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 X INC.

DECISION
(HELD *IN CAMERA)*

Hearing:	August 31, 2010 and September 8, 2010	
Decision:	October 26, 2010	
Panel:	James E. A. Turner	-Vice-Chair (Chair of the Panel)
	Carol S. Perry	Commissioner
	James D. Carnwath	Commissioner
Counsel:	Karen Manarin Sean Horgan Cullen Price Pavel Malysheuski	-for Staff of the Ontario Securities Commission
	Joel Wiesenfeld Andrew Gray	-for the Bank

DECISION

COMMISSIONER CARNWATH

[1] The Executive Director of the Ontario Securities Commission (the "Commission") applies *in camera* pursuant to s. 144 of the *Securities Act* R.S.O. 1990, c.S.5, as amended (the "*Act*"). The Executive Director seeks an order pursuant to s. 144 of the *Act* varying or revoking the Confidential Reasons and Order of the Commission dated March 25, 2010 (the "Decision") in this matter. The Bank opposes any change to the Decision which required certain of its account holders be given notice of Staff's application under s. 17(1) of the *Act.*

[2] The matters to be resolved are:

(A) Our reasons for imposing conditions in an order sealing the Fresh Evidence which the Executive Director submitted in support of the application.

(B) Were certain of the Bank's account holders entitled to notice of Staff's application under s. 17(1) of the *Act,* as the Decision directed?

(C) What is the appropriate test on a s. 144 application?

I. BACKGROUND

[3] On November 23, 2009, Staff requested that a panel of the Commission (the "Panel") issue an order under s. 17(1) of the *Act* permitting a foreign securities regulator (the "Foreign Securities Regulator") to disclose to a foreign criminal law enforcement agency (the "Foreign Criminal Law Enforcement Agency") certain compelled documents relating to two account holders of the Bank.

[4] Staff provided the Bank with notice of the motion pursuant to ss. 17(2) of the *Act.* On December 2, 2009, Staff and counsel for the Bank made submissions *in camera* on the motion. The only facts that were relied upon were the agreed facts, reproduced as follows:

(i) The OSC issued an investigation Order under section 11 of the *Act.*

(ii) Under the section 11 Order, Staff delivered a summons to the Bank for the production of documents relating to two account holders (the

"Documents").

(iii) The Bank responded to the summons and delivered the Documents to Staff.

(iv) The Foreign Securities Regulator obtained the Documents pursuant to an Order under section 11(l)(b) of the *Act.*

(v) Staff seek an Order under section 17 of the *Act* permitting the Foreign Securities Regulator to disclose the Documents to the Foreign Criminal Law Enforcement Agency.

(vi) Staff provided notice to the Bank pursuant to section 17(2) of the *Act.*

(vii) The Bank objects to the making of the proposed Order without notice to the two account holders.

[5] Staff submitted that notice to third parties, such as the account holders, was not required under ss. 17(2)(a). The Bank submitted that ss. 17(2)(a) of the *Act* required that notice be provided to the two corporate account holders.

[6] In its Decision, the Panel held that "persons named by the Commission" in ss. 17(2)(a) of the *Act* included persons referred to in a s. 13 summons. It ordered that notice of Staff's motion and an opportunity to be heard be given to the two corporate account holders, who were indeed named in the s. 13 summons. The Decision turned primarily on the interpretation of ss. 17(2)(a) of the *Act.*

[7] The Panel also concluded that it was "not aware of any reason why it would not be practicable to give notice" to the two corporate account holders and provide them with "an opportunity to be heard on this application".

[8] Following the issue of the Panel's confidential reasons and order on March 25, 2010, the Executive Director made the application which is the subject of this hearing.

[9] The Notice of Application recites that circumstances have changed such that it is not practicable to provide notice to the two corporate account holders. It further recites that Staff are in possession of affidavit evidence (the "Fresh Evidence") that demonstrates that it is not practicable to provide notice to the two corporate account holders.

