



Ontario
Securities
Commission

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**IN THE MATTER OF
DONALD MASON**

**ORAL REASONS AND DECISION ON A STAY MOTION
Subsection 8(4) of the *Securities Act*, RSO 1990, c S.5**

Hearing: April 2, 2018

Decision: April 2, 2018

Panel: Janet Leiper Commissioner and Chair of the Panel

Appearances: Michael Denyszyn For Staff of the Commission

Christopher J. Sommerville For Donald Mason

ORAL REASONS AND DECISION ON A STAY MOTION

The following reasons have been prepared for publication in the Ontario Securities Commission Bulletin, based on the transcript of the reasons delivered orally in the hearing, and as edited and approved by the Panel, to provide a public record.

- [1] This is a motion to stay a decision of the Director, pending a review of that decision, pursuant to subsection 8(4) of the *Securities Act*¹.
- [2] The Applicant, Donald Mason, is a mutual fund dealing representative. In July 2017, the Applicant became a non-paid volunteer leader or “Lay Minister” with his church. As a result of his decision, Staff of the Ontario Securities Commission recommended that terms and conditions be placed on the Applicant to separate the registered activity from his activity as a Lay Minister.
- [3] The Applicant was given an opportunity to be heard before the Director of the Compliance and Registrant Regulation branch on October 30, 2017.
- [4] For reasons given on November 30, 2017, the Director accepted Staff’s recommendation, which was to prohibit the Applicant from acting as a dealing representative for any person who is a member of the congregation of the Apostolic Pentecostal Church of Pickering (the **Church**) or their spouse, parent, brother, sister, grandparent or child.
- [5] As a result of the Director’s decision, the terms and conditions appear on a search of the National Registration Search database maintained by the Canadian Securities Administrators.
- [6] The Applicant’s sponsor, Quadrus Investment Services Ltd. (**Quadrus**), requires the Applicant to ask prospective new clients if they are members of the Church and his branch manager contacts new prospective clients to confirm they are not members of the Church.
- [7] The Applicant has applied for a review of the Director’s decision under subsection 8(2) of the *Securities Act*.
- [8] The Applicant’s motion today seeks to have the terms and conditions removed, pending his review, including from his registrant profile. He proposes that pending the review, he will provide an undertaking that he will avoid taking on any new mutual fund clients he knows to be a member of the Church or who he knows to be the spouse or child of a member (member being defined as an individual whose written application for membership in the Church has been accepted—it would not include persons who attend Church services and have not made such a written application).
- [9] The parties agree that the test to be applied is articulated in *RJR-MacDonald*² by the Supreme Court of Canada. It is a three-part test and I will deal with each part in turn.

¹ RSO 1990. c S.5.

² *RJR – MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (***RJR-MacDonald***).

1. Is there a serious issue to be tried?

- [10] The parties agree that this is a low threshold and it is met in this case.
- [11] The Applicant argues that the terms and conditions are overbroad and infringe his freedom of conscience and religion under section 2(a) of the *Charter*³. He also argues and will argue that the terms and conditions discriminate against him on the basis of creed and therefore contravene the *Human Rights Code*⁴.
- [12] I agree that the Applicant met this prong of the test.

2. Will the Applicant suffer irreparable harm if the application is refused?

- [13] The Applicant argues that his professional reputation has been and will be adversely affected by the Director's decision and the terms and conditions which restrict him due to a potential conflict of interest between his activities at the Church and as a mutual fund dealer. He argues that the terms and conditions have a deleterious impact on his ability to earn income as a mutual fund dealer.
- [14] Staff argue that the Applicant has not met this branch of the test. Staff argue that any harm is speculative and no evidence has been put forward to demonstrate this type of harm.
- [15] As noted by the Court of Appeal, and agreed to as a correct statement of the law by both parties, in *Sazant v The College of Physicians and Surgeons (Ontario)*⁵ at paragraph 11: "[e]vidence of irreparable harm must be clear and not speculative, and it must be supported by evidence that demonstrates that [the Applicant] would suffer it."
- [16] The Applicant argues that the publication of the terms and conditions on the National Registration Service put him at a disadvantage when compared to dealing representatives without terms and conditions.
- [17] Staff point to many similar cases where outside activities require such terms and conditions. Further, Staff submits that the terms and conditions have been published and there has been no evidence of actual harm as a result of that publication to date.
- [18] In brief oral evidence tendered at the beginning of the hearing of this motion, the Applicant testified that last week, he was provided a new book of business that included two mutual fund clients that he has yet to contact. Staff submit that this evidence, along with the willingness of Quadrus to administer the terms and conditions, support a conclusion that the Applicant has been able to pursue his livelihood.
- [19] The Applicant's terms and conditions flow only from his roles. In the Director's reasons for imposing the terms and conditions, the Director was careful to note that these did not in any way reflect on the Applicant's integrity. This continues

