



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

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED**

- AND -

**IN THE MATTER OF PAUL AZEFF, KORIN BOBROW,
MITCHELL FINKELSTEIN, HOWARD JEFFREY MILLER AND
MAN KIN CHENG (a.k.a. FRANCIS CHENG)**

ORAL REASONS AND DECISION

**(Rules 5.2 and 9 of the Commission's *Rules of Procedure* (2014), 37 O.S.C.B. 4168 and
Section 9 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22)**

Hearing: July 29 and 31, 2014

Decision: August 8, 2014

Panel: Alan J. Lenczner - Commissioner and Chair of the Panel
Catherine E. Bateman - Commissioner

Appearances: Donna E. Campbell - For Staff of the Commission
Tamara Center

Korin Bobrow - In Person

Tyler Hodgson - For Paul Azeff and Korin Bobrow
Melissa MacKewn
Nicolas Businger

Greg Temelini - For Man Kin Cheng (a.k.a. Francis Cheng)

Gordon Capern - For Mitchell Finkelstein
Jeffrey Larry

- No one appeared on behalf of Howard
Jeffrey Miller

ORAL REASON AND DECISION

The following text has been prepared for the purposes of publication in the Ontario Securities Commission Bulletin and is based on excerpts from the transcript of the hearing. The excerpts have been edited and the text has been approved by the Panel for the purpose of providing a public record of the decision.

[1] This was a hearing before the Ontario Securities Commission (the “**Commission**”) on July 29 and 31, 2014 (the “**Motion Hearing**”). This matter was initiated by a Notice of Hearing issued in connection with a Statement of Allegations filed by Staff of the Commission (“**Staff**”) on September 22, 2010 with respect to Howard Jeffrey Miller (“**Miller**”) and Man Kin Cheng (a.k.a. Francis Cheng) (“**Cheng**”). On November 11, 2010, the Commission issued an Amended Notice of Hearing, pursuant to sections 127(1) and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “**Act**”), accompanied by an Amended Statement of Allegations of Staff which added the respondents Paul Azeff (“**Azeff**”), Korin Bobrow (“**Bobrow**”) and Mitchell Finkelstein (“**Finkelstein**”). On April 18, 2011, Staff filed an Amended Amended Statement of Allegations (the “**Amended Amended Statement of Allegations**”) against Miller, Cheng, Azeff, Bobrow and Finkelstein (together, the “**Respondents**”).

[2] By Notice of Motion dated July 14, 2014, counsel for Azeff and Bobrow (together, the “**Moving Parties**”) brought a motion (the “**Motion**”) to adjourn the hearing on the merits in this matter, scheduled for September 18 to November 14, 2014 (the “**Merits Hearing**”). The essential grounds of the Motion were that:

1. the work product of an expert consultant, Kim Stewart (“**Stewart**”) who was retained by the Moving Parties, has been lost through no fault of hers or of the Moving Parties and that that loss was only discovered in February, 2014; and
2. despite ongoing efforts to reach an agreement with a Third Party to provide certain documents to the Respondents, as ordered by the Commission on July 16, 2013, the Third Party has not produced information in its possession for all trades executed under the IA codes registered to Azeff and/or Bobrow between January 1, 2002 to December 31, 2009 in an electronic spreadsheet format.

[3] On July 18, 2014, Staff brought a cross-motion for an Order severing this matter against Finkelstein, but only in the event that the Moving Parties were successful in obtaining an adjournment of the Merits Hearing to dates outside the dates currently scheduled between September 18 to November 14, 2014 (save and except certain dates), and an Order preserving such dates to conduct the Merits Hearing against Finkelstein (the “**Cross-Motion**”).

[4] On July 29, 2014, Staff, counsel for the Moving Parties (Tyler Hodgson, “**Hodgson**”), counsel for Finkelstein and counsel for Cheng appeared before the Commission for the Motion Hearing. Bobrow attended the hearing in person and nobody appeared on behalf of Miller. Staff and counsel made submissions on the Motion and Staff’s Cross-Motion, and Stewart testified at the Motion Hearing.

