Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF NEST ACQUISITIONS AND MERGERS, IMG INTERNATIONAL INC., CAROLINE MYRIAM FRAYSSIGNES, DAVID PAUL PELCOWITZ, MICHAEL SMITH, and ROBERT PATRICK ZUK

REASONS AND DECISION ON A MOTION

Hearing:	December 16, 2011	
Decision:	February 3, 2012	
Panel:	James D. Carnwath, Q.C.	- Commissioner and Chair of the Panel
	Margot C. Howard	- Commissioner
Appearances:	Cullen Price	- For Staff of the Ontario Securities Commission
	Carlo Rossi	
	Caroline Myriam Frayssignes	- For herself
	Robert Patrick Zuk	- For himself
		- No one appeared on behalf of Nest Acquisitions and Mergers, IMG International Inc., David Pelcowitz or Michael Smith

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I. BACKGROUND

A. Overview

[1] One of the Respondents, Caroline Myriam Frayssignes (" **Mme. Frayssignes**" or the "**Respondent**"), moved before the Ontario Securities Commission (the "**Commission**") requesting two orders. First, Mme. Frayssignes requested French translation services to be provided to her during the hearing on the merits and any other proceeding in relation to this matter. Second, Mme. Frayssignes requested French translation of all documents relied upon by Staff of the Commission ("**Staff**") in this matter.

[2] The motion was heard on December 16, 2011 (the "**Motion Hearing**"). Before the Motion Hearing, Mme. Frayssignes and Staff filed written submissions. At the Motion Hearing, Mme. Frayssignes made oral submissions to which Staff responded.

[3] We issued an oral decision at the Motion Hearing with written reasons to follow. These are those reasons.

B. History of the Proceeding

[4] The Commission issued temporary cease trade orders on April 8, 2009 against Nest Acquisitions and Mergers and Mme. Frayssignes and on June 11, 2009 against IMG International Inc./Investors Marketing Group International Inc. and Michael Smith (the "**Temporary Orders**"). The Temporary Orders were extended from time to time and eventually extended, by separate orders on January 22, 2010, until conclusion of the hearing on the merits.

[5] The Commission issued a Notice of Hearing on January 18, 2010, pursuant to sections 37, 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "***Securities Act***") (the "**Merits Hearing**"). Staff filed a Statement of Allegations on the same day. Staff alleged that the respondents breached subsections 25(1)(a) and 126.1(b) of the *Securities Act*. Further, Staff alleged that Mme. Frayssignes and Robert Patrick Zuk ("**Mr. Zuk**") breached subsection 122(1)(a), that Mr. Zuk breached 122(1)(c) and that Michael Smith is liable under section 129.2 of the *Securities Act*.

[6] The Merits Hearing was first scheduled to start on January 31, 2011. Following two adjournments, it was fixed for June 27, 2011.

[7] On June 27, 2011, Mme. Frayssignes asked that she be provided with a simultaneous French translation of the hearing on the merits and a translation of the documents Staff proposed to tender at that hearing. This Panel ordered that the Merits Hearing be adjourned to a date to be fixed by the Office of the Secretary and that the

Commission would provide a simultaneous translation into French of the Merits Hearing. We further ordered the parties to make written submissions and that the Motion Hearing take place on September 26, 2011. The order of June 27, 2011 resolved the matter of simultaneous translation for the Merits Hearing, leaving only the question of whether to grant Mme. Frayssignes' motion for translation of documentary evidence.

[8] The Motion Hearing was adjourned on September 26, 2011 to allow Staff to translate their written submissions on the motion into French.

II. THE ISSUES

[9] The Respondent argued that all documents to be relied upon by Staff in this matter should be translated into French. She took the position that as a bilingual individual she was entitled to receive the documents in French. Mme. Frayssignes also submitted that while her English was good, it was not equivalent to her French comprehension, and that English documentation would impede her ability to defend herself as an unrepresented respondent or to adequately respond to Staff's allegations.

[10] Addressing this issue involves two main questions:

(i) Does the Commission have a legal obligation to translate into French documentary evidence which Staff intends to rely upon at the Merits Hearing?

(ii) If not, would proceeding with the Merits Hearing without translating documentary evidence prejudice Mme. Frayssignes?

III. ANALYSIS

1. Respondent's Position

[11] The Respondent submits that she would "not be able to meaningfully participate in the [h]earing or be able to effectively provide answer and defence to the allegations without the assistance of a translator or without translated copies of documents the Staff intends to rely upon." The basis for this argument is that the Respondent's language rights must be protected. The Respondent relies on the *Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "***Charter***"), for the proposition that French is a recognized as an official language of Ontario courts and appears to rely on sections 16 through 20 of the *Charter, supra* for the existence of language rights applicable to this case.

