

3.1.3 OSC and Toronto Stock Exchange Inc. v. Taylor Shambleau

Divisional Court File No.: 262/02
DATE: 20030121

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MCNEELY, WRIGHT AND HOWDEN, JJ.

BETWEEN:

TAYLOR SHAMBLEAU

Appellant

- and -

THE ONTARIO SECURITIES
COMMISSION and THE TORONTO
STOCK EXCHANGE INC.

Respondent

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)
) Matthew Gottlieb
) for the Appellant
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) Yvonne B. Chisholm
) for Ontario Securities Commission
)
) Jane R. Ratchford
) for Toronto Stock Exchange
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)
) HEARD: November 18, 2002

[1] The appellant appeals a decision of the Ontario Securities Commission. The Commission was sitting in review of a decision made by the Board of the Toronto Stock Exchange which upheld a decision of a hearing panel of the Exchange ordering the Regulatory Staff of the Exchange to disclose to the appellant an investigation report relating to disciplinary proceedings brought against the appellant. The Commission decided that the disclosure already made to Mr. Shambleau was sufficient and disclosed all relevant material and that the actual report itself need not be produced. The Commission accordingly set aside the order of the Board of the Toronto Stock Exchange.

[2] It is particularly important in this case to understand the narrow nature of the charges faced by Mr. Shambleau and the nature of the evidence relevant to the charges. The nature of the charge is described in the Commission's decision as follows:

Mr. Shambleau is alleged to have committed an infraction of section 11.26(1) of the General By-Law of the Toronto Stock Exchange. Specifically it is alleged that, while an approved person employed by Sprott Securities, Mr. Shambleau made a bid and executed a trade for the account of a customer when there was reason to believe that the intended purpose of such an action was to establish an artificial price or quotation in a listed security, or to effect a high closing price or quotation in a listed security. The complaint arises

out of the investigation with respect to RT Capital Management Inc.

[3] The investigation by the Toronto Stock Exchange staff which led to the charge was carried out by Kim Stewart, a staff investigator. Her investigation resulted in obtaining from Mr. Shambleau's employer, Sprott Securities and from the Toronto Stock Exchange, documentary evidence of the trades made by Mr. Shambleau, transcripts of phone calls to which Mr. Shambleau was a party relating to the trades and a taped interview she had on May 26, 2000 with Mr. Shambleau who was represented by counsel at the interview. Having obtained this material, she prepared an investigation report dated May 29, 2000 giving the results of her investigation. Mrs. Stewart was extensively cross-examined by counsel for Mr. Shambleau relating to her investigation and the transcript of the cross-examination which was before the Commission. In the transcript the extent of the investigation is clearly set out:

"BY MR. GOTTLIEB:

226. Q. All right, I want to get back to the investigation steps you took, and I am going to just run over this real fast, because we already got them. I just want to make this clear, though. As part of the investigation of Mr. Shambleau's trading activity, you obtained records from the Toronto Stock Exchange; correct?

A. Trading data.

227. Q. Yes, you obtained records from Sprott Securities?

A. Yes.

228. Q. You obtained some documents and tapes from the Ontario Securities Commission?

A. The transcripts and the tapes.

229. Q. Yes, you interviewed Mr. Shambleau?

A. Yes.

230. Q. All right. What else did you do in the course of your investigation of Mr. Shambleau's matter; anything else?

A. From memory, no".

and again at page 309 after review the same steps is the following:

"BY MR. GOTTLIEB:

268. Q. To the best of your knowledge, sitting here, after giving this some thought, that is really, what you have just described for me, the sum total of the investigation process that you undertook with respect to Mr. Shambleau?

A. Requesting the documents, the interviews?

269. Q. Yes.

A. Yes

270. Q. Okay. Now, we talked before a little bit about preparing your report and understanding that you have an obligation to be fair and complete and contain all relevant facts; correct?

A. Yes.

271. Q. And the facts that you put in, as we said before, are what I will call the good facts and the bad facts, the facts that would lead to proceeding and the facts that would lead to closing the file?

A. We put in all the facts".

All of the documentation obtained as a result of the investigation including the transcript of the interview and the phone calls were furnished to Mr. Shambleau as well as a summary of the proposed evidence of Kim Stewart. At the hearing before the Commission, the following exchange took place between Mr. O'Sullivan, a member of the

Commission Hearing Panel and Mr. Gottlieb, counsel for Mr. Shambleau:

"MR O'SULLIVAN: In your cross-examination of her, did you ask her whether she had any information in her report which was not included in the summary of her evidence that had been provided to you?

A. No, did not".

It was the position of the Toronto Stock Exchange staff before the Commission that all of the fruits of the investigation were disclosed and that the actual report itself which might contain the investigator's opinion on the facts need not be produced. The report itself was made available for perusal by the Commission Panel if it so wished. Mr. Shambleau's counsel's position before the Commission and before this Court was that he had an absolute right to production of the investigation report in its entirety and whether or not he had obtained all of the factual information in the report and all the documents and transcripts which were the entire fruits of the investigation.

