

COURT FILE NO.: 06-CL-4-6328

DATE: 20060627

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N

MR. A.

Applicant

)
)
) *Thomas G. Heintzman, Junior Sirivar* for
) the Applicant

-and-

ONTARIO SECURITIES COMMISSION

Respondent

)
)
) *Kathryn J. Daniels, Anne Sonnen* for the
) Respondent

) **HEARD:** June 1, 2006
)

C. CAMPBELL J.

Addendum to Reasons for Decision

[1] At an appointment to settle the terms of the formal Order following the delivery of reasons in this matter, it became apparent that the cooperation between the parties, anticipated during the oral hearing, was unlikely to happen. Further written submissions were requested and have been received from counsel on the issues raised on June 12, 2006 from the OSC and on June 21, 2006 from counsel for Mr. A. Further written submissions were received on June 23 and June 26, 2006.

[2] At the time of the original hearing, there was a concession by counsel for the OSC that given the differing immunity regimes in Canada and the United States, Mr. A was at some risk in respect of his Charter values in responding to a compulsory summons to take his evidence.

[3] In the reasons of April 24, 2006, I had in anticipation of cooperation with respect to the legitimate concerns of Mr. A, suggested but not directed that there be some separation between the persons conducting the investigations under s. 11(1)(a) and s. 11(1)(b) of the *Securities Act*. I am satisfied, based on the written submissions, of the impracticality of requiring at this time separate investigative teams in respect of an investigation that has been underway since March 2004. However, that does not end the issue.

[4] I am now advised that the very same individuals have been appointed under both subsections and that the investigations are sufficiently advanced that it would be extremely difficult, if not impossible, to separate them at this time.

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[5] This information has done nothing to allay the concerns of Mr. A.

[6] My conclusion previously was to uphold the validity of the OSC process as set out in the statute at this time. I have not changed from that view, despite the submission of counsel for the OSC that the only basis for this Court to intervene would require a finding at this time of a *Charter* breach. In my view, it is appropriate for the court to provide ongoing supervision where an investigation, although in compliance with the *Securities Act*, runs the risk of interference with *Charter* protected values even though no direct breach has been established.

[7] I had thought, in error as it now appears, that there was a recognition by the OSC and its counsel that a statutory body that is regulatory, investigative and adjudicative and which can and does operate (quite properly) in a high degree of confidentiality and secrecy, would have an interest in transparently and efficiently dealing with a recognized risk and that expeditious access to the Court would be helpful to both sides.

[8] I am concerned that the offer contained in the earlier Reasons, to assist with further direction should there be dispute about how there could be continuing assurance to Mr. A about the risk to his *Charter* concerns, is now not feasible in the form that I envisaged. As a result, there will be further direction to clarify how the risk of *Charter* is to be protected.

[9] It is apparent to me that there will be further disagreement.

[10] A *Charter* risk can arise when an individual such as Mr. A. provides testimony that itself is not directly conveyed, but later events show could only have come into the hands of investigators from Mr. A. This is more than an illusory risk.

[11] The decision of April 24, 2006 should not be taken as a finding other than at the present time and based on the material before me, there is not a breach of Mr. A's *Charter* rights. This conclusion as to breach should not be taken as speaking other than at this time. That does not mean that there is no risk of *Charter* violation at any time during the investigation. The form of Order, in my view, should reduce prospective risk to a minimum without interfering with the investigation.

[12] If an investigator, who has responsibility under s. 11(1)(a) and s. 11(1)(b) were to be directly involved in the examination of Mr. A., no one outside the OSC would ever know whether information was inappropriately conveyed. This is not to suggest that any such investigator would purposely do so. The risk of inadvertent as well as purposeful disclosure is worthy of *Charter* protection even where there is no direct evidence of a breach, but only a risk of a breach.

[13] Since it conceded that a s. 11(1)(a) summons cannot be used for the purpose of a s. 11(1)(b) investigation and the summons to Mr. A. is under s. 11(1)(a) alone, the clearest way to minimize any risk to the *Charter* values is to provide that no persons be present during the examination of Mr. A. other than those conducting the examination only under s. 11(1)(a).

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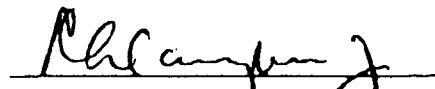
[14] This will mean that these persons who have been appointed to conduct investigation under s. 11(1)(b) not be present during the s. 11(1)(a) examination and the s. 11(1)(b) investigators not be informed about the s. 11(1)(a) examination.

[15] Counsel for the OSC points out that the obligation of the investigators under the Act is not to transfer information except in accordance with the statute. In my view, to avoid any confusion or ambiguity, the form of Order should spell out the separation of investigative functions to provide the transparency I had originally intended and believed would operate co-operatively.

[16] In my earlier reasons, an offer and not an Order was made to have the court assist by way of further direction should the questions, if required to be answered, run the risk of *Charter* breach. I am now satisfied that given the differing positions of counsel, the likelihood of disagreement, and the risk to *Charter* values that either party should be able to deal with issues arising from the scope of the investigation of Mr. A. under s. 11(1)(a) of the Act by return to this court for further direction.

[17] Given the above clarification and additions, I agree with Mr. Heintzman that there is no need to make reference to s. 16 or s. 17 of the *Securities Act* in the Order. The written submissions of counsel and materials relied on in support will form part of the record in this matter.

[18] I would hope that with this addition, counsel will be in a position to agree on the form of Order appropriate to this conclusion. If there are any continuing areas of disagreement in the form of order, counsel may seek an appointment to settle the terms.


C. CAMPBELL J.

Released: June 27, 2006

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REASONS FOR DECISION

C. CAMPBELL J.

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