

## Chapter 3

# Reasons: Decisions, Orders and Rulings

### 3.1 Decisions

#### 3.1.1 Superintendent of Financial Services and OSC vs. Universal Settlements International, Inc.

Court File No. 01-CV-218291

Date: 20011106

ONTARIO  
SUPERIOR COURT OF JUSTICE

**B E T W E E N:**

UNIVERSAL SETTLEMENTS INTERNATIONAL, INC.,  
DEREK O'BRIEN AND TONY DUSCIO

Applicants

- and -

THE SUPERINTENDENT OF FINANCIAL SERVICES  
AND THE ONTARIO SECURITIES COMMISSION

Respondents

)  
)  
) *Randy Bennett* for the Applicant  
) Universal Settlements International, Inc.  
)

)  
) *Robert Conway* for the Respondent  
) The Superintendent of Financial Services  
)

) *Yvonne B. Chisholm* for the Respondent/Moving  
) Party, the Ontario Securities Commission  
)

)  
) **Heard:** October 25, 2001  
)  
)

**C. CAMPBELL J.:**

### FACTS

#### REASONS FOR DECISION

[1] The respondents move to quash or alternatively stay the application of USI, Derek O'Brien and Tony Duscio, which application seeks a declaration that neither the *Securities Act*, R.S.O. 1990, c.s.5 and the regulations thereunder nor the *Insurance Act* R.S.O. 1990, c.1.8 apply to USI's business in Ontario.

#### BACKGROUND

[2] The basis of the motion to quash is that the court does not have jurisdiction, or at the very least, should not exercise jurisdiction at this stage since the Ontario Securities Commission (OSC) has neither refused to register persons to sell USI's product or commenced enforcement proceedings against the applicant. The Superintendent moves on the basis that a hearing has been requested by USI before the Financial Services Tribunal (FST) with respect to matters that are within the jurisdiction of the Superintendent and the FST.

[3] USI seeks in its application statutory interpretation by way of a declaration as to which, if either of the statutes administered by the regulatory agencies applies to its business.

[4] The basic facts are not in dispute. For the purposes of the motion to quash, the OSC urges that the appropriateness of the relief sought by the applicants can only be determined once the OSC has had an opportunity to fully consider the issues within the context of its regulatory process and procedure designed to protect investors and foster fair and efficient capital markets to determine whether the applicants' products meet that criteria.

[5] On behalf of the Superintendent it is urged that s.2 of the governing statute provides that the Financial Services Commission of Ontario is to provide regulatory services that protect the public in the sectors supervised by the Superintendent or the Commission and to provide the resources for the proper functioning of the FST. The Superintendent further urges that the applicant may have committed an offence under s.115 of the *Insurance Act*, which makes it an offence for any person, other than an insurer and its duly authorized agent, to traffic or trade in insurance policies as follows:

"Any person, other than an insurer or its duly authorized agent, who advertises or holds himself, herself or itself out as a purchaser of life insurance policies or of benefits thereunder, or who traffics or trades in life

insurance policies for the purpose of procuring the sale, surrender, transfer, assignment, pledge or hypothecation thereof to himself, herself or itself or any other person, is guilty of an offence”.

[6] USI is an Ontario corporation which deals in what are called “life settlements” or “viatical agreements”. In essence it is a financial vehicle involving the purchase of the death benefits of life insurance policies of terminally ill persons or senior citizens.

[7] The settlement permits an “investor” or “purchaser” to be entitled to receive the death benefits when a life insured person (viator) dies by paying a discounted price for the policy while the insured is still alive.

[8] The precise manner by which the viatical settlement is purchased has been the subject of consideration by both the OSC under the *Securities Act* and the Superintendent of Financial Services under the *Insurance Act* with a pending hearing with the FST.

[9] For the purpose of determining this motion to quash, it would appear that USI facilitates the purchase by an investor by identifying a qualifying life insurance policy issued by a US life insurer, obtaining from a medical underwriting company in Georgia, USA, a medical evaluation of a terminally ill insured or life expectancy evaluation of a senior citizen who may or may not have a life threatening condition.

[10] The life insured obtains the discounted value of the life benefit prior to death. The investor pays a discounted amount for a certificate that entitles that investor to the full life insurance death benefits on the death of the insured.

[11] The medical evaluation company apparently offers a “tracking service” whereby it tracks or monitors the medical condition and/or death of the viator including receiving postcards from the viator and visiting the viator.

