



Ontario
Securities
Commission

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de l'Ontario

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Citation: El-Bouji (Re), 2020 ONSEC 5
Date: 2020-02-06
File No. 2018-28

IN THE MATTER OF ISSAM EL-BOUJI

REASONS FOR DECISION

Hearing: January 23, 2020

Decision: February 6, 2020

Panel: D. Grant Vingoe
Lawrence P. Haber
Raymond Kindiak

Vice-Chair and Chair of the Panel
Commissioner
Commissioner

Appearances: Joseph Groia
Bethanie Pascutto

Derek Ferris
Ryan Lapensee

For Issam El-Bouji

For Staff of the Ontario Securities
Commission

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REASONS FOR DECISION

I. OVERVIEW

- [1] On January 21, 2020, the Ontario Securities Commission (the **Commission**) and the Ontario Ministry of Finance announced that Vice-Chair Vingoe, the Chair of the Panel in this proceeding, would commence serving as Acting Chair and Chief Executive Officer (CEO) of the Commission on April 15, 2020, following the effective time of the resignation of Maureen Jensen, current Chair of the Commission.
- [2] Vice-Chair Vingoe determined that these circumstances may give rise to the apprehension of bias in the current proceeding. Since the merits hearing dates in this proceeding are scheduled to continue beyond the date of the change in Vice-Chair Vingoe's role, the Panel requested submissions from the parties concerning Vice-Chair Vingoe's continued participation as a member of the Panel for the remainder of the merits hearing.
- [3] On January 23, 2020, after receiving submissions, the Panel advised the parties of its decision that Vice Chair Vingoe would cease participating as a Panel member in this proceeding, with reasons to follow. These are the reasons for that decision.

II. PROCEDURAL HISTORY

- [4] A brief procedural history is provided for context. Staff of the Commission (**Staff**) filed a Statement of Allegations against the Respondent on May 24, 2018 and this proceeding was commenced by the issuance of a Notice of Hearing on the following day. Several attendances and motions followed. In 2019, the Respondent brought a motion seeking to halt the proceedings against him on the basis that the Commission lacked jurisdiction to hear some or all of the allegations. Among other things, he asserted institutional bias as a basis for the Commission's lack of jurisdiction. That motion was determined in Reasons and Decision issued on October 7, 2019.¹ The issues considered in that motion are separate and distinct from the issue currently before this Panel.
- [5] The schedule for the merits hearing was set by Order of the Commission issued on October 15, 2019.² The merits hearing in this proceeding ultimately commenced on January 14, 2020 before the current three-member Panel, which was assigned by the Office of the Secretary of the Commission. Over the course of three days in January 2020, this Panel heard opening submissions from both parties and the examinations of five of Staff's witnesses, one of which is not yet complete. Staff's final witnesses, the Respondent's evidence, if any, and closing submissions are currently anticipated to require several more hearing days, some of which are scheduled for late April 2020.
- [6] At the end of the last merits hearing date, January 17, 2020, the Respondent's counsel indicated he would be bringing a motion seeking an Order for Staff to disclose certain additional documents. The Panel directed that the motion would

¹ *El-Bouji (Re)*, 2019 ONSEC 33, (2019) 42 OSCB 8094.

² *El-Bouji (Re)*, (2019) 42 OSCB 8420.

be heard in writing and indicated that a decision would be made at the next scheduled merits hearing date, January 23, 2020.

III. ADJUDICATION GUIDELINE

[7] The prevailing practice at the Commission has been for the Chair of the Commission not to adjudicate due to the Chair's scope of responsibilities, which includes management of Staff. Subsection 3(1) of the Commission's *Adjudication Guideline* states: "The Secretary will not assign the Chair of the Commission to any Panel."

