct likely to be prejudicial to the public. If the Commission panel were unable to receive and consider evidence concerning the current practices of a market participant the fulfillment of its mandate to make appropriate prospective orders in the public interest would be frustrated; see *Québec, supra; Gordon Capital Corp. v. Ontario Securities Commission* (1991), 1 Admin. L.R. (2d) 199 (Ont. Div. Ct.). We are of the view that the Commission acted appropriately in the circumstances prevailing.

FAILURE TO ADJOURN THE HEARING

[16] Ornstein's counsel, Mr. Greenspan, and Ms. Kelly were involved in a criminal trial in Nova Scotia. That jury trial commenced November 3, 1998 and the verdict was delivered on December 18, 1998. Mr. Greenspan had been operating on the premise that the Nova Scotia trial would operate on a four day week basis with Fridays off. Apparently this arrangement was

changed by the Judge in that case, the timing of that was somewhat unclear but Mr. Greenspan seems to recall that the announcement was made around the beginning of that case. Mr. Greenspan was scheduled to cross-examine the salesman witness Gottschalk on November 20th but by letter received by the Commission a few minutes before 5 p.m. on November 19th, the day before, Mr. Greenspan advised the Commission that he was required to attend in the Nova Scotia trial. The panel wrote Mr. Greenspan on November 20th indicating that the panel decided not to continue with Gottschalk's cross-examination in Mr. Greenspan's absence but that the cross-examination would continue on a previously scheduled day of November 26th and continue as long as reasonably necessary to permit the completion of Gottschalk's examination. The Commission letter concluded with: "If you have any concerns that you will be unavailable on November 26th, *if your client wishes to cross-examine Gottschalk*, you should make alternative arrangements".

[17] On November 26th, the partner of Mr. Greenspan attended before the panel to request an adjournment of likely several months to allow Mr. Greenspan to conduct the cross-examination or a somewhat shorter period to instruct other counsel. The panel indicated that it would release Gottschalk unless Mr. Greenspan's partner wished to cross-examine; the partner declined.

[18] Mr. Greenspan recognized that the Commission has the discretion to refuse an adjournment and he does not quarrel with that if the discretion is exercised reasonably and fairly. The panel had noted that the hearing dates including the cross-examination of Gottschalk had been previously set some time ago with some difficulty because of having to accommodate the schedule of counsel. Gottschalk had already been subjected to extensive cross-examination including five days by counsel for Marchment. Mr. Ornstein was acknowledged to be the guiding mind of Marchment. In that capacity he would have been in a continuing position to instruct counsel for Marchment, including as to any cross-examination of Gottschalk.

[19] We further note that Gottschalk apparently, according to his evidence had never spoken to Ornstein except to say: "hello" or "good morning". The Nova Scotia trial commenced over two weeks before Mr. Greenspan sent his letter the day before he was to cross-examine Gottschalk. A more timely request probably would have been in order if accommodation were being requested and reasonably expected. Mr. Greenspan did not make any other arrangements to deal with cross-examination of Gottschalk between November 20 and November 26th when his partner attended to request a further adjournment. The Commission panel had accommodated Mr. Greenspan's last minute request received on the eve of his long-scheduled cross-examination of Gottschalk, but it required that Mr. Greenspan work out by November 26th alternative arrangements if his client wished "direct" cross-examination of Gottschalk.

[20] The Commission panel had the advantage of the testimony of the other salesmen parties to take into account when reaching its conclusion as to the appellants instigating an inappropriate sales campaign and failing to take any steps to make such campaign appropriate in the circumstances or to stop this scheme.

[21] In *Stolove v. College of Physicians & Surgeons of Ontario*, [1988] OJ No. 1426 (Div. Ct.) it was held that decisions regarding adjournments are in the discretion of administrative tribunals

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B E T W E E N:

MARCHMENT & MACKAY, CHARLES LORNE ORNSTEIN and AMIT JAMES SOFER

Appellants

- and -

ONTARIO SECURITIES COMMISSION

Respondent

ORAL REASONS FOR JUDGMENT

Date of Reasons for Judgment: June 24, 2002

Date of Release: July 16, 2002

and that availability of counsel of choice was not grounds for an adjournment. We would not interfere with the discretion of the Commission panel here in these circumstances as we do not see that Ornstein has demonstrated any true reasonable prejudice on these facts and it appears that this discretion was reasonably and fairly exercised.

PENALTY

[22] We would not interfere with the penalties imposed. These penalties appear to be reasonable and appropriate in the circumstances.

CONCLUSION

[23] We are not convinced that the appellants have demonstrated that they have been prejudiced at any material way as to how the proceedings were conducted in the circumstances prevailing. The appeal is dismissed. The appellants are to jointly and severally pay $20,000 costs (on a partial indemnity basis) to the Commission payable forthwith and in no event later than July 24, 2002.

FARLEY J.

THEN J.

LINHARES DE SOUSA J.

Date of Reasons for Judgment: June 24, 2002

Date of Release: JUL 16 2002