



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e 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 AN APPLICATION FOR DISCLOSURE
BETWEEN DAVIDE AMATO AND S.A. CAPITAL
GROWTH CORP. (APPLICANTS) AND PETER WELSH,
JULIA DUBLIN AND AYLESWORTH LLP (RESPONDENTS)**

REASONS AND DECISION

Hearing:	May 21, 2015	
Decision:	May 29, 2015	
Panel:	Alan Lenczner, Q.C. Timothy Moseley	Commissioner and Chair of the Panel Commissioner
Appearances:	Alan Merskey Pamela Sidey Simon Bieber Lucas Lung Jennifer Lynch	For the applicants Davide Amato and S.A. Capital Growth Corp. For the respondents Julia Dublin and Aylesworth LLP For the respondent Peter Welsh For Staff of the Ontario Securities Commission

REASONS AND DECISION

I. OVERVIEW

- [1] Staff of the Ontario Securities Commission (the **Commission**) investigated an alleged Ponzi scheme. In the course of that investigation, Staff conducted examinations pursuant to section 13 of the *Securities Act* (the **Act**).¹ Davide Amato (**Amato**) and S.A. Capital Growth Corp. (**SA Capital**; together, the **Applicants**), who claim to be victims of the Ponzi scheme, request a disclosure order pursuant to section 17 of the Act, in order to assist them in a civil action.
- [2] For the reasons that follow, we order that disclosure of some of the requested material be authorized.

II. STATUTORY FRAMEWORK

- [3] Section 11 of the Act empowers the Commission to issue an order appointing one or more persons to investigate a matter “for the due administration of Ontario securities law or the regulation of the capital markets in Ontario.” A person appointed under section 11 has the authority, pursuant to section 13 of the Act, to summon and compel a person to testify and to produce documents.
- [4] Clause 16(1)(b) of the Act provides that, except in accordance with section 17, no person shall disclose, except to his/her counsel:
- ...the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13...
- [5] Subsection 17(1) of the Act empowers the Commission to authorize the disclosure of anything protected by section 16 if the Commission “considers that it would be in the public interest” to do so.

III. FACTUAL BACKGROUND

A. Introduction

- [6] This application arises from an alleged Ponzi scheme, the transactions underlying which spawned an investigation by Commission Staff and numerous court proceedings, three of which are relevant to this application. These matters are described in the following paragraphs.

B. Investigation by Commission Staff

- [7] In 2008, the Commission issued an order pursuant to section 11 of the Act, initiating a formal investigation by Staff into the business and affairs of Peter Sbaraglia (**Sbaraglia**) and Robert Mander (**Mander**), among others.
- [8] In 2009, as part of that investigation, Staff conducted section 13 examinations of Sbaraglia and Mander. At those examinations, both Sbaraglia and Mander were represented by Julia Dublin (**Dublin**), of the law firm Aylesworth LLP (**Aylesworth**).

¹ R.S.O. 1990, c. S.5, as amended.

C. SA Capital's Application to Appoint a Receiver

- [9] In early 2010, SA Capital commenced an application in the Superior Court of Justice. The application named Mander and an associated corporation as respondents and sought the appointment of a receiver over the assets, properties and undertakings of Mander and the corporation.
- [10] The Court appointed a receiver on March 17, 2010. On that same day, Mander died, and on March 31 the application was continued against the executor of his estate.²
- [11] In April 2010, the Commission issued orders pursuant to subsection 17(1) of the Act, authorizing disclosure of the transcripts of the section 13 examinations of Mander and Sbaraglia (the **Section 13 Transcripts**) to the receiver for the purposes of carrying out its duties. Mander was deceased, and Sbaraglia did not object to the request for disclosure.

D. The Commission's Application to Appoint a Receiver

- [12] In September 2010, the Commission commenced an application in the Superior Court of Justice, seeking the appointment of a receiver over the business and assets of Sbaraglia, his wife, and related corporations (the **OSC Application**).³
- [13] In the course of that application, cross-examinations were conducted of Sbaraglia and of a Commission Staff investigator, based on affidavits submitted by those two individuals and filed in the proceeding. Those transcripts are available through the court's process.

E. Action Brought by the Applicants

- [14] The Applicants, who say they are victims of the Ponzi scheme, commenced an action in the Superior Court of Justice (the **Amato Action**)⁴ in September 2010, claiming damages from Aylesworth, Dublin and Peter Welsh, another member of that firm. The Applicants plead that the defendants provided legal services to them, as well as to the perpetrators of the Ponzi scheme, among others.
- [15] In the Amato Action, the Applicants allege that Dublin breached fiduciary and professional duties owing to them, by making misleading statements to Commission Staff and omitting to disclose to Staff the existence of the Applicants. It is alleged that the misleading statements and misconduct occurred during and surrounding the section 13 examinations of Sbaraglia and Mander.

IV. RELIEF SOUGHT

- [16] The Applicants' request for relief in their Notice of Motion was later re-framed in their Memorandum of Fact and Law and in oral submissions. In their written materials, the Applicants ask that the Commission:
- a. authorize the disclosure of the Section 13 Transcripts;
 - b. authorize the disclosure of the transcripts of the two cross-examinations conducted in the OSC Application, referred to in paragraph [13] above (the **Court Transcripts**);

² *SA Capital Growth Corp. v. Christine Brooks as Executor of the Estate of Robert Mander, Deceased and E.M.B. Asset Group Inc.*, Toronto, Court File No. 10-8619-00CL (Ont. Sup. Ct.).