[12] The funds invested by a purchaser in Ontario are apparently to be held in trust by an escrow agent who acts for a Qualified Settlement Provider (QSP), which is a life settlement company licensed in the state where the viator resides. The QSP (a) owns the life insurance contract; (b) pays the premiums; (c) tracks the viator’s life; and (d) assists in obtaining the claim for death benefits.

[13] The entire investment is based on the provision to the prospective investor of marketing material based on a sample contract and escrow documents as well as a sample purchasing agreement.

[14] Staff of the OSC have reviewed and considered the material provided by USI through its counsel in Ontario and advised USI on June 19, 2001, that the view of staff was that the interests marketed to Ontario investors by USI fell within the definition of a “security” under the *Securities Act* and as a result securities were being sold in contravention of s.53 (which requires the filing of a prospectus) and s.25 (which requires registration of persons trading in securities).

[15] There is currently no proceeding before the OSC brought either by the applicant or the commission itself to deal with the issues raised in the staff letter.

[16] The Superintendent and his staff investigated USI activities and concluded that there was a contravention of s.115 of the *Insurance Act* as set out above. The applicant was served with a Notice of Proposed Cease and Desist order pursuant to s.441 of the *Insurance Act*. Following receipt of the letter of June 19, 2001, from the OSC the applicant has voluntarily ceased its activities with respect to the matters in issue.

[17] The parties have agreed, for the purposes of this motion to quash, that there is a pending hearing before the FST requested by the applicant in which the applicant intends to argue that the Financial Services Commission of Ontario (FSCO) lacks jurisdiction to regulate the activities of USI.

## ISSUE

[18] Should this court deal with the issues raised in the application by way of declaratory relief prior to determination of any current or prospective proceedings before either or both regulatory agencies, namely the OSC and the FST?

## ANALYSIS AND LAW

[19] On behalf of USI it is urged that it is appropriate for the court to make a determination on an application invoking Rule 14.05(3) of the Rules of Civil Procedure where there are no material facts in dispute.

[20] USI submits that there is no need for further information or factual record before either of the regulatory agencies and hence no need for a hearing before either. Since the jurisdiction of each agency is limited under their respective statute it is urged the court is the more appropriate forum for resolution of the matters raised.

[21] I accept that the court may have jurisdiction over the subject matter of the application but the issue for this motion is whether any jurisdiction *should* be exercised at this time, given that there has been no hearing before either regulatory agency.

[22] The cases relied on by the applicant for the proposition that the court may exercise jurisdiction must be looked at in light of more current authorities which deal with the deference to be accorded regulatory tribunals which have important public protection functions, are experts in complicated regulation and who have a hearing process that provides the opportunity to advance full argument which can be considered by the tribunal within the context of its mandate.

[23] *Bell v. Ontario (Human Rights Commission)* (1971), 18 D.L.R. (3d) 1 SCC and *Re London Life Insurance Co. & Ontario Human Rights Commission* (1985), 50 D.L.R. (2d) 748 (HCJ) both deal with a different type of tribunal, a different context and without consideration of the more recent developments of judicial review. A tribunal set up under the *Human Rights Act* is not of the same regulation in the public interest as is either the OSC or the FST.

[24] Counsel for the applicant urges that there are no cases which deal with the difference to be afforded statutory regulatory tribunals which touch on the loss of expediency and of efficiency of resolution which occurs when a person or entity in the position of the applicant faces two sets of hearing under

two statutes giving rise to two conclusions that may or may not be inconsistent and may result in a jurisdiction being exercised by one or other or both or none of the tribunals.

[25] The applicant submits that these circumstances support the declaratory relief sought to enable one procedure before the court that can, in a timely fashion, deal with the issues of what, if any jurisdiction, either tribunal may have.

[26] On behalf of the respondents it is urged that this application is at the very least premature. It is submitted that in the case of OSC there is no hearing process which has been invoked by either the applicant or the commission which has made any determination on the issues raised by the applicant. All there is at the moment is a letter from the staff indicating its position based on hypothetical facts arising from the material filed with it. Counsel for the commission urges that it would be inappropriate for the court to make a determination on a factual background which is at best hypothetical and most likely incomplete.

[27] Ms Chisholm submitted that it is only within the factual context or factual matrix that comes from a proceeding and hearing before the Commission that it can make a determination as to whether or not the investment vehicle of the applicant offends the *Securities Act*. It is submitted that the courts should act on no less a record and indeed, given the expertise of the commission, it would benefit from the consideration of the commission of its own jurisdiction, which, in accordance with the decided cases, would be given deference on a standard of reasonableness.