[10] The Notice of Application also discloses that the Fresh Evidence contained confidential information that should not be disclosed. Staff sought a sealing order for the Fresh Evidence before the hearing of this application.

II. ANALYSIS

(A) Our reasons for imposing conditions on an order sealing the Fresh Evidence which the Executive Director submitted in support of the application.

[11] At the opening of the *in camera* hearing, counsel for Staff told us that the first order of business from Staffs perspective was a motion for a sealing order of the Fresh Evidence. The order was sought not only to keep the Fresh Evidence confidential but also to prevent its disclosure to the Bank. Evidently the declarant provided the Fresh Evidence to Staff on the basis that it would be sealed and not given to the Bank. If the Panel decided that the sealing order would not issue, Staff's intention was to request an adjournment to consider whether to abandon the application in the absence of a sealing order, or to proceed and argue s. 144 of the *Act* in any event.

[12] Not surprisingly, counsel for the Bank was quick to point out the difficulties facing the Bank, flowing from Staff's request for a sealing order. Counsel noted that the Bank was not agent or proxy for the account holders whose rights and interests were at issue.

[13] The Panel received copies of the Fresh Evidence and adjourned for a short recess. Upon its return, the Chair told the parties that the Panel had not examined the Fresh Evidence. The Panel proposed that counsel for the Bank would leave the hearing room. Before counsel for the Bank withdrew, the Panel heard submissions from Staff with respect to the sealing order.

[14] Counsel for the Bank then withdrew and Staff counsel told the Panel that it proposed to make its submissions by referring to the paragraph numbers in the declaration without referring to that evidence. Counsel for the Bank then re-entered the hearing room and counsel for Staff made extensive submissions on why the sealing order should be granted without giving the Bank an opportunity to examine the Fresh Evidence.

[15] Staff submitted that the procedure they proposed was analogous to an "O'Connor" application, where evidence is sought to be led in a criminal prosecution without disclosing it to the accused. With respect, we disagree.

[16] On an O'Connor application, the court is involved in reviewing the evidence. If it is relevant to the accused's ability to make full answer and defense, following any called-for redaction, the accused must receive it. Since Staff made it clear that no part of the Fresh Evidence could be revealed to the Bank or the account holders, any meaningful redaction could not take place.

[17] The many cases cited by Staff in support of its submission deal with applications by members of the media for access to contents of search warrants obtained during the course of an investigation. Those cases do not help us.

[18] Rule 15.2 of the *OSC Rules of Procedure* states that,

> If a party proposes to introduce new evidence at the hearing of the application for a further decision or for a revocation or variation of a decision, the party shall, at least 10 days before the hearing, advise every other party as to the substance of the new evidence and shall deliver to every other party copies of all new documents that the party will rely on at the hearing.

The rule requires that the Bank receive the new evidence. Nowhere in its submissions did Staff refer to r.15.2 nor make submissions as to why it could be disregarded.

[19] Following submissions by counsel for the Bank, the Panel adjourned over the lunch recess. On its return, the decision of the Panel was that it would grant a sealing order, but on conditions. The Fresh Evidence was to be disclosed on a confidential basis to legal counsel for the Bank and one of the Bank's senior legal officers. The order was to last for 6 months,

subject to the right of Staff to apply for an extension.

[20] The Bank stressed the lack of procedural fairness in what Staff proposed. We agree with its submission that to withhold from the Bank the substance of the Fresh Evidence would result in a process devoid of procedural fairness. The concerns of the Panel were to ensure that the Bank, as a party to the proceeding, had a fair opportunity to respond to Staff's application in accordance with the principles of natural justice. To conclude otherwise would be contrary to the public interest.

(B) Were certain of the Bank's account holders entitled to notice of Staff's application under s. 17(1) of the *Act,* as the Decision directed?

