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

Citation: El-Bouji (Re), 2019 ONSEC 19
Date: 2019-05-31
File No. 2018-28

IN THE MATTER OF
ISSAM EL-BOUJI

REASONS FOR DECISION ON MOTION

Hearing:	In writing	
Decision:	May 31, 2019	
Panel:	D. Grant Vingoe	Vice-Chair and Chair of the Panel
Appearances:	Joseph Groia	For Issam El-Bouji
	Derek Ferris	For Staff of the Commission

TABLE OF CONTENTS

REASONS FOR DECISION ON MOTION

I. OVERVIEW

[1] The Respondent, Issam El-Bouji, has brought a motion challenging the jurisdiction of the Ontario Securities Commission (the **Commission**) to hear the allegations made by Staff of the Commission in this proceeding. In advance of hearing that jurisdiction motion, the Respondent brought a second motion seeking, among other things, an order striking certain paragraphs of a factum and affidavit filed by Staff of the Commission on the jurisdiction motion.

[2] On May 27, 2019, I issued an order dismissing the Respondent's motion to strike, with reasons to follow. These are my reasons for that decision.

II. BACKGROUND

[3] This proceeding was commenced by a Statement of Allegations dated May 24, 2018 and a Notice of Hearing issued on May 25, 2018.

[4] Staff of the Commission (**Staff**) make the following allegations against the Respondent:

a. in 2014, the Respondent entered into a settlement agreement with Staff dated April 14, 2014 (the **2014 Settlement Agreement**), in which the Respondent admitted to breaches of Ontario securities law and agreed to certain sanctions;

b. the agreed sanctions were imposed as part of an order of the Commission dated April 16, 2014 (the **2014 Order**), which approved the 2014 Settlement Agreement;

c. from January 17, 2015 to December 31, 2017, the Respondent failed to comply with the 2014 Order; and

d. as a consequence, the Respondent breached s. 122(1)(c) of the Ontario *Securities Act*[1] and acted contrary to the public interest.

[5] On April 12, 2019, the Respondent filed a Notice of Motion (the **Jurisdiction Motion**[2]) seeking the following relief:

a. an order confirming that the Commission has no jurisdiction to hear some or all of the allegations in the Notice of Hearing and Statement of Allegations on the grounds of institutional bias, a breach of natural justice, a breach of its duty of fairness and a misuse of its public interest jurisdiction;

b. an order that the Commission dismiss, stay, or adjourn these proceedings, in whole or in part; and

c. such further and other relief as is appropriate.

---

[1] RSO 1990, c S.5.

[2] The Respondent refers to this as the "Fairness Motion", and I use the defined term employed by Staff solely for convenience.

[6] The Jurisdiction Motion also states that:

> the 2014 Order is executory as it states that "[t]he Commission will make an order". No further order was made. Without that further order, there is no order that Mr. Bouji could have breached and no basis for a hearing under s.127 of the *Securities Act*.

[7] In response to the Jurisdiction Motion and the affidavit and submissions filed by the Respondent, Staff filed the Affidavit of Michael Denyszyn, sworn April 18, 2019 (the **Staff Affidavit**) and a Responding Factum dated April 29, 2019 (the **Staff Factum**).

[8] The Jurisdiction Motion is scheduled to be heard on June 5, 2019, at the scheduled commencement of the hearing on the merits in this proceeding.

[9] On May 1, 2019, the Respondent filed a Notice of Motion (the **Motion to Strike**) seeking the following relief:

a. an order striking paragraphs 83-98 of the Staff Factum and paragraphs 9, 12-41, 45-58, and 60-62 of the Staff Affidavit (collectively, the **Disputed Paragraphs**);

b. in the alternative, an order stating that the Disputed Paragraphs are irrelevant to the Jurisdiction Motion and Staff is not to call evidence with respect to the issues raised in the Disputed Paragraphs;

c. directions concerning Staff's failure to disclose materials reviewed by Vice Chairs Monica Kowal and D. Grant Vingoe in determining how monies received under the 2014 Settlement Agreement are to be dealt with; and

d. such further and other relief as is appropriate.

[10] The parties agreed that the Motion to Strike would be heard in writing at a hearing held *in camera* on May 7, 2019.[3] The parties also agreed to a schedule for the delivery of written submissions on the Motion to Strike.

[11] At the same hearing, the parties advised the panel that Staff had made certain disclosures to the Respondent in an attempt to satisfy the Respondent's disclosure request specified in subparagraph c. of paragraph [9] above. Counsel for the Respondent advised that he did not at that time plan to make any submissions on the request for directions relating to such disclosure. The submissions filed by the Respondent on the Motion to Strike made no request for directions. Accordingly, I consider that aspect of the motion abandoned.

[12] On May 27, 2019, after reviewing the submissions filed by both parties, I issued an order dismissing the Motion to Strike, with reasons to follow. These are the reasons for that decision.

[3] The May 7, 2019 hearing was held *in camera* because it dealt with matters involving privacy concerns.

III. ANALYSIS

[13] The Motion to Strike raises the following issues:

a. What test should be applied on a motion to strike?

b. Do the Disputed Paragraphs meet the test?

c. Should the Respondent's alternative request for relief be granted?

A. What test should be applied on a motion to strike?

[14] Both parties refer to Rule 25.11 of Ontario *Rules of Civil Procedure*[4], which states:

> The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the court.

