



Ontario
Securities
Commission

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**IN THE MATTER OF THE SECURITIES ACT
R.S.O. 1990, CHAPTER S.5, AS AMENDED (the Act)**

AND

**IN THE MATTERS OF X AND A CO.
AN APPLICATION BY Y
UNDER SECTION 17(1) OF THE ACT**

Hearing: September 6 and 7, 2006

Order: September 7, 2006

Reasons: January 8, 2007

Panel: Paul M. Moore, Q.C. - Vice-Chair and Chair of the Panel
Robert L. Shirriff, Q.C. - Commissioner

Counsel: Kevin P. McElcheran - for Y
Philip Anisman - for Z
Gavin H. Finlayson - for X
Johanna Superina - for Staff of the Ontario Securities Commission

REASONS

INTRODUCTION

[1] In this hearing, we dismissed an application by Y for an order under s. 17(1) of the Act that would have permitted Y (in its capacity of receiver and manager of A Co) as plaintiff in a civil proceeding against X (as the former auditor of A Co) and former clients of A Co as plaintiffs in a class action against X (as the former auditor of A Co) to use in the two proceedings transcripts of the examination of Z (a partner in X) conducted under s.13 of the Act.

[2] The issue in this application was whether the intended uses would be in the public interest and should be permitted notwithstanding s.16 of the Act, or any implied undertaking to the Commission as to limitation on use for a collateral purpose arising by reason of the disclosure to Y and its counsel of the transcripts pursuant to the Commission's disclosure obligation to respondents in the matters of X and of A Co.

[3] A related issue in this application was whether the fact that Y was acting in the civil proceeding in the capacity of receiver and manager of A Co, and that Y had been appointed by the court to act in such capacity at the request of the Commission under s. 129 of the Act, gave Y special status as an instrumentality of the public interest mandate of the Commission which should cause us to view Y's intended use as equivalent to use by the Commission, and therefore, a permitted use by Y.

BACKGROUND

[4] Z was examined by staff under s. 13 of the Act in an investigation relating to A Co. and others under s. 11 of the Act. Staff commenced proceedings under s. 127 of the Act against A Co., X and others. The proceeding as against X was settled. In an agreed statement of facts filed with the Commission in the hearing to approve the settlement, X made certain admissions.

[5] Y commenced a civil proceeding against X relating to X's role as auditor of A Co. In addition, A Co.'s former clients commenced a class action against X relating to its role as auditor of A Co.

[6] Counsel for Y represents the plaintiffs in each civil action (i.e., Y in one and A Co.'s former clients in the other).

[7] In the proceedings under s. 127 of the Act, staff disclosed to the parties and their counsel (including counsel to Y) the transcripts of staff's examinations of Z, as required under Rule 3.3(2) of our Rules of Practice.

[8] Counsel for Y inadvertently disclosed to the plaintiffs in the class action copies of the transcripts of the examination of Z. In addition, excerpts from the transcripts were included in the motion records for motions in the civil proceeding brought by the counsel of Y and the class action plaintiffs. All copies of the transcripts and the excerpts of the transcripts have been

retrieved or removed from the motion records.

[9] This hearing was held in camera. Counsel suggested that our reasons not use the actual names of X, Y, Z, or A Co.

THE APPLICATION

[10] Y applied for,

- (a) an order of the Commission under s. 17(1) of the Act to permit Y, as plaintiff in its action, and the plaintiffs in the class action, to disclose in the two civil proceedings transcripts of staff's examination of Z,
- (b) confirmation that Y and the class action plaintiffs may ask the same questions, in any examination for discovery, cross-examination, or other examination in the two civil proceedings, that were asked in the transcripts, and
- (c) authorization or confirmation of the right of Y and the class action plaintiffs to use the transcripts for the purpose of cross-examining or impeaching Z's credibility in the civil proceedings.

[11] We decided not to grant the requested relief.

SUBMISSION OF THE PARTIES

[12] Counsel for Y submitted that it would be in the public interest to permit disclosure of the transcripts because, (i) the civil action by Y is a natural extension of the Commission's obtaining an order appointing Y receiver and manager to recover losses for A Co.'s former clients; (ii) disclosure would be consistent with the Commission's mandate to protect investors; (iii) the transcripts are directly relevant to the civil proceedings; (iv) X has made statements in its pleadings in the civil proceedings contrary to and in violation of its settlement agreement with staff; (v) X should not be able to use s. 16 of the Act as a form of immunity from civil liability; (vi) releasing the transcripts would not prejudice Z further because the settlement agreement is already public; and (vii) Y is not subject to any implied undertaking rule.

[13] Counsel for Y also submitted that if we refused the application, we should clarify that Y and the class action plaintiffs would not be precluded in the two proceedings from asking the same or similar questions as asked on Z's examination under s. 13 of the Act to elicit information elicited on his examination under s. 13 of the Act.