[21] On the return date of September 8, 2010, Staff told us it was withdrawing the motion based on the Fresh Evidence and wished to proceed to argue the s. 144 application. This removed the necessity to address any of the arguments made by Staff that were premised on new or fresh evidence. At Staff's request the hearing continued *in camera.*

[22] Staff opened its submissions on the s. 144 application with the following statement:

> What we seek to do is clarify and explain various aspects of the original decision and what staff will be doing for you today is pointing out inaccuracies in the decision.

[23] Staff then drew our attention to the OSC decision in *Re Ultramar PLC (1991),* 14 O.S.C.B. 5221 and the following finding:

> After hearing the submissions of all counsel, we concluded that when an application is brought under provisions of section 140 (now s.144) of the Act, for an Order revoking or varying a decision made by the Commission, and that application is disputed by the part[y] that applied for and received the Order or Ruling, we should, except in the most unusual circumstances, before we consider rescinding or varying the Order or Ruling, find that the

> original applicant had either misrepresented a fact to the Commission or omitted to state a material fact, or alternatively that there was, unknown to that applicant, a material fact which was not therefore brought to the attention of the original panel. We should also consider whether or not the knowledge of such material fact by the original panel would in our opinion have been likely to have affected the Order or Ruling made. In this case, none of these circumstances were in our opinion present. We do not believe that any of the facts raised by counsel for Ultramar could be considered to be material in the circumstances of the Order and Ruling that were made on October 18, 1991. Accordingly we denied the request of Ultramar.

Staff then told the Panel that it was proceeding on the first part of the statement in *Ultramar,* i.e. that the original applicant had either misrepresented a fact to the Commission or omitted to state a material fact which Staff identified as the inaccuracies in the Decision it would establish. We are at a loss to understand this submission. It is Staff who is the applicant in this matter. How Staff could rely on a fact which it misrepresented or omitted to state is beyond us.

[24] Staff drew our attention to the decision in *Re Universal Settlements International Inc.* (2003), 26 O.S.C.B. 2345, particularly the following finding:

> Section 144 is appropriate to be used to vary or revoke a decision of the Commission when new facts come to light, or new law is enacted, making it desirable to change the decision that has been rendered. I am not aware of a section 144 proceeding being used to review and second-guess a decision of another panel of the Commission, although there is nothing in section 144 that would prevent us from doing that if we decided it was the right thing to do.

Following on the reference to *Re Universal Settlements International Inc.,* Staff submitted that, based on the inaccuracies in the Decision that would be pointed out to the Panel, it would be "the right thing to do" to revoke or vary the order.

[25] The first inaccuracy alleged by Staff was a submission by the Bank referred to in paragraph 51 of the Decision in which the Bank submitted that the Commission placed significant weight on the consent of the party affected in determining whether to order disclosure under ss. 17(1) of the *Act (Re Y* (2009), 32 O.S.C.B. 7188). When it was pointed out to Staff that a submission by the Bank could hardly qualify as an inaccuracy in the Decision, Staff agreed.

[26] To establish the second inaccuracy alleged by Staff, we were referred to para. 29 of Staff's Factum. That paragraph refers to the Dagenais/Mentuck test setting out when a publication ban/sealing order can be ordered. At this point in the hearing the sealing order question had been disposed of and the Panel was concerned with the alleged inaccuracies in the Decision whereby the Panel directed that the account holders must be given notice of the s. 17 application. We are not satisfied that principles developed to respond to an application for a sealing order have very much to do with the considerations applicable to an application for a s. 144 order.

[27] There then followed a lengthy examination of those sections in the Decision where the Panel referred to the bank's obligation to its account holders. Staff's submission, as we understand it, was that in balancing the importance of cooperation with American authorities and the Bank's obligation to its account holders, the Panel was inaccurate in that balancing. We reject this submission.