[8] In addition, pursuant to s. 2(1) of the *Adjudication Guideline*, Members of the Commission shall not participate in a hearing where to do so would give rise to bias. Subsection 2(2) provides the following test to determine whether a reasonable apprehension of bias exists:

...would a reasonable and informed person, viewing the matter realistically and practically — and having thought the matter through — conclude that there is bias on the part of the Panel or individual Panel Members impairing their duty to fairly and impartially adjudicate the matter?

[9] Due to his anticipated assumption of the Acting Chair's duties, Vice-Chair Vingoe determined that he would follow the procedure set out in s. 2(4)(b) of the *Adjudication Guideline*:

A Panel Member who becomes aware of circumstances at any time during a hearing that may give rise to bias shall:

[...]

(b) Request the other Panel Members' advice as to whether the circumstances might give rise to bias.

If the other Panel Members determine that the circumstances might give rise to bias, the Panel Member should consider removing himself or herself immediately. In the alternative, the Panel may decide to inform the parties of the circumstances and invite them to make submissions on the Panel Member's continued participation in the hearing. The Panel should provide the parties with reasons for its decision.

IV. COMMUNICATIONS TO AND SUBMISSIONS BY THE PARTIES

[10] Accordingly, the parties were informed of the circumstances and were invited to make submissions on Vice-Chair Vingoe's continued participation as a Panel member for:

- a. the outstanding written motion by the Respondent requesting Staff's disclosure of documents, and
- b. the remainder of the proceeding, subject to an ethical wall being established such that Vice-Chair Vingoe would not interact with Staff with regard to this proceeding other than in a hearing or through written communications made through the Registrar, with a copy to all parties.

- [11] The communication to the parties also asked for the parties' positions with regard to the possibility of accelerating the entire merits hearing so that it could be concluded by April 15, 2020, when Vice-Chair Vingoe's new role would become effective.
- [12] At a hearing on January 23, 2020, the Panel, including all three members and chaired by Vice-Chair Vingoe, heard submissions from the parties concerning the effect of these circumstances on Vice-Chair Vingoe's continued participation on the Panel. Staff was prepared to accelerate the hearing dates to complete the merits hearing before April 15 or to utilize an ethical wall after that date to address any apprehension of bias.
- [13] The Respondent argued that, upon the announcement that Vice-Chair Vingoe would commence acting in the role of Chair and CEO of the Commission, the Vice-Chair should cease participating in hearings for this proceeding. The Respondent objected to Vice-Chair Vingoe's continued participation either by accelerating the hearing dates or establishing an ethical wall. The Respondent did not object to Vice-Chair Vingoe's participation in the decision of the Panel on the Respondent's pending written motion and stated that he would consent to this limited participation, as did Staff.

V. CONCLUSION

- [14] The Panel concluded that Vice-Chair Vingoe should not continue to participate in the merits hearing. There is a short transition period before Vice-Chair Vingoe will be assuming his new responsibilities as Acting Chair of the Commission and there is the expectation that, in the meantime, he will be participating in meetings related to management functions as a transitional matter and to ensure continuity. In these circumstances, absent consent of the parties, a reasonable and informed person may perceive that Vice-Chair Vingoe has a bias in favour of Staff, with whom he will interact as Acting Chair and CEO in the near future.
- [15] As such, it is necessary for Vice-Chair Vingoe to cease participating as a Panel member in this proceeding, except for the purpose of deliberating upon and participating in the preparation of these Reasons.
- [16] The Panel also determined that these considerations were equally applicable to the Respondent's written motion for disclosures, since its outcome may affect the evidence given on future dates in the merits hearing in which Vice-Chair Vingoe will not participate.
- [17] For these reasons, Vice-Chair Vingoe shall not continue as a member of the Panel and the merits hearing in this proceeding will proceed as a two-person Panel with the continuing members.

Dated at Toronto this 6th day of February, 2020.

"D. Grant Vingoe"

D. Grant Vingoe

"Lawrence P. Haber"

Lawrence P. Haber

"Raymond Kindiak"

Raymond Kindiak