[5] On July 29, 2014, Hodgson requested an *ex parte* hearing to show why Stewart's assistance is critical to the Moving Parties to cross-examine Staff's witnesses adequately. Staff raised concern that submissions during the *ex parte* portion of the hearing could be taken out of context, but Staff relied on the Panel's judgment and expertise in proceeding with an *ex parte* hearing. We agreed to continue the Motion Hearing on July 31, 2014 as an *ex parte* confidential hearing with Hodgson, which would be followed by a public hearing.

[6] The Motion Hearing continued on July 31, 2014 and began as an *ex parte* confidential hearing in which Stewart testified and counsel for the Moving Parties made submissions on the Motion. Following the *ex parte* portion of the hearing, Staff, Hodgson and counsel for Cheng appeared and made submissions. Counsel for Finkelstein appeared by telephone conference and also made submissions.

[7] A total of eight exhibits were filed at the Motion Hearing, and a total of eight separate exhibits were filed in the *ex parte* portion of the Motion Hearing. As requested by counsel for the Moving Parties, we ordered that the transcript and Exhibits 4 to 8 of the *ex parte* portion of the Merits Hearing will be permanently sealed by the Commission, and these documents will only be available to the Moving Parties.

[8] As previously mentioned in paragraphs 4 and 6 above, Stewart gave evidence before the Commission on July 29 and 31, 2014. In her testimony and in her affidavit sworn July 14, 2014, Stewart indicated that some 600 hours of work product that she had completed over a period of two years (December, 2010 to December, 2012) had been lost. She indicated that she began to recreate this work product in or about the month of March, 2014, and that as of the date of her affidavit, July 14, 2014, she had been able to recreate less than 50% of it. We are entirely satisfied that Stewart was not responsible, nor can be faulted, for the lost work product.

[9] Stewart indicated that it would take her approximately six to nine months to complete the work and retrieve all of her lost work product. She stated that the time required has been supported by significant changes to Staff's Amended Amended Statement of Allegations, which were provided in draft form as a document entitled "Fresh As Amended Statement of Allegations" to Hodgson on July 30, 2014 (the "**Draft Fresh As Amended Statement of Allegations**", Exhibit 3 of the *ex parte* hearing).

[10] It was not apparent to the Panel until July 31, 2014 that Stewart will not be giving testimonial evidence and will not be providing an expert report in relation to the Merits Hearing. The Panel has read paragraph five of the Memorandum of Fact and Law of the Moving Parties, which states that "[t]he denial of the adjournment would prejudice the [Moving Parties] by effectively denying them the benefit of expert testimony and the benefit of the Commission's production order." It is now very clear that any misconception has been cleared up that the role of Stewart is an advisory one to assist Hodgson in his preparation of their case and with his cross-examination of Staff's witnesses at the Merits Hearing.

[11] Stewart, from the résumé that is attached as part of the Supplementary Affidavit of Elizabeth Tessari sworn July 28, 2014 (Exhibit 8, Tab 2E), is clearly a person who is an expert in matters involving trading. She has worked in that capacity for various self-regulatory

organizations for quite a number of years. There is no doubt that her expertise in that area of trading will be helpful to the Moving Parties.

[12] The allegations as set out in the Amended Amended Statement of Allegations, and we will now refer to the Draft Fresh As Amended Statement of Allegations, which represents the third amendment to Staff's Statement of Allegations dated September 22, 2010, involve six discrete, independent events. We will only describe two of the events to give a flavour of what this case is about.