[12] In support of her motion, the Respondent referred us to a number of court cases that consider the application of language rights. The Respondent submits that linguistic guarantees provided by statute create obligations for the State to take necessary measures to implement those rights (*R. v. Beaulac*, [1999] 1 S.C.R. 768 at para. 24 ("***Beaulac***")).

[13] In addition, the Respondent cited the decision in *Dehenne v. Dehenne*, (1999) 47 O.R. (3d) 140, in which the Ontario Superior Court considered the application of the *French Language Services Act*, R.S.O. 1990 c. F.32, (the "***FLSA***"). In that case, the Public Guardian and Trustee had replied to counsel for the applicant in English only, even though the Trustee had a duty to reply in French to communications received in French. The court stated that the Public Guardian and Trustee could not "allege a lack of human or financial resources in an effort to justify an obstacle to carrying out his language responsibilities" (at para. 9).

[14] The Respondent also noted the importance of an accused person's ability to recognize the meaning of documents and how a slight misinterpretation could drastically affect the meaning of the document cited.

[15] According to the Respondent, Staff should provide translated copies of documents it intends to rely upon during the Merits Hearing including, but not limited to, all witness statements and interview transcripts, transcripts of compelled interviews of subjects under investigation, and private investigator notes.

2. Staff's Position

[16] Staff submits there is no absolute right to translation of Staff's intended exhibits and that no such right arises under the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "***Commission Rules***"), the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "***SPPA***") or the *FLSA, supra.* Staff further submits that a respondent must demonstrate actual prejudice to the right to make full answer and defense prior to the Commission making an order on fairness grounds.

[17] Staff notes that sections 16 through 20 of the *Charter, supra* deal exclusively with institutions of Parliament and the governments of Canada and New Brunswick, but do not apply to institutions of the government of Ontario.

[18] Staff submits the *FLSA* provides rights to communicate with and receive government services from a government agency in French, but only subject to reasonable limitation. Staff submits that third party records in the possession of the Commission and documents created by Staff in the course of the investigation are not collected as a "service" within the meaning of the word as defined at section 1 of the *FLSA, supra*.

[19] Staff refers us to *R. c. Rodrigue*, [1994] Y.J. No. 113 (Y.S.C.) at paras. 30 and 31 ("***Rodrigue***"), in which the Yukon Superior Court held that evidence in the hands of the Crown does not fall under language-rights legislation because the evidence is either created by a third party or an internal investigation document, which are not mainly intended for the public. In that case, the Court was considering similarly worded provisions in federal legislation including the *Charter, supra* and the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.).

[20] Staff further submits that this interpretation of the *FLSA* is supported by guidelines published by the Ontario Ministry of the Attorney General which state:

> [T]he tribunal's responsibility is to provide a translation of any correspondence, response or hearing decisions that they are making and conveying to the Client, which means documents the tribunal is producing only"[emphasis added].
>
> (The Ministry of the Attorney General, "Guidelines for Administrative Tribunals" (20 December 2010), online: http://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/french_language_services/services/administrative_tribunals.asp (the "**Ministry Guidelines**"))

The Ministry Guidelines suggest that tribunals do not have a responsibility to translate all documents which are filed.

[21] In addition, Staff referred us to administrative decisions in which panels declined requests to order translation of documents (*Decision No. 691 04*, [2005] O.W.S.I.A.T.D. No. 480 at addendum para. 5; *Re Pierre Emond, Armel Drapeau, and Jules Bossé*, unreported oral decision and reasons of the New Brunswick Securities Commission, dated May 10, 2011 ("***Re Pierre Emond***")).

[22] In the alternative, Staff submits that it is reasonable and necessary to limit French-language rights pursuant to section 7 of the *FLSA, supra* to exclude the Respondent's request because of the nature of the document as evidence. Staff argues that evidence should not be altered in any way. Staff submits that this approach is consistent with the rules for criminal proceedings (*Criminal Code*, R.S.C. 1985, c. C-46, s. 530.1(g)) and was approved by the Ontario Court of Appeal in *R. v. Simard*, [1995] O.J. No. 3989 at para. 33.

[23] With respect to procedural fairness, Staff submits the onus is on the applicant to establish actual prejudice to her right to make full answer and defence. Staff says in the criminal context there is no duty on the Crown to translate evidence into the language of the accused. Staff relies on *Rodrigue, supra* for the proposition that the Crown has met its disclosure obligations once it has disclosed all relevant evidence in the language in which it exists (at paras. 50 and 51).