[14] Counsel for staff and counsel for Z submitted that (i) Y had not satisfied the onus of demonstrating that disclosure would be in the public interest; (ii) Y had not exhausted all other possible means of obtaining the information in the transcripts; (iii) information obtained under

Part VI of the Act should not be used as an alternative form of discovery in civil proceedings as this is not within the public interest ambit contemplated by s. 17 of the Act; (iv) disclosure would undermine the integrity of staff's investigations and the ability of staff investigators to secure co-operation from witnesses; (v) witnesses compelled to testify under s. 13 have an expectation of privacy; (vi) staff investigative powers are broad and should not be an aid to private litigation; (vii) disclosure should not be granted merely for its use in private litigation; (viii) all of the admissions needed for the civil proceedings are contained in the settlement agreement and disclosure of the transcripts would serve no purpose other than to prejudice confidentiality; and (ix) there is an implied undertaking to the Commission that Y will not use in collateral proceedings matters disclosed to it in the Commission proceeding under Rule 3.3(2).

[15] Counsel for X submitted that (i) there is a presumption of privacy in s. 17 against permitting disclosure; (ii) X has already been harmed by the improper disclosure by Y's counsel and permitting disclosure of the transcripts would legitimize that wrongdoing; (iii) disclosure of the transcripts would prejudice X's settlement position with Y and the third parties; (iv) there is no inconsistency between X's pleadings in the civil proceedings and the settlement agreement; and (v) the settlement agreement provides that it should not prejudice X in any other proceedings against Z.

[16] In addition to making arguments similar to those of staff and X, Z argued that disclosure would not be in the public interest because s. 9 of the Ontario *Evidence Act* and s. 14 of the *Statutory Powers Procedure Act* prevent the use of this material in civil proceedings.

[17] Counsel for Z and for staff acknowledged that if we refused the application, Y would not be precluded from asking any questions that may be relevant to the pleadings in the civil action, even if they were similar to questions in the transcripts asked of Z on his examination under s. 13 of the Act, provided the transcripts were not used in this regard.

ANALYSIS

Part VI of the Act

[18] Part VI of the Act sets out the statutory scheme for investigations and examinations by staff of the Commission.

[19] Section 11 provides for investigation with respect to any matter the Commission considers expedient. The investigation, however, must relate, among other things, to the due administration of Ontario securities law or the regulation of the capital markets in Ontario.

[20] For purposes of an investigation under this section, there are wide powers to conduct examinations of documents and other things.

[21] Section 13 of the Act allows an investigator appointed under s.11 to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to produce documents and other things. A person so compelled may be represented by counsel and

may claim any privilege to which the person is entitled.

[22] Section 16 of the Act provides that, except in accordance with s. 17, no person shall disclose at any time, except to his or her counsel, the nature or content of an order under s. 11 or any testimony given under s. 13. Section 16 also provides that all testimony given under s. 13 and all documents and other things obtained under that section relating to an investigation or examination are for the exclusive use of the Commission and shall not be disclosed or produced to any other person or in any other proceeding except as permitted under s. 17.

[23] Section 17 provides that, if the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person of certain information, such as the nature or content of an order under s. 11, any testimony given under s. 13, and the nature or content of any questions asked under s. 13. However, no such order may be made by the Commission, unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to the person or company that gave the testimony.

[24] Subsection s. 17(6) of the Act provides that a person appointed to make an investigations under the Act may disclose or produce confidential materials but only in connection with a proceeding commenced or proposed to be commenced by the Commission under the Act or an examination of a witness, including an examination of a witness under s. 13.

[25] Section 18 of the Act provides that testimony given under s. 13 shall not be admitted in evidence against the person from whom the testimony was obtained in a prosecution for an offence under s. 122 or in any other prosecution governed by the *Provincial Offences Act*.

[26] In summary, Part VI of the Act provides for the compulsion of persons and protection against misuse of and controls on the use of compelled testimony under s. 13. It also provides the Commission with the ability to depart from the protection and controls where in the Commission's opinion it would be in the public interest to authorize such departure.

The Meaning of "Public Interest"

[27] In considering the Commission's public interest jurisdiction under s. 127 of the Act, Justice Iacobucci stated in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, [2001] 2 S.C.R. 132 at para. 41,

... the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets." Therefore, in considering an order in the

public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.

[28] Justice Iacobucci was speaking of the Commission's jurisdiction under s. 127 of the Act, which is a broad jurisdiction. Section 17, unlike s. 127, is part of Part VI of the Act which has a narrow purpose relating to investigations and compelled testimony. Accordingly, the term "public interest" in s. 17 of the Act should be interpreted in the context of Part VI of the Act: to enable the Commission to conduct fair and effective investigations and to give those investigated assurance that investigations will be conducted with due safeguards to those investigated, thus encouraging their cooperation in the process.