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (**Charter**).

⁴ RSO 1990 c H.19.

⁵ 2011 Carswell Ont 15914; 219 A.C.W.S. (3d) 19.

to be the case. The evidence suggests that the Applicant enjoys the confidence of Quadrus. The firm has agreed to administer the terms and conditions and the Applicant has recently been provided with an additional book of business.

- [20] The Applicant himself has been aware of and taken steps to avoid conflicts between his role as a dealing representative and his role with his Church. He has been careful in the past to avoid marketing his services as a registrant to other members of the Church congregation. He also has offered, as noted above in these reasons, to provide an undertaking, pending the review of the Director's decision. In essence, he does not challenge the need for boundaries between the roles, but he challenges the manner in which the Ontario Securities Commission has imposed those boundaries and the impact on his *Charter* and human rights. These are matters for the hearing on the merits.
- [21] The Applicant also argues that prospective clients would find it intrusive for him to make inquiries as to their religious affiliation as part of administering the terms and conditions. Quadrus requires that he specifically ask prospective new clients whether they are members of the Church and confirm in writing that they are not, and his branch manager is to contact each prospective new client to confirm that they are not members of the Church.
- [22] The Applicant argues that these steps that Quadrus requires him to take "irreparably disable" him from soliciting new mutual fund business. However, the record provides no evidence to support this conclusion. There have been no failed attempts at soliciting new business, nor problematic conversations about the rationale for avoiding conflicts between the Applicant's two roles.
- [23] I am unable to conclude that the Applicant has met the onus of showing irreparable harm as required by the second branch of the *RJR-MacDonald* test.
- [24] I have considered whether, as in the *Livent* decision of the Court of Appeal for Ontario⁶, the strength of the issue to be heard can compensate for weak evidence of irreparable harm. In *Livent*, the harm was a substantial damages and costs award. There was some evidence of monetary harm and sufficient disruption of the appellant's business.
- [25] These circumstances are different. The harm here can fairly be described as speculative. It requires an assumption that the reasons for the implementation of terms and conditions cannot be meaningfully communicated to prospective clients. Accordingly, I find the second branch of the test has not been met.
- [26] I will now address the balance of convenience issue.

3. Does the balance of convenience favour granting a stay?

- [27] It is appropriate at this stage to consider the public interest (see *RJR-MacDonald*, pages 342 to 345).
- [28] The Ontario Securities Commission acts in the public interest through its mandate to protect investors. The Director's decision was to protect potentially vulnerable investors and avoid conflicts of interest. The Applicant's role as a Lay

⁶ *Livent Inc (Special Receiver and Manager of) v. Deloitte and Touche*, 2016 ONCA 395; [2016] O.J. 2659 (**Livent**).

Minister brings him into contact with potentially vulnerable members of the community. He has recognized this by avoiding marketing within his congregation in the past.

- [29] The Applicant suggests that an undertaking be substituted with the effect that potential new clients would not see the terms and conditions on the National Registration Service. Staff argue that this would be a reduced level of transparency and contrary to the public interest.
- [30] The application does raise serious questions to be heard. The Applicant is able to continue to practice his livelihood through his sponsoring firm. There is a timetable in place and a hearing date scheduled for late May.
- [31] In all of the circumstances, and in the absence of any evidence of irreparable harm or damage to the public interest by imposing a stay, I conclude that the balance of convenience favours maintaining the terms and conditions as imposed.
- [32] The application is dismissed.

Approved by the Chair of the Panel on this 10th day of April, 2018.

"Janet Leiper"

Janet Leiper