[24] More recently in *R. c. Potvin*, [2004] O.J. No. 2550 at para. 39, a case cited by the Respondent, the Ontario Court of Appeal confirmed that there was "no automatic right to translation of documents filed at a trial".

[25] Staff says the Panel has discretion to order translation of documentary evidence where it is satisfied the Respondent has demonstrated actual prejudice to her right to make full answer and defence.

3. The Law

[26] In *Beaulac, supra,* a criminal case, the Supreme Court of Canada (the "**SCC**") stated that "[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada" (at para. 25).

[27] The Respondent appears to rely on the *Charter* for the existence of language rights applicable to this case. Subsection 16(1) of the *Charter, supra* states:

> English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. [emphasis added]

[28] With respect to services, subsection 20(1) of the *Charter, supra* states:

> Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where
>
> *(a)* there is a significant demand for communications with and services from that office in such language; or
>
> *(b)* due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French. [emphasis added]

[29] These *Charter* provisions establish that language rights and privileges are bestowed in relation to communications to and from institutions of Parliament and the government of Canada. There are similar *Charter* provisions applicable to institutions of the legislature and government of New Brunswick (*Charter, supra,* subsections 16(2) and 20(2)). There no such provisions applicable to institutions of the government of Ontario. However, the *Charter* does note the authority of provincial legislatures "to advance the equality of status or use of English and French" (*Charter*, *supra*, subsection 16(3)).

[30] In Ontario, one example of the advancement of linguistic rights is the *FLSA.* The preamble of the *FLSA, supra* acknowledges a desire to preserve the French language for future generations and to guarantee its use in institutions of the government of Ontario. In *Lalonde v. Ontario (Commission de restructuration des services de santé),* [2001] O.J. No. 4767 at para. 143 ("***Lalonde***"), the Ontario Court of Appeal held that the underlying purposes and objectives of the *FLSA* included the protection of the minority francophone population and the advancement of the French language and promotion of its equality with English.

[31] The *FLSA, supra* creates the right of persons to communicate with and receive government services from a government agency in French. Subsection 5(1) states:

> A person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any head or central office of a government agency or institution of the Legislature, and has the same right in respect of any other office of such agency or institution that is located in or serves an area designated in the Schedule.

[32] Section 1 of the *FLSA, supra* defines the word "service" as "any service or procedure that is provided to the public by a government agency or institution of the Legislature and includes all communications for the purpose". In this case, it is not disputed that the Commission is a government agency to which the *FLSA* applies.

[33] With respect to evidence, the *Securities Act* contains a confidentiality provision dealing with evidence collected or created in the course of the investigation. In particular, subsection 16(2) of the *Securities Act, supra* states:

> If the Commission issues an order under section 11 or 12 [investigation order], all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and shall not be disclosed or produced to any other person or company or in any other proceeding except as permitted under section 17.

The confidentiality provision suggests that internal investigation documents and evidence collected under the *Securities Act* are not intended for the public. Rather, they are for the "exclusive use of the Commission" and therefore their collection would not necessarily constitute a service to the public.

[34] However, even if the documentary evidence were considered were considered part of a service, the *FLSA* also provides that obligations of government agencies are subject to limitation. Section 7 of the *FLSA, supra* states:

> The obligations of government agencies and institutions of the Legislature under this Act are subject to such limits as circumstances make reasonable and necessary, if all reasonable measures and plans for compliance with this Act have been taken or made.

[35] In *Lalonde, supra* at para. 166, the Court of Appeal discussed the limitation provision of the *FLSA* and noted:

> Although it is impossible to specify precisely what is encompassed by the words "reasonable and necessary" and "all reasonable measures", at a minimum they require some justification or explanation for the directions limiting the rights of francophones to benefit…

As stated above, Staff's argument in favour of imposing limitations on a language right in these circumstances is to uphold the integrity of the evidence and ensure that it is provided to the Respondent in it's original form.

[36] With respect to fairness, the SCC in *Beaulac, supra* distinguished language rights from the right to a fair trial (*Beaulac, supra* at paras. 41 and 45). The SCC stated that the requirement of substantive equality signals that a violation of a language right is a substantial wrong, but does not constitute a procedural irregularity (*Beaulac, supra* at para. 54). In that case, the court stated that "[l]anguage rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure[*sic*] the equality of status of French and English" (*Beaulac, supra* at para. 41). This interpretation indicates that language rights serve unique functions which address cultural goals, and not procedural deficiencies.