[13] The first event is the acquisition of Masonite International Corporation ("**Masonite**") by Kohlberg Kravis Roberts & Co., commonly known as "**KKR**". The allegation is that Finkelstein, a lawyer at Davies Ward Phillips & Vineberg LLP ("**Davies**") at the time in 2004, was acting on behalf of Masonite, the company to be acquired. The allegation is that on November 16, 2004, he met with management of Masonite and knew of their intention to sell to KKR. He is then alleged to have telephoned Azeff, who was employed by CIBC World Markets Inc. ("**CIBC**") at the time in Montreal, and advised Azeff of these facts. The allegation is that as a result, Azeff bought shares of Masonite between November 19 and December 6, 2004. The transaction was not publicly disclosed until December 22, 2014. Azeff, within weeks thereafter, is then alleged to have sold shares for a profit and within a few weeks of that came to Toronto and gave Finkelstein cash. A fuller description of that transaction is set out in the Draft Fresh As Amended Statement of Allegations at paragraphs 15, 20 and 21. The allegations made against Bobrow are found at paragraphs 26(a) and 27(a) in the Draft Fresh As Amended Statement of Allegations.

[14] The second event that we will briefly describe is the purchase by Barrick Gold Corporation ("**Barrick**") of Placer Dome Inc. in about a year later, October, 2005. There is a similar allegation that Finkelstein, although not the lawyer acting for Barrick on the transaction, accessed documents from a colleague at Davies, who was acting for Barrick, and thereafter provided that information of the potential purchase to Azeff, who then supplied that information to Bobrow. Once again, the allegation is that before the transaction was publicly disclosed, Azeff and Bobrow, and perhaps some of their clients, bought shares, sold them after the public announcement and gave Finkelstein some cash.

[15] There are four other such events. It appears to us that with respect to each of these separate, distinct transactions and events, the majority of the evidence has to be fact evidence. Staff indicated that it intends to call a number of fact witnesses who will speak to the events and will file telephone records and emails, from which Staff will want the Commission to draw inferences about the contacts that were made by the Respondents. Staff will also file trading records to show when trades were allegedly made by Azeff, Bobrow and on behalf of their clients, either in purchasing their shares in the first instance or selling the shares after public disclosure. It does not seem to us that there will be much controversy about the authenticity of a telephone record or a trade record. It will be for the Panel to determine what inferences may be drawn from the evidence presented by the parties.

[16] Staff has indicated that its hearing brief is 1,279 documents, and that is what essentially Staff relies on, together with its fact witnesses to prove its case. That, of course, does not

preclude the Respondents from bringing forward additional documents that shed light on what Staff will be producing.

[17] This matter has had a long and intense history before the Commission. The Amended Notice of Hearing was issued on November 11, 2010. There were a number of motions, which are fully set out in the Orders of the Commission dated July 29, 2013 and July 3, 2014.

[18] In particular, we would like to note that on July 29, 2013, the Commission granted an adjournment on a motion brought by Bobrow vacating the scheduled hearing dates, but noted that at that time, a year ago, the “Respondents were made aware of the Commission’s view that a further request for adjournment would be subject to strict scrutiny and the Commission likely would be reluctant to grant another adjournment of the [Merits Hearing]” (*Re Paul Azeff et al.* (2013), 36 O.S.C.B. 7766). While we say that, we do note that what occurred with the revelation in February, 2014 that the work product was lost was not in anybody’s contemplation and is really an unexpected development.

[19] This matter has been outstanding now for almost four years and relates to events that took place beginning in 2004 to 2007. It is a mature matter that should be determined by an adjudicative hearing.

[20] If an adjournment were to be granted, there is no certainty as to when the Merits Hearing would be scheduled before September, 2015. Hodgson has a criminal matter that has been scheduled to proceed commencing in January, 2015 and continuing to June, 2015 (the “**Criminal Matter**”). Hodgson indicated that there was an application made pursuant to subsection 11(b) of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the “**Charter**”). He indicated that the application will be heard starting in November, 2014 and that, if the application is successful, then the Criminal Matter would not be going forward and he would be available to commence the Merits Hearing in January, 2015. He also indicated that even if the Charter application was dismissed, the parties had now agreed to dispense with a jury and, therefore, it was his expectation that the Criminal Matter starting in January, 2015, as scheduled by the Supreme Court of Nova Scotia, would be able to be completed by the end of April, 2015.

[21] Unfortunately, these are all matters that are uncertain and the common experience is that once trials start, one can never be sure that they will finish in the time that everyone expects. Realistically, if there were to be an adjournment, we would have to schedule the Merits Hearing for September, 2015.

