Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
CONRAD M. BLACK, JOHN A. BOULTBEE
AND PETER Y. ATKINSON

ORAL RULING AND REASONS

Hearing:	October 6, 2014	
Oral Ruling:	October 8, 2014	
Panel:	Christopher Portner	- Commissioner and Chair of the Panel
	Judith N. Robertson	- Commissioner
Appearances:	Anna Perschy Jed Friedman	- For the Ontario Securities Commission
	Peter F.C. Howard Edward Waitzer Sinziana R. Hennig	- For Black
	John A. Boultbee	- For himself

ORAL RULING AND REASONS

The following decisions and reasons have been prepared for the purpose of publication in the Ontario Securities Commission Bulletin and are based on portions of the transcript of the hearing. The excerpts from the transcript have been edited and supplemented and the text has been approved by the Chair of the Panel for the purpose of providing a public record of the decisions and reasons.

[1] On October 6, 2014, we heard motions from the parties with respect to a number of matters, and indicated that we would provide our decisions on the second day of the hearing. These are our decisions and reasons which we propose to provide orally.

1. Boultbee's Severance Motion

[2] The first matter relates to the request by John Boultbee ("**Boultbee**") for reasons relating to our decision in response to his motion for the severance of his case. On August 11, 2014, we held a hearing in that regard relating to the Respondent Boultbee, to sever his case from the current proceeding. The Panel heard submissions from Boultbee on his own behalf and from Staff of the Commission and reserved its decision on the motion.

[3] On August 12, 2014, the Panel issued an order dismissing Boultbee's severance motion and stated that reasons would follow. We have decided to issue oral reasons which are as follows.

[4] Boultbee argued that his case should be severed and heard separately from the current proceeding relating to him and the other Respondent, Conrad Black ("**Black**"), for the following reasons:

(a) There is little or no benefit in terms of time or cost to hearing both cases together;

(b) There is no common question of fact or law between Boultbee and Black, and Boultbee and Black were convicted for different conduct and were subject to different penalties in the U.S. Criminal Proceeding[1];

(c) There are no SEC findings against Boultbee and he was not involved with the SEC settlement and a significant part of the hearing time will be dedicated to the SEC findings and settlement;

(d) Boultbee has said that he will not be entering any evidence and will rely on Staff's Joint Hearing Brief;

[1] As defined in our Reasons and Decision on a Motion dated June 13, 2014.

(e) Boultbee does not anticipate that his oral arguments will be very lengthy and that the length and timing of the hearing is being driven by Black;

(f) Hearing the cases together will cause Boultbee to bear unnecessary costs travelling to and staying in Toronto for the duration of the hearing which will cause serious financial and time hardships which Boutlbee cannot afford;

(g) Hearing the cases together will prejudice Boultbee's ability to have a fair hearing as Black's criminal convictions will be in the minds of the Panel members; and

(h) There would be no harm in terms of cost or time if severance is granted.

[5] It is well established that the party requesting severance must establish, on a balance of probabilities, that the interests of justice require severance. The Supreme Court of Canada has articulated a non-exhaustive list of factors to consider in determining whether severance is required, which include the following:

(a) The factual and legal connection between the allegations, including whether all of the allegations arise from the same or related transactions;

(b) General prejudice to the respondent;

(c) The complexity of the evidence;

(d) Whether the respondent wishes to testify on some matters as opposed to others;

(e) The possibility of inconsistent verdicts;

(f) The desire to avoid a multiplicity of proceedings;

(g) The use of similar evidence at the hearing;

(h) The length of the hearing having regard to the evidence to be called;

(i) The potential prejudice to the respondent with respect to the right to be tried within a reasonable period of time; and

(j) The existence of antagonistic defenses as between co-respondents.

[6] Taking into account Boultbee's submissions and applying the foregoing factors, we are of the view that severance is inappropriate and that a single hearing should be held. The factors which influenced our decision are as follows:

(a) There is a factual and legal connection between the allegations. The conduct at issue relating to Black and Boultbee is dealt with in the same judgments from the U.S. Criminal Proceeding, which form the basis for the section 127(10) hearing.

(b) The costs and prejudice to Boultbee have been minimized by allowing him to attend the hearing by teleconference and participate on only those hearing days that deal with his evidence and arguments.

(c) It is in the public interest to avoid a multiplicity of proceedings based on substantially the same evidence, particularly when this would cause further delay in bringing on the case and entail additional costs to the Commission.