[28] Counsel for the Superintendent submits that at the request of the applicant there is a pending hearing before the FST. The FST will decide within its jurisdictional mandate whether the activities of the applicant contravene the *Insurance Act* and like the situation with the OSC the court on judicial review not only can then, but should have the factual context provided by the hearing process of the FST.

[29] I am satisfied that the motions of the OSC and the Superintendent should be granted and the application for a declaration quashed on the basis of prematurity.

[30] There have been a number of recent cases in the Supreme Court of Canada commencing with *National Corn Growers Assn. v. Canada (Canada Import Tribunal)* (1990), 74 D.L.R. (4<sup>th</sup>) 449 (S.C.C.) which have dealt with the deference to be given by the courts and the standard of review to be applied to various types of regulatory tribunals.

[31] The leading case dealing with securities is *Pezim v. British Columbia (Superintendent of Brokers)* (1994), 114 D.L.R. (4<sup>th</sup>) 385. The issue in that case dealt with the meaning to be given to the phrase "Material Change" under the *Securities Act of British Columbia*. In speaking for the court Iacobucci J. stated as may be summarized from the headnote as follows:

- (1) When reviewing a decision of a securities commission not protected by a privative clause, but from which lies a statutory right of appeal and the case turns on a question of interpretation of the governing statute, the appellate court should give curial deference to

the opinion of the securities commission on issues that fall squarely within its area of expertise. Further, the purpose of the statute, the breadth of the commission's powers and the fact that it has a role in policy development, support the fact that the commission has special expertise and also warrant curial deference of the commission.

[32] In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* (2001), 199 D.L.R. (4<sup>th</sup>) 577 (S.C.C.) the Supreme Court again confirmed that the standard of review with respect to a decision of the Securities Commission should be one of reasonableness, given its expertise, the purpose of the statute and the nature of the problem.

[33] In *Wilder v. Ontario Securities Commission* (2001), 53 O.R. (3d) 519 C.A. the Court of Appeal recognized the jurisdiction of the Securities Commission to reprimand lawyers for their conduct as solicitors before the OSC, notwithstanding that a lawyer was generally governed by the Law Society's rules of professional conduct. Where the Law Society's rules imposed on the lawyer a duty of confidentiality necessary to defend a client's interest, the court held that the Commission had jurisdiction to review the conduct of the lawyer notwithstanding issues of solicitor-client privilege as long as it, on a case by case basis, insured that the substantive right to solicitor-client privilege was respected.

[34] Two cases in this court confirm the appropriateness of declining declaratory relief where a comprehensive statutory framework exists within a recognized regulatory field being the more appropriate forum for the determination of issues. In *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Gen. Div.) Mr. Justice Sharpe reviewed the role to be undertaken by an adjudicative body in the context of a broad public mandate, a tribunal (the CRTC) to which a strong degree of curial deference has been granted and where there was a statutory regime including rights and a procedure for their resolution. He held that there should be a strong reluctance to permit jurisdiction to be divided between the specialized agency and the court. He went on to say at p.996:

It is however, clear that the regulations under the *Broadcasting Act* and the interpretation of those regulations, are not only a central substantive component of the applicant's case, but indeed the focus of the relief that the applicant seeks. To decide this case would require a detailed consideration and interpretation of those regulations. The exercise would require consideration of how those regulations operate in the overall framework of the scheme established by the Act and by the Regulations as the scheme is administered by the C.R.T.C.

[35] At p.701 of the same decision Sharpe J. dealt with the particular relief of a declaration which was sought, which in effect would pre-empt the jurisdiction of the regulatory tribunal in which no decision had been made and stated as follows:

It is true that this is not a case where review is sought of the decision of the C.R.T.C. nor is it a collateral attack on such a decision. In some ways, however, the case at bar presents a more serious challenge to the integrity of the regime established by Parliament. If the

applicant's submission were accepted and this court were to decide the case, there would, in effect, be an alternate forum for the determination of an important aspect of the relationship between suppliers of cable services and subscribers. A superior court would be deciding that issue without the benefit of the opinion of the C.R.T.C.....The net result would be to disrupt the scheme envisaged by Parliament for the interpretation of the regulations, a scheme which includes scrutiny by a court exercising jurisdiction akin to that of a superior court.

[36] A similar result was reached in *Ontario Hydro v. Kelly* (1998), 159 D.L.R. (4<sup>th</sup>) 543 (Ont. Gen. Div.) where MacPherson J. stated at pp.551-2 as follows:

I believe Sharpe J.'s approach is the correct one. It seems to me that, as a matter of logic, if deference is to be paid to the actual decision of a tribunal, then deference should also be paid to the jurisdiction of the tribunal to make that decision. If the factors of specialization, policy-making role, and limiting overlapping jurisdiction protect the actual decision of a tribunal, those same factors, if present in a particular fact situation, should also protect the integrity of the jurisdiction of the tribunal to make the decision.