[22] We were benefitted by an *ex parte* confidential hearing to which Staff did not object, wherein Hodgson adduced evidence from Stewart as to the nature of her work. We say we were benefitted because what that examination demonstrated was that Stewart is truly an expert and has a good grasp of the events of this case and of its intricacies. It also demonstrated that Hodgson was able to lead her through some examples in a very efficient and direct manner.

[23] It appeared from that examination that Stewart has been able to review the six separate events, and although she would like more time and would like to be more thorough, it appeared

to us that she has all the essentials available to her and can assist Hodgson fully in understanding what the weaknesses of Staff's case are.

[24] We are now faced with competing interests in this case. On the one hand, there must be procedural fairness to the Respondents. They have to have a proper opportunity to cross-examine the evidence adduced by Staff and to present fairly their own defence. In respect of presenting their own defence, there is no suggestion made that Azeff or Bobrow could not give evidence and/or call any witnesses if they wished to. The request for the adjournment really narrowed itself to whether or not proper cross-examination could be made of Staff's witnesses if Stewart has not completed the recreation of her work product by the time the Merits Hearing commences. We are of the view that most of Staff's witnesses will be fact witnesses and that Stewart's assistance will not be time-consuming with respect to those witnesses. It would certainly seem that with respect to trading records and the timing of telephone calls, her assistance to Hodgson will be necessary and helpful.

[25] The other factor to be considered is the need for a timely and efficient adjudicative process. As earlier stated in paragraph 19 above, this matter has been outstanding for four years. It relates to events that happened many years ago, and there is a need to complete the process for the benefit of not only of the public, but also for the benefit of the Respondents.

[26] In conclusion, we are of the view that Stewart is sufficiently prepared from what we have heard and seen in the *ex parte* portion of the Motion Hearing to deal with all of Staff's allegations on the six events. To the extent that she needs more time, the Merits Hearing is now not scheduled for another eight weeks, and we think that will give her ample time to continue with her investigation and to assist Hodgson. Any concerns raised by Hodgson regarding his ability to present his clients' defence fully and fairly during the course of the Merits Hearing can be raised at that time.

[27] Counsel has also raised the changes to Staff's Amended Amended Statement of Allegations in the Draft Fresh As Amended Statement of Allegations. We have gone through these changes. They do not change the substance of Staff's allegations made with respect to the six discrete events. There are changes to the alleged amounts of money obtained and the alleged number of trades that were made; that goes to the public interest allegation and can be sorted during the course of the Merits Hearing. The main thrust of the Merits Hearing is not the amount of the money obtained, but the fact of whether or not there was insider trading and/or tipping.

[28] For the reasons stated above, we are going to proceed with the Merits Hearing as scheduled. We indicated to the parties on July 29, 2014 that we are prepared to start the Merits Hearing on September 29, 2014, as opposed to September 18, 2014, which provides a further 11 days to counsel and the Respondents, provided that we can make up the time on December 8, 2014 and December 16 to 19, 2014. On August 6, 2014, Staff advised the Office of the Secretary through email that all the parties agreed to amend the dates for the Merits Hearing accordingly.

[29] Given this decision, the Cross-Motion brought by Staff does not need to be addressed. However, for the sake of clarity, as we indicated to the parties on July 29, 2014, we would not have granted severance in this matter, because all of Staff's allegations, as is now even clearer, are interrelated and must be dealt with at one hearing.

CONCLUSION

[30] For the reasons stated above, we dismiss the Motion, and accordingly need not address Staff's Cross-Motion. We also order that, on the consent of all parties, the dates for the hearing on the merits previously scheduled for September 18, 19, 22 and 24, 2014 are vacated, and additional dates for the hearing on the merits are added on December 8, 16, 17, 18 and 19, 2014.

Dated at Toronto this 8th day of August, 2014.

"Alan J. Lenczner"

Alan J. Lenczner

"Catherine E. Bateman"

Catherine E. Bateman