[4] The Commission in deciding that the investigator's report itself need not be produced said the following:

"We are of the opinion that the adequacy of disclosure must be considered in the context of the nature of the regulatory proceeding and whether "the fruits of the investigation" have been disclosed to Mr. Shambleau. Such disclosure is paramount to achieving fairness in such proceedings as it permits the opportunity to make full answer and defence.

Regulatory Staff of the Toronto Stock Exchange acknowledges that there is a requirement and duty to be fair to Mr. Shambleau and recognized its obligation to provide adequate disclosure. Based upon the principles of natural justice, this would require disclosure of the following information:

- a) the provisions alleged to have been violated;
- b) particulars of the conduct that led to the alleged violation;
- c) the documents RS intends to refer to or tender as evidence at the hearing;
- d) any other materials gathered during the course of the investigation that may reasonably be used in meeting the case, advancing a defence, or in making a decision that would affect the conduct of the case; and
- e) a list of witnesses and a summary of the evidence that those witnesses are expected to give.

In essence, this consists of all the facts that underpin the report. According to Ms. Stewart's affidavit upon which she was cross-examined, these have already been produced. Mr. Shambleau has been provided with all the relevant material gathered in the course of the investigation. All of the documents referred to in the investigation report have been disclosed. A witness list has been provided and witness statements have also been provided.

Mr. Gottlieb would add the investigation report to the list of materials that should be disclosed on the basis that one may reasonably expect there to be matters in Ms. Stewart's report which will be relevant and admissible to the issues at stake in the allegations being made against him. We disagree. Moreover we are not prepared to infer that the report may contain undisclosed facts. In *Re Mills*, it was submitted that the investigation report may contain facts of which the respondent is not aware, comments concerning the credibility of the Association's witnesses and opinions concerning the events that occurred. To this the Ontario District Council responded as follows:

"In these circumstances, the District Council will not infer that additional undisclosed facts may be revealed by Mr. Lane's report (s) ... Mr. Lane's views concerning credibility are beside the point. They will not provide a basis from cross-examination of Mr. Long; and the District Council must make its own assessment of credibility. The same applies to Mr. Lane's opinions of what occurred. The District Council must reach its own conclusions on the facts on the basis of the evidence presented at the hearing, not on the basis of opinions reached by Mr. Lane during his investigation."

In conclusion, for the reasons given, we find the investigation report not relevant. Accordingly, we disagree with the Boards decision and set aside the order of the Board.

As was pointed out in *Re Mills*, supra, we recognize that the obligation to disclose is ongoing. Should an issue arise at the hearing which results in some specific aspect of the "report" becoming relevant to a fact in issue, the panel may very well determine that it is relevant and therefore that it should be produced in part. Prior to making this decision, if necessary, the panel should review the report, in accordance with these reasons and decision, to determine what part should be produced".

[5] The question before the Court in this appeal is whether the decision of the Commission is unreasonable. In our opinion it is not.

[6] The duty of disclosure which applies in disciplinary matters is a high one. The Commission recognized this and the standard of disclosure set out in its Reasons is entirely consistent with that set out in *Stinchcombe* (1991) 3 S.C.R. 327 and also that set out in the dissenting reasons of Mr. Justice Laskin in *Howe v. Institute of Chartered Accountants (Ontario)* (1994) 19 O.R. (3d) 483 on which counsel for the appellant relies. The Appellant submits that these cases mandate that the investigative report must in all cases be produced. In *Howe v. Institute of Chartered Accountants (Ontario)*, the report in question was that of an accountant who had examined all the books of the accountant charged with professional misconduct, formed opinions as to the propriety of the accused's conduct and was to be called as an expert witness at the hearing as to his findings. Clearly in those circumstances, the entire report was required to be produced. Mr. Justice Laskin noted that the issue was so clear that there was no need to even examine the report itself to decide that a mere summary of the report would not suffice. The reasons of Justice Laskin were given in the context of the case before him and did not purport to establish nor does it establish any rule that in all cases all investigative reports must be released.

[7] The basis of the disclosure requirement is found in the duty of fairness. The question is not whether a particular class of documents must be disclosed or not. Whatever disclosure is necessary to satisfy the duty of fairness must be made. The Commission recognized and accepted this and found that in the present case, the disclosure already made satisfied the duty of fairness without the actual report of Kim Stewart, the document gathering investigator, being produced. We are unable to find that the Commission was unreasonable in so finding.

[8] For the reasons given, the appeal is dismissed. Counsel may make submissions as to costs within 10 days.

**MCNEELY, J.
WRIGHT, J.
HOWDEN, J.**

Released: January 21, 2003.