³ *Ontario Securities Commission v. Peter Sbaraglia et al.*, Toronto, Court File No. CV-10-8883-00CL (Ont. Sup. Ct.).

⁴ *Davide Amato and S.A. Capital Growth Corp. v. Peter R. Welsh et al.*, Toronto, Court File No. CV-10-410760 (Ont. Sup. Ct.).

- c. authorize the disclosure of other transcripts, correspondence, documents and things;
- d. order that section 16 of the Act “does not prohibit the disclosure and use of” various requested materials and evidence for certain purposes related to the Amato Action; and
- e. authorize examination upon the Section 13 Transcripts, the Court Transcripts, and Dublin’s conduct and comments in connection with the Commission’s investigation.

[17] Not all the relief requested in writing was pursued in oral submissions.

V. ANALYSIS

A. Issue to be Determined

[18] This tribunal is not a court, and has no inherent jurisdiction. We can order only what we are empowered to order. Section 17 of the Act permits us to authorize disclosure of things protected by section 16, if we consider it to be in the public interest to do so.

[19] We have no power under section 17 to authorize disclosure, use, or questioning upon, things not protected by section 16. The Court Transcripts, for example, are not protected by section 16.

[20] This application therefore presents one principal issue: Is it in the public interest to authorize disclosure of some of the materials and evidence protected by section 16 of the Act?

B. The Public Interest Test

[21] Sections 11, 13, 16 and 17 fall within Part VI of the Act, which relates to investigations and examinations. The public interest test prescribed by section 17 must be considered in the context of that Part. We must balance the Applicants’ interest in disclosure against the confidentiality interests of the parties and witnesses and Staff’s unfettered ability to exercise its investigative powers.⁵

[22] In *Re X*, the Commission noted that:

[t]he 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.⁶

[23] The *Re X* panel went on to find that:

[w]hatever 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.**⁷ [emphasis added]

[24] The *Re X* matter was typical of cases where third parties seek disclosure to assist them in the pursuit of their civil action against subjects of the Commission’s investigation.

⁵ *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] SCJ No. 62 at para. 29; *Re Black* (2008), 31 O.S.C.B. 10397 at para. 135.

⁶ *Re X*, 2007 CarswellOnt 44, 30 OSCB 327, at para. 32.

⁷ *Ibid.*, at para. 33.

[25] The Applicants' request before us features an important distinguishing characteristic. The Applicants seek disclosure not to advance a claim against the perpetrators of the alleged Ponzi scheme (*i.e.*, the subjects of the investigation), but to assist in their claim against their own lawyers in respect of the lawyers' conduct during the investigation.

C. Relevant Factors

[26] Bearing this distinction in mind, we turn to weighing the factors relevant to a determination of whether it is in the public interest to order disclosure. In the context of this case, those factors are:

- a. the integrity of Staff's investigation;
- b. any confidentiality interest associated with the compelled material; and
- c. the purpose for which the compelled material is sought to be used.

[27] As to the integrity of Staff's investigation, Staff does not oppose disclosure of the compelled material. Staff has concluded its investigation and submits that no harm or prejudice would result from disclosure.

[28] The need to protect the confidentiality of the Section 13 Transcripts has been eliminated. The Commission has previously authorized the disclosure of those transcripts for use by the receiver in court proceedings.

[29] The Applicants do not seek disclosure to assist them in pursuing the subjects of Staff's investigation. Instead, the Applicants wish to use the compelled material to support their claim against Dublin and Aylesworth.

D. Conclusion

[30] The Applicants' claims in the Amato Action directly engage the issue of Dublin's interactions with Staff during the investigation. Dublin's interactions with Staff, including statements she made at the section 13 examinations on behalf of Mander and Sbaraglia, are clearly relevant to the issues to be determined in the Amato Action.

[31] In our view, that fact distinguishes this case from those in which parties seek disclosure to assist them in pursuing the subjects of a Commission investigation. There is no appreciable confidentiality interest associated with the two Section 13 Transcripts. Staff has concluded its investigation and there is therefore no risk of harm to the integrity of that investigation.

[32] Lawyers appearing before the Commission are officers to the Commission, as they are to a court. While they are free to represent their clients' interests vigorously, they must nevertheless conduct themselves in a frank and honest manner. The investigative process would be compromised if it were otherwise. We make no findings on the allegations in the Amato Action, but note that they strike at the integrity of the Commission's processes. Disclosure of the Section 13 Transcripts and other related communications of Dublin and Aylesworth is in the public interest.

VI. DECISION

[33] For the reasons set out above, and pursuant to subsections 17(1) and (4) of the Act, we authorize the disclosure of:

- a. the Section 13 Transcripts; and

- b. any document, correspondence, information or evidence, protected by section 16 of the Act, that relates to Dublin's or Aylesworth's interaction with Commission Staff in the course of their investigation;

provided that anything disclosed shall be used only in the discovery, trial and adjudication of the Amato Action or any appeal therefrom.

[34] Counsel for Dublin and Aylesworth submitted both in writing and orally before us that if the Applicants were to succeed on this application, we should also authorize disclosure of any section 13 examination of Amato. This relief was not properly sought, and in any event, we do not consider that the reasons justifying the disclosure authorized in paragraph [33] above would extend to any section 13 examination of Amato.

Dated at Toronto this 29th day of May, 2015.

"Alan Lenczner"

Alan Lenczner, Q.C.

"Timothy Moseley"

Timothy Moseley