[28] It is important to remember the issues identified by the Panel in the Decision. The first issue the Panel felt it had to decide was whether the account holders were entitled to reasonable notice and an opportunity to be heard under ss. 17(2)(a) of the *Act* in connection with the application pursuant to s. 17. of the *Act.* In paragraph 37 of the Decision, the Panel engaged in an analysis of ss. 17(2)(a) of the *Act.* In doing so it applied the principles of statutory interpretation set out by the Supreme Court of Canada in *BellExpressVu Limited Partnership v.* R., [2002] S.C.J. No. 43. The Panel concluded its analysis in para. 40:

> In interpreting the words of subsection 17(2)(a), it is clear that they refer to persons or companies other than the person or company that gave the testimony or from whom the documents or information were obtained. Those latter persons are expressly specified in subsection 17(2)(b) of the *Act* as persons to whom notice must be given. It is equally clear that clauses (a) and (b) are conjunctive, joined by the word "and", suggesting two separate categories of persons.

[29] In its analysis of ss. 17(a) and (b), nowhere does the Panel refer to or consider the Bank's obligation of confidentiality to its account holders, nor was it necessary for the Panel to do so. Nowhere in Staff's submissions has the Panel's analysis of s. 17(2)(a) and (b) been characterized as an "inaccuracy". In the final analysis, the Bank's obligations to its account holders were irrelevant to the Panel's decision.

(C) What is the appropriate test on a s. 144 application?

[30] No decision was cited to us, nor do we know of one, where the Executive Director has applied under s. 144 to vary or revoke a decision which found against Staff's submissions in a contested hearing. There is an explanation for this.

[31] The *Act* is structured to make it clear that Staff cannot appeal a Panel decision on the merits. Subsection 9(1) provides that "a person or company" directly affected by a final decision of the Commission may appeal to the Divisional Court. Staff is neither a person or a company. Subsection 9(4) provides that the Commission is the respondent to an appeal taken under s. 9. These two sections read together express the legislative intention that Staff shall have no right of appeal.

[32] Nevertheless, the *Act* recognizes that situations may arise where it is obvious that a decision cannot stand. Examples include:

- A change in the law not brought to the attention of the Panel;

- A conclusive and binding decision not brought to the attention of the Panel;
- A misstatement of a material fact affecting the outcome; and
- Where "fresh evidence" has been discovered that would have a bearing on the outcome and which was not discoverable at the time of the hearing.

[33] In *Re Banks* (2003), 26 O.S.C.B. 5189, a misunderstanding caused the Panel to assume that counsel for Mr. Banks had completed his submissions, when he had yet to make submissions on sanctions. The Executive Director, to his credit, brought a s. 144 application to permit Mr. Banks to seek a variation permitting submissions on sanction.

[34] Earlier in these reasons we referred to the statement in *Re Universal Settlements,* above, cited by Staff. We repeat the statement here for convenience.

> Section 144 is appropriate to be used to vary or revoke a decision of the Commission when new facts come to light, or new law is enacted, making it desirable to change the decision that has been rendered. I am not aware of a section 144 proceeding being used to review and second-guess a decision of another panel of the Commission, although there is nothing in section 144 that would prevent us from doing that if we decided it was the right thing to do.

[35] With respect, the statement on its face is wrong in law. Only if the words "in accordance with applicable law" are added following the words "the right thing to do" can any useful meaning be ascribed to the statement. We do not say there can never be a situation where the Executive Director can apply under s. 144 to revoke or vary a Panel decision that went against Staff. We do say that only in the rarest of circumstances should such an application be considered. If the s. 144 application is, in effect, simply an appeal, it should be rejected as contrary to the intention of the *Act* and contrary to the public interest.

III. CONCLUSION

[36] We find it would be contrary to the intention of the *Act* and to the public interest to grant the Executive Director's application. The application is dismissed.

[37] We find no compelling reason to interfere with the Decision.

DATED at Toronto this 26th day of October, 2010.

"James D. Carnwath"

James D. Carnwath

"Carol S. Perry"

I concur: Carol S. Perry

"James E. A. Turner"

I concur: James E. A. Turner