[7] The case law has recognized that inconvenience resulting from a lengthier trial does not constitute undue prejudice in the context of a severance, and although cost is an issue, it is not determinative. Specifically, courts have denied severance where it has been determined that any prejudice was largely confined to having to attend a longer trial, and the courts have recognized that such prejudice could be mitigated by the case management process, which we have attempted to do here. While the hearing before us is scheduled for several days, Boultbee may decide whether he wishes to attend all or only part of the hearing as he did on the first day of the hearing on October 6, 2014. The hearing schedule and timing of the witnesses will be confirmed today and Boultbee will be kept informed of the days on which witnesses will be heard so that he can make an informed decision with respect to his attendance by teleconference or in person.

[8] We find that there is substantial commonality in the allegations against the Respondents, and while Boultbee is not a party to the SEC Proceeding[2], he is a party to the U.S. Criminal Proceeding. The fraud convictions against the Respondents are rooted in the same underlying transactions, specifically the non-competition payments that they both received. While the amounts received by the Respondents differ, the payments relate to the same transaction. Holding separate hearings in these circumstances would be duplicative and inefficient.

[9] In our view, Boultbee has not demonstrated that there has or will be any infringement on his right to have a fair hearing.

[10] On balance, the circumstances are such that severance would be inappropriate and we issued the Severance Order[3] accordingly.

[2] As defined in our Reasons and Decision on a Motion dated June 13, 2014.
[3] Defined in paragraph [11] below.

2. Boultbee Motion for Vary the Severance Order

[11] On September 20, 2014, Boultbee requested that the Commission review our Order relating to severance dated August 12, 2014 (the "**Severance Order**") pursuant to subsection 8(2) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**").

[12] The proper section of the Act to request a variation of an order of the Commission is section 144, as section 8 of the Act deals with a review of a decision of a Director of the Commission and not a decision by the Commission itself. Although Boultbee has invoked an incorrect provision of the Act, we do have discretion under the Act to deal with his request and we propose to do so.

[13] The Commission may revoke and/or vary an order under section 144 if, in the Commission's opinion, the order would not be prejudicial to the public interest. In practice, an order to vary a prior order is only issued in the rarest of circumstances, for example, where new facts come to light or a new law is enacted, making it desirable to vary a decision that was previously issued. The onus is on the applicant, in this case, Boultbee, to demonstrate that the appropriate circumstances exist for us to vary our prior order.

[14] The Commission's case law provides examples in which section 144 has been used to revoke or vary an order. They include situations where the original applicant either misrepresented a fact to the Commission or omitted to state a material fact, or alternatively there was a material fact unknown to the applicant which was not brought to the attention of the original Panel.

[15] We find that Boultbee has not provided us with any new and/or compelling evidence to persuade us to revoke or vary the Severance Order. Boultbee's arguments are substantially the same as the arguments that he made at the severance motion hearing in August. In addition, there has been no change in the legislation since the issuance of the Severance Order and Boultbee has failed to identify any misrepresentation or omission of a material fact that would have affected the Severance Order.

[16] As a result, Boultbee's request to have the Severance Order varied or reversed is dismissed.

3. Boultbee's Request to Delay the Section 127(10) Hearing

[17] Boultbee has also asked for the commencement of this hearing to be delayed to provide him with the necessary time to receive and assess the Panel's reasons on the Severance Order and then appeal the Severance Order if it is not reversed.

[18] Rule 9 of the Commission's *Rules of Procedure* (2014), 37 O.S.C.B. 4168 sets out a number of factors that have to be considered in connection with a request for an adjournment, including the following:

(a) Whether an adjournment would be in the public interest;

(b) Whether all parties consent to the request;

(c) Whether granting or denying the adjournment would prejudice any party;

(d) The amount of notice of the hearing date that the requesting party received;

(e) The number of any previous adjournment requests made and by whom;

(f) The reasons provided to support the adjournment request;

(g) The cost to the Commission and to the other parties to reschedule the hearing;

(h) Evidence that the party made reasonable efforts to avoid the need for the adjournment; and

(i) Whether the adjournment is necessary to provide an opportunity for a fair hearing.

[19] In our view, an adjournment would not be in the public interest considering the number of delays that have already occurred in this matter. In addition, (i) all parties do not consent to an adjournment; (ii) granting an adjournment at this stage would prejudice the other parties who have prepared and are ready to proceed; and (iii) the cost of adjourning would be significant to the tribunal and it would be extremely difficult to reschedule this matter which would result in a further and lengthy delay.

