

Decision and Reasons (Motion)

File Nos. 201042 and 201344



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Gabriele Gentile and Ronald Bruce Brinson

Decision and Reasons: February 27, 2014

DECISION AND REASONS (MOTION)

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.
Ann Etter
Darrell Bing

Chair
Industry Representative
Industry Representative

Appearances:

David Halasz)
Lyla Simon)
)

For the Mutual Fund Dealers Association
of Canada

Brian K. Awad)
)

For the Respondents

A. NOTICE OF MOTION

1. By Notice of Motion, dated February 3, 2014, Staff of the MFDA (“Staff”) sought the following relief:

(a) an Order abridging the time for serving and filing the Notice of Motion herein, if necessary;

(b) an Order that certain conditions be imposed on any potential cross-examination of Staff’s witness, Christopher John Bevis (“Mr. Bevis”), by counsel for the Respondent, Brian Awad (“Mr. Awad”), as follows:

i. Mr. Bevis may only be cross-examined by counsel who is independent from Mr. Awad and his law firm, Burchells LLP (the “Independent Counsel”);

ii. there shall be no consultation between Mr. Awad and the Independent Counsel with respect to the nature of the evidence or the defence in the proceeding herein;

iii. there shall be no communication between Mr. Awad and the Independent Counsel with respect to any matter pertaining to the cross-examination of Mr. Bevis; and

(c) such further and other relief as Staff may advise and the Hearing Panel may permit.

2. The Notice of Motion was supported by an Affidavit of Mike Ford, a Manager of Investigations in the Enforcement Department of the MFDA.

3. In his Affidavit, Mr. Ford swore that, on August 27, 2008, he conducted an interview of Mr. Bevis during Staff’s investigation into the matters underlying the proceedings herein. Mr. Awad, current Counsel for both Respondents, attended the interview as legal counsel to Mr. Bevis.

4. In his Affidavit, Mr. Ford set out a chart, which purported to show that the anticipated evidence of Mr. Bevis would be contrary to the positions taken by the Respondents in these proceedings.

5. By e-mail, dated January 30, 2014, Staff Counsel brought his concerns to the attention of Mr. Awad and suggested that if the Respondents were to examine Mr. Bevis, it was appropriate and necessary for Mr. Awad and the Respondents to undertake to abide by conditions similar to those imposed by the Ontario Securities Commission Hearing Panel in the case of AiT Advanced Information Technologies Corp., 2007 LNONOSC 524. (“AiT Advanced”).

6. By e-mail, dated January 30, 2014, Mr. Awad advised Staff Counsel that: “The defence will be conducted in an ethical manner, and will do no harm to the integrity of the hearing.”

7. Shortly thereafter, the current Notice of Motion was served and filed by Staff.

8. The Respondents were provided with an opportunity to respond to Staff’s Motion, which they did by means of a letter from Mr. Awad, dated February 7, 2014.

9. The position of the Respondents is that “there is no property in a witness.” If Mr. Bevis is called as a witness, the relationship of Mr. Awad with Mr. Bevis will not preclude him from “eliciting evidence from him.”

10. The Respondents believe that Staff’s concern is that Mr. Awad will be instructed to “cross-examine Mr. Bevis in a manner that attacks his credibility.” Mr. Awad submits that he has recognized the potential for conflict between his duties to represent the Respondents and his duties to Mr. Bevis.

11. The Respondents submit that their replies to the allegations indicate that they have admitted all of the material evidence which Staff have indicated that Mr. Bevis will offer. Thus, any difference between their recollections of events and the recollection of Mr. Bevis is

immaterial. Mr. Awad submits that the Respondents would not instruct him to cross-examine on immaterial errors in the evidence of any witness.

12. Mr. Awad submits that, depending on what is elicited through the questions posed by Staff to Mr. Bevis the Respondents may instruct him to (a) ask no questions at all, or (b) elicit additional relevant evidence from Mr. Bevis. It is submitted that there is only the remotest possibility that the Respondents will instruct him to “cross-examine” Mr. Bevis in the sense of attacking his credibility.

13. While Mr. Awad submits that the possibility of such an instruction is remote