[15] While Rule 25.11 is most commonly used to strike pleadings in civil cases, it is also used to strike affidavits.[5] Neither party provided submissions on the test for striking written argument. However, given my findings below with respect to the Staff Affidavit, I need not consider whether the same test or other considerations might apply to the Disputed Paragraphs of the Staff Factum.

[16] I find that Rule 25.11 provides an appropriate guideline to consider in a motion to strike evidence in Commission proceedings.

[17] Rule 25.11 does not list irrelevance as a ground for striking evidence. There is support for the proposition that irrelevance alone is insufficient to warrant striking evidence on a preliminary motion, absent other grounds set out in Rule 25.11.[6]

[18] I agree. If the only concern with the evidence at issue is relevance, the determination of whether that evidence is admissible is best left to the panel hearing the main motion.

B. Do the Disputed Paragraphs meet the test?

[19] None of the grounds set out in Rule 25.11 have been demonstrated by the Respondent.

[20] The Respondent's argument to strike the Disputed Paragraphs focusses primarily on the alleged irrelevance of the Disputed Paragraphs. The Respondent submits that the Disputed Paragraphs are included in the Staff Affidavit as evidence of a course of conduct that Staff alleges demonstrates that the Respondent viewed the 2014 Order as valid and enforceable. The Respondent submits that the

---

[4] RRO 1990, Reg 194.

[5] *Allianz Global Risks US Insurance Co v Canada (Attorney General)*, 2016 ONSC 29 at para 10 [***Allianz***]; *876502 Ontario Inc v IF Propco Holdings (Ontario) 10 Ltd*, [1997] OJ No 4722, 1997 CarswellOnt 4721 at paras 12-14 [***IF Propco***].

[6] *IF Propco* at paras 16-19; *Holder et al v Wray et al*, 2018 ONSC 6133 at paras 42-48.

issues raised in the Disputed Paragraphs are not before the Commission on the Jurisdiction Motion and will only serve to waste significant time and resources.

[21] Conversely, Staff submits that while irrelevance is not properly a ground to strike evidence on this motion, the Disputed Paragraphs are nevertheless relevant to the Jurisdiction Motion for the following reasons:

a. they are directly responsive to issues raised in the Respondent's Notice of Motion;

b. they provide helpful context to the bias allegation against my involvement in a decision related to the allocation of amounts received as financial sanctions under the 2014 Settlement Agreement; and

c. they are relevant to the allegation that the Commission is misusing its public interest jurisdiction.

[22] As I indicated in the preceding section, irrelevance alone is insufficient to warrant striking evidence in advance of a hearing. Relevance and admissibility are considerations for the panel hearing the evidence on the motion. Absent the factors outlined in Rule 25.11, it would be premature to consider the admissibility of evidence before hearing the motion to which the evidence relates. This is consistent with Ontario Superior Court of Justice decisions cited by Staff for the proposition that orders to strike evidence in advance of a hearing should only be made for special reasons or in the clearest of cases.[7]

[23] Similar to *Papazian*, the Jurisdiction Motion seeks an order to dismiss, stay or adjourn this proceeding, at the very least prolonging the period before it can be adjudicated on the merits if not obtaining an outright dismissal. As stated in *Papazian*:

> The applicants should be afforded a full opportunity to respond to this very serious form of relief. As a general rule, the court should not, at least at this stage, limit or prune the applicants' evidence in this fashion. The relevance and appropriateness (or lack thereof) of the impugned evidence will become clearer as the evidence develops overall with cross-examinations.[8]

[24] For purposes of this Motion, I adopt the view expressed in *Papazian* that orders striking evidence in advance of the hearing of, in this case, the main motion, "should only be made for special reasons in the clearest of cases."[9] Further, special reasons should generally be based on the criteria set out in Rule 25.11 of Ontario *Rules of Civil Procedure.*

[25] The Respondent does argue that the alleged irrelevant material in the Disputed Paragraphs would add significantly to the time and expense of the Jurisdiction Motion and will only serve to delay, prejudice or frustrate the Motion.

[26] I disagree. While the Disputed Paragraphs may lead to a longer cross-examination on the Staff Affidavit at the outset of the Jurisdiction Motion

---

[7] *Allianz* at paras 12-19; *Papazian v Morris Manning, QC Professional Corporation*, 2018 ONSC 6398 at para 19 [***Papazian***].
[8] *Papazian* at para 19.
[9] *Papazian* at para 19.

(assuming the Respondent chooses to cross-examine on evidence the Respondent submits is irrelevant), in this case the extra time may be necessary to assess the relevance of the Disputed Paragraphs to the relief sought on the Jurisdiction Motion. The relevance (or lack thereof) of the impugned evidence will become clearer as the evidence develops in cross-examination.

[27] Accordingly, I need not address at this time the potential relevance of the Disputed Paragraphs to the Jurisdiction Motion.

C. Should the Respondent's alternative request for relief be granted?

[28] As an alternative to striking the Disputed Paragraphs, the Respondent seeks an order stating that the Disputed Paragraphs are irrelevant to the Jurisdiction Motion and that Staff is not to call evidence with respect to the issues raised in the Disputed Paragraphs.

[29] This relief would have much the same effect as striking the Disputed Paragraphs and I reject it for the same reasons outlined above.

IV. CONCLUSION

[30] For the foregoing reasons, I dismissed the Respondent's Motion to Strike.

Dated at Toronto this 31st day of May, 2019.

"D. Grant Vingoe"
D. Grant Vingoe