[20] As Boultbee is unrepresented, we should perhaps note that the Severance Order is an interim decision in this proceeding and that, as a matter of practice, the Divisional Court will require that the proceeding be concluded and a final decision issued before it will hear an appeal. This approach was recently confirmed in the case of *Paul Azeff v. Ontario Securities Commission* 2014 ONSC 5365, in which the Divisional Court found that it was premature to deal with an appeal of the Commission's adjournment order in that matter as the applicants had failed to establish that the Commission's refusal to grant an adjournment of the hearing was so manifestly unfair as to amount to a breach of natural justice.

[21] Boultbee is entitled to exercise his right to file an appeal under section 9 of the Act, however, we will not delay the proceeding while he does so.

4. Staff's Motion for Directions

[22] The primary motion dealt with on October 6, 2014 was Staff's motion for directions. Staff has requested that the Panel provide directions regarding the scope of admissible evidence, particularly regarding the proposed witnesses and evidence that may be adduced by them and by Black. Staff's position is based on its view that substantial

portions of the proposed evidence, as reflected in will-say statements, are inconsistent with the scope of evidence permitted by our prior decision in this matter dated June 13, 2014 (see *Re Black* (2014), 37 OSCB 5847 the "**June Decision**").

[23] We received detailed written submissions from Staff and from Black in response as well as oral submissions by both parties. The written and oral submissions relating to Staff's request were extensive and we do not propose to summarize them in these reasons.

[24] The June Decision was quite detailed in setting out the parameters of what we would consider permissible evidence. We do, however, recognize that there is no bright line test for such evidence and do not want to unduly restrict the Respondents in adducing evidence that they believe could mitigate the severity of any sanctions that may be imposed on them.

[25] That said, we will not, directly or indirectly, permit the re-litigation of the matters decided in the U.S. Proceedings. We are concerned that Black's proposal to provide what might be termed as contextual evidence or evidence to re-characterize the evidence from the U.S. Proceedings, may be an attempt to avoid the prohibition against re-litigation. One example of this is the submission that Black needs to adduce evidence relating to the payments received by the Respondents in the CanWest transaction which was not challenged in the U.S. Proceedings.

[26] We would permit testimony from Black relating to what Mr. Howard has described as "box score" matters, which could, by way of example, include a brief description of transactions that included non-competition payments, and Black's general approach to best corporate practices, as they are relevant to the issue of sanctions, but not to the underlying details of the transactions. However, evidence relating to transactions in which the corporate entities were involved could only serve to demonstrate that, to the extent that the governance practices of those companies were identical to those followed in connection with the Forum and Paxton payments, for example, the judgments relating to the U.S. Proceedings were incorrect in making adverse findings in connection with the latter payments.

[27] Although Staff's apprehension that some or all of the matters set out in the will-says appended to Staff's application would raise the issue of re-litigation was reasonable in our view, we have concluded that it would not be appropriate for the Panel to review the will-says of any witness to determine, *a priori*, what questions would be permissible.

[28] As a result, we are not prepared to agree to Staff's request for directions relating to permissible evidence and expect counsel to be guided by the June Decision in determining what questions are appropriate and will elicit responses that are relevant. We would ask Mr. Howard to bear the foregoing admonition in mind when questioning his witnesses and would ask Staff to be judicious in raising objections, recognizing that the Panel will, in coming to its eventual decision, ignore evidence that is improper and/or ascribe the appropriate weight to evidence that strays over the line.

[29] Given that we do not wish to be overly prescriptive in terms of the evidence that Black may lead, we will permit Joan Maida and Donald Vale to testify but expressly subject to the limitations previously summarized in these reasons relating to re-litigation.

[30] We will similarly not agree to Staff's Alternative Motion for Directions. The proposal to introduce trial transcripts and exhibits from the U.S. Proceedings would not be appropriate and they should only be used in cross-examination, when appropriate, in instances where a witness is alleged to have made a prior inconsistent statement under oath.

[31] For the foregoing reasons, Staff's motion and alternative motion are dismissed.

5. Motion for Leave to Call Ronald Safer

[32] Lastly, there is the matter of the motion for leave to call Ronald Safer ("**Safer**") as a witness. On September 29, 2014, Black's counsel filed with the Commission a motion seeking leave to call Safer as a witness. Safer was counsel to Mark Kipnis, the former General Counsel of Hollinger International Inc., in the U.S. Criminal Proceeding.

[33] It is clear from Mr. Howard's submissions on his motion that Safer was not a witness to the impugned transactions or the conduct of Black and would not be an expert witness. Accordingly, there is no basis for his proposed testimony and the motion is, accordingly, dismissed.

Dated at Toronto this 8th day of October, 2014.

"Christopher Portner"

Christopher Portner

"Judith N. Robertson"

Judith N. Robertson