[37] The onus is on accused to show he or she was denied opportunity to assess the evidence and make informed decisions about his or her defence (*R. v. Butler*, [1997] N.B.J. No. 604 at para. 51). In other words, a respondent must provide evidence of prejudice or unfairness in the circumstances of each case.

[38] We must determine whether the Commission has a substantive legal obligation to provide translation of documentary evidence to the Respondent as a result of language rights provisions, and if not, whether there is a separate obligation on the Commission to provide translation of documentary evidence to ensure a fair hearing.

4. Analysis

[39] We find there is no legal obligation on the Commission to translate documentary evidence into French, and there is no evidence of prejudice to the Respondent in providing documentary evidence in its original form.

i. French Language Rights

[40] We accept the argument of Staff there is no absolute right to translation of third party documents expressed in the applicable legislation or the *Commission's Rules*.

[41] We note that the definition of services in section 1 of the *FLSA, supra* expressly acknowledges that the service or procedure is to be "provided to the public". Section 16(2) of the *Securities Act, supra* states that investigation documents or evidence obtained in the course of investigation are for the exclusive use of the Commission, and thus does not form part of a service provided by the Commission to the public. To the same end, we agree with the court in *Rodrigue, supra* at paras. 30 and 31 that evidence created by a third party does not come from the governmental institution itself and that internal investigation documents are not, strictly speaking, intended for the public since they are prepared and compiled for internal use.

[42] We acknowledge that communications and decisions of the tribunal and that submissions of Staff which pertain to a public proceeding, do fall with the definition of

services as provided in the *FLSA, supra*. With respect to those services, it is incumbent upon the Commission to provide documents in the official language requested by the party to ensure that language rights are upheld.

[43] Our conclusions are supported by the Ministry Guidelines, *supra*, and the decision of the New Brunswick Securities Commission ("**NBSC**") in *Re Pierre Emond, supra.* The Guidelines expressly state that only documents produced by the tribunal must be translated under the *FLSA.* In *Re Pierre Emond, supra*, the panel considered similar language-rights legislation and concluded that the NBSC was under no obligation to translate evidence and that the evidence should be tendered in the language of its original author.

[44] We find there is no right to translation of documentary evidence in these circumstances, and therefore no corresponding obligation on the Commission to translate documentary evidence. Since we have found no right to translation of documentary evidence, it is unnecessary to consider arguments on possible limitations.

ii. Procedural Fairness

[45] The right to fairness in a proceeding is distinct from individual language rights (*Beaulac, supra* at para. 41). We do not find unfairness or prejudice to the Respondent in holding that documentary evidence need not be translated in these circumstances. We agree with Staff's submission that the Panel has discretion to order translation of documents if the Respondent can establish prejudice.

[46] The SCC has stated that language rights are not meant to be minimum conditions for fairness, nor are they in place to aid efficiency of the defence (*Beaulac, supra* at para. 47). Further, in terms of disclosure, it is noted in *Rodrigue, supra* at para. 51 that "the right to disclosure of evidence does not include a right to legal assistance nor to scientific expertise nor to translation services".

[47] However, the Court also noted in *Rodrigue, supra* at para. 55 that there may be circumstances in which the translation of documentary evidence is necessary to ensure an accused's right to make full answer and defence. The onus is on the accused to show he or she was denied opportunity to assess the evidence and make informed decisions about his or her defence (*R. v. Butler*, [1997] N.B.J. No. 604 at para. 51).

[48] The Respondent has failed to demonstrate the existence of any prejudice to her ability to make full answer and defense in the event that no translation of documentary evidence is ordered. An assertion of prejudice, without evidence, is insufficient to prove that she has or will suffer actual prejudice. We do not find unfairness or prejudice to the Respondent in dismissing her motion for translation of documentary evidence.

III. CONCLUSION

[49] We find it is in the public interest to dismiss Mme. Frayssignes' request. In coming to this conclusion, we find that, given the strength of jurisprudence on the matter, Mme. Frayssignes would have to put forth clear and conclusive evidence in order to persuade the Commission that her request for third-party document translation should be granted. She has not done so. However, the Commission has ordered Mme. Frayssignes to be provided with simultaneous translation for the Merits Hearing and that written submissions and decisions initiated by the Commission or Staff shall be available in both English and French. We therefore ordered, on December 16, 2011, that documentary evidence does not require translation by Staff. We further ordered that the Merits Hearing shall be scheduled on a date to be fixed by the Office or the Secretary, upon consultation with the parties.

DATED at Toronto on this 3rd day of February, 2012.

"James D. Carnwath"	*"Margot C. Howard"*
James D. Carnwath	Margot C. Howard