[29] In *Deloitte & Touche LLP v Ontario Securities Commission* [2003] 2 S.C.R. 713, Justice Iacobucci, in commenting on whether the Commission had properly balanced the interests of disclosure to respondents in a s. 127 proceeding and the protection of confidentiality expectations and interests of a party examined under s. 13 stated at para 29:

I believe the OSC properly balanced the interests of disclosure to Philip and the officers, along with the protection of confidentiality expectations and interest of Deloitte. In this respect I am of the view that in making a disclosure order in the public interest under s. 17, the OSC has a duty to parties like Deloitte to protect its privacy interests and confidences. That is to say that the OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act.

[30] In that case, the mandate referred to was the holding of a fair hearing under s. 127 of the Act. At para 30, Justice Iacobucci set out the order of the OSC which contained several conditions, including: "The respondents and their counsel will not use the evidence for any purpose other than for making full answer and defence to the allegations made against the respondents in these proceedings."

[31] The power of compulsion in s. 13 of the Act is extraordinary. It gives the Commission meaningful and powerful tools to use in its investigation of matters. Part VI, however, has limitations and protections with respect to confidentiality, and the possible use of compelled testimony. From this, we discern that the public interest referred to in s. 17 relates to a balancing of the integrity and efficacy of the investigative process and the right of those investigated to their privacy and confidences, all in the context of certain proceedings taken or to be taken by the Commission under the Act.

[32] The longstanding policy and practice of the Commission is that production of confidential materials obtained by the Commission under Part VI of the Act for use by a party in a civil action is not in and of itself in the public interest. See *Biscotti v. Ontario Securities Commission* (1991) 1 O.R.(3d) 409 (C.A.); *Coughlan v. WMC International Ltd.*, [2000] O.J. No 5109 (Div. Ct.) (QL); *Weram International Ltd. v. Ontario Securities Commission* [1990] O.J. No. 918 (Div. Ct.) (QL); and *Re Mr. X* (2004), 27 O.S.C.B. 49.

[33] Whatever public interest concerns may be relevant under s. 17, we are satisfied that they do not include disclosure to facilitate investors in pursuing civil causes of action against those investigated under s.11.

[34] In appropriate cases, there may be other interests that will have to be balanced against the safeguards in Part VI for those investigated, in making a determination of the public interest under s. 17 (See, for example *Deloitte* at para 29). Counsel for Y has not persuaded us that there are any such interests in the application before us.

Premature

[35] If, in the course of the proceedings against X, X should violate any provision of its settlement agreement with the Commission, then it may be appropriate for staff of the Commission to bring the violation to the attention of the Commission. The Commission could then take such action it considered appropriate which may not necessarily involve public disclosure of the transcripts. The apprehension on the part of Y that X might violate its settlement agreement with the Commission in the course of the proceedings against it is not a sufficient reason for us to order at this time the disclosure requested by Y.

No Special Status

[36] We have not examined the two civil proceedings. We do not need to in order to conclude that those proceedings are different proceedings from actual or potential proceedings by the Commission against X.

[37] Y was appointed as receiver and manager of A Co. by the court. It is true that this occurred at the request of the Commission. But Y is not acting as an agent or instrumentality of the Commission in any capacity, and certainly not in pursuing civil action against X.

[38] Subsection 16(2) of the Act states that all things obtained under s. 13 are for the exclusive use of the Commission. The intended use by Y of the transcripts in the civil proceeding would not be a use of the Commission.

[39] We do not consider that the requested disclosure can be justified as being in the public interest in the circumstances presented to us when the proposed use would not be connected to a permitted use of the transcripts by the Commission but would disclose information, whose providers had the reasonable expectation would be kept confidential, for use in a collateral civil proceeding against them.

Use

[40] With respect to the interplay between s. 17 as to disclosure and s. 16(2) as to use, in our view, they work hand in hand. Any order for disclosure under s. 17 implies use by the person to whom it is disclosed and would likely deal expressly with the question of use and the implied

undertaking to the Commission (cf. the order of the Commission set out in *Deloitte*).

[41] Since we are not prepared to grant the application for disclosure pursuant to s. 17 of the Act, we are not prepared to grant an exemption from the implied undertaking to the Commission as to limitation on use for a collateral purpose.

[42] We have been asked by counsel for Y whether, his having read the transcripts, it would be a breach of the implied undertaking to the Commission for him to ask relevant and probative questions in the two civil proceedings that may relate to matters in respect of which evidence was given in the transcripts. In our view it would not be a breach of such undertaking to ask relevant and probative questions in these actions provided the transcripts are not used or referenced in the process and the questions are not structured upon or from the transcripts. Our view is not intended to trench upon the jurisdiction of the court in the two civil proceedings to give such directions and rulings on counsel's examination in these actions as it may consider proper and in the interests of justice.

Dated at Toronto, this 8th day of January, 2007.

Paul M. Moore, Q.C.

Robert L. Shirriff, Q.C.