



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: Miller (Re), 2020 ONSEC 16

Date: 2020-06-02

File No. 2019-48

**IN THE MATTER OF
DAVID RANDALL MILLER**

REASONS FOR DECISION

Hearing: May 27, 2020

**Reasons for
Decision:** June 2, 2020

Panel: Timothy Moseley Vice-Chair and Chair of the Panel

Appearances: Christina Galbraith For Staff of the Ontario Securities
Commission

Lynda Morgan For David Randall Miller

REASONS FOR DECISION

I. OVERVIEW

- [1] David Randall Miller, the respondent in this enforcement proceeding, seeks an extension of a previously agreed-upon deadline for him to deliver a witness list and witness summaries, and for him to indicate whether he intends to call an expert witness at the merits hearing.
- [2] At the conclusion of the hearing of Miller's motion, I decided to deny his request, with reasons to follow. These are my reasons, in which I explain that Miller did not present sufficient grounds to justify an extension.

II. BACKGROUND

- [3] In this proceeding, Staff of the Ontario Securities Commission (**Staff**) makes various allegations against Miller, including allegations of fraud and illegal insider trading.
- [4] Staff filed its Statement of Allegations on December 19, 2019. At a first attendance on January 14, 2020, various procedural matters were addressed, and a second attendance was set for May 5, 2020.
- [5] Prior to the scheduled May 5 attendance, Staff and Miller agreed to the matters that were to be the subject of that hearing. Specifically, they agreed that the next attendance would be on July 3, 2020, and that by June 3, 2020, Miller would: (i) serve and file his witness list, (ii) serve a summary of each witness's anticipated evidence, and (iii) indicate whether he intended to call an expert witness.
- [6] At Staff's request, and on Miller's consent, I issued an order on May 1, 2020, reflecting the above agreement.
- [7] On May 22, 2020, Miller's counsel advised that Miller would seek an extension of the June 3 deadline. Miller filed his motion record on May 25. Staff filed written submissions the same day. I heard the motion by teleconference on May 27.

III. ANALYSIS

- [8] Miller's motion record sets out a number of events leading up to the motion hearing. It describes the situation in Toronto relating to COVID-19 generally, the circumstances of Miller's return to Canada in April, and the fact that he had to quarantine upon his return. All of those events pre-date the parties' agreement that underlies the deadlines set out in the May 1 order.
- [9] Miller's counsel explained that since that time, she has communicated with Miller by phone. She also met with Miller once in a parking lot, because Miller's counsel's office is closed to clients. Miller's counsel submitted that in her view, the meeting in a parking lot was unsatisfactory. She asserted that she believes that additional in-person meetings with Miller are required.
- [10] In expressing that belief, Miller's counsel clearly implied that there were circumstances that impeded her ability to help him comply with his obligations under the May 1 order. She stated, however, that she was unable to specify what those circumstances are because of solicitor-client privilege.

- [11] The issue on this motion is whether there are circumstances sufficient to justify an extension of an agreed-upon deadline. If I cannot know what those circumstances are, then Miller has not met his burden.
- [12] Miller's counsel referred me to the Supreme Court of Canada's decision in *R v Cunningham*, in which the court held that a solicitor's request to withdraw for ethical reasons must be accepted at face value, so as not to trench on matters that may be the subject of solicitor-client privilege.¹
- [13] In my view, there is a critical distinction between the issue in *R v Cunningham* and the issue on this motion. When a solicitor seeks to withdraw for ethical reasons, the solicitor is representing to the court that circumstances exist that prevent the solicitor from continuing the solicitor-client relationship without breaching the solicitor's professional conduct obligations. In those circumstances, there is good reason to accept the solicitor's assessment.
- [14] Miller's counsel made no such suggestion about the situation facing her and Miller. She merely asserts that current circumstances warrant the extension of a deadline. While I have no reason whatsoever to doubt her representations as to what her belief is, the relief sought on this motion compels me to understand better what underlies that belief. What does it mean to say that an in-person meeting between counsel and her client is required in order to comply with the May 1 order? How significant are the impediments?
- [15] At the hearing of this motion, Miller's counsel did not go so far as to say that Miller would be denied procedural fairness if I were not to extend the deadline. But when I attempted to explore the prejudice that Miller might suffer, Miller's counsel was unable, for the reasons explained above, to be specific about what impediments exist and what consequences flow from those impediments.
- [16] The Commission must be sensitive to challenges faced by parties as a result of the COVID-19 pandemic. In general, those challenges are manageable. The extent to which they are manageable in a particular case depends on the circumstances of that case. Even during the pandemic, lawyers and their clients can communicate by videoconference, by telephone, and privately in person in any number of settings (while respecting physical distancing guidelines). Documents may be exchanged in-person or delivered. If a respondent seeking relief faces personal challenges of some sort that preclude the use of these methods, then it is incumbent on that respondent to explain.
- [17] On this motion, Miller did not present any circumstances that would justify an extension of the agreed-upon deadline. His failure to do so cannot be rescued by his assertion of solicitor-client privilege. It is not sufficient to hint at the existence of challenges but then choose not to articulate what those challenges are. Miller cannot have it both ways. It is of course his choice whether to waive solicitor-client privilege, and if so, to what extent. When he brings this motion, it is his decision as to what grounds to assert. But any ground he asserts must have some support. If supporting a ground would mean that he has to waive solicitor-client privilege in some limited way, then his choice is to do that or to abandon the ground.

¹ 2010 SCC 10 at para 48

[18] On this motion, I was left with his counsel's unsupported assertion that in-person meetings are required, for reasons that cannot be divulged and that must, it would appear, have surfaced since the May 1 agreement. Had those reasons existed before May 1, presumably they would have been factored into that agreement.

IV. CONCLUSION

[19] For these reasons, I decided that Miller did not meet his burden of demonstrating that an extension of the agreed-upon deadline was warranted.

Dated at Toronto this 2nd day of June, 2020.

"Timothy Moseley"
Timothy Moseley