[37] Counsel for the applicant urges that the above decisions are applicable to a situation involving a single regulatory tribunal. He urges that where there is more than one tribunal involved and where the decisions of such tribunals may be inconsistent that the court then becomes the more appropriate forum for resolution of all issues in the interests of efficiency and expediency. Counsel was unable to provide me with an authority to support that proposition.

[38] The case of *114557 Canada Ltée v. Hudson (Town)* (2001), 200 D.L.R. (4<sup>th</sup>) 419 (S.C.C.) was cited by counsel for the respondents for the proposition that there can be two valid competing regulatory authorities that can stand as long as one statute does not compel what the other forbids. In that case what was in issue was the by-law of the Town of Hudson which prohibited the use of pesticides within its territory, except for certain purposes when *Pesticides Act* R.S.Qcp-9.3 permitted a municipality to carry out pesticide application.

[39] Counsel for the applicant submitted that notwithstanding the fact that the above decision involved a constitutional issue it was dealt with by the lower courts on a motion for declaratory judgment.

[40] I am not persuaded that the potential for two different hearings before two different tribunals is sufficient in of itself to warrant the interference by a court. The above authorities emphasize the importance not only of the deference due to regulatory tribunals, but also the importance of having a full background consideration by the tribunal which then determines what its jurisdiction is and what its regulation will be, if any, within that jurisdiction.

[41] I accept the submissions on behalf of the OSC that except in the most extraordinary circumstances a court should not grant declaratory relief where the regulatory authority has not been fully engaged and does have a process for doing so. There is a danger that a court which would make a

pronouncement on hypothetical facts might well undermine the policy direction of a regulatory tribunal which has not only a particular case before it, but many policy factors to consider in determining the scope and extent of appropriate regulation.

[42] For the above reasons the motion to quash will be granted on the basis that it is premature. If counsel cannot agree I may be spoken to on the issue of costs.

**C. CAMPBELL J.**

**Released:**

**Court File No. 01-CV-218291**

**Date: 20011106**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

UNIVERSAL SETTLEMENTS INTERNATIONAL, INC.,  
DEREK O'BRIEN AND TONY DUSCIO

Applicants

- and -

THE SUPERINTENDENT OF FINANCIAL SERVICES  
AND THE ONTARIO SECURITIES COMMISSION

Respondents

**REASONS FOR JUDGMENT**

**C. CAMPBELL J.**

RELEASED: November 6, 2001

**3.1.2 Universal Settlements International, Inc. -  
Endorsement Regarding Costs**

Court File No. 01-CV-218291  
Date: 20011121

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

UNIVERSAL SETTLEMENTS INTERNATIONAL, INC.,  
DEREK O'BRIEN AND TONY DUSCIO (Applicants)

**AND:**

THE SUPERINTENDENT OF FINANCIAL SERVICES  
AND THE ONTARIO SECURITIES COMMISSION  
(Respondents)

**BEFORE:**

C. CAMPBELL J.

**COUNSEL:**

*Randy Bennett* for the Applicant Universal Settlements  
International, Inc.  
*Robert Conway* for the Respondent the Superintendent  
of Financial Services  
*Yvonne B. Chisholm* for the Respondent the Ontario  
Securities Commission

**ENDORSEMENT**

[1] Written submissions have been received in the issue of costs. The unsuccessful Applicant submits that given the novelty of the issue, the Court should consider exercising discretion to refrain from awarding costs. In the alternative, Universal submits costs should be fixed in the amount of \$2000 to be divided between the moving parties.

[2] Counsel for the OSC submits that costs to it should be ordered in the sum of \$4500 payable forthwith while counsel for the Superintendent seeks \$1500 on a party and party basis.

[3] While the costs grid which will be in force as of January 1, 2002 does not yet apply, it does provide a useful guide. In this case, the range for partial to substantial indemnity for a half-day motion would be from \$1400 to \$2400.

[4] Having considered the factors applicable, including result, and considering that counsel for the OSC bore the main portion of the argument for the Respondents, I conclude that costs in the sum of \$2000 for the OSC and \$1500 for the Superintendent are appropriate and so fix these costs to be payable forthwith.

**MR. JUSTICE C. CAMPBELL**

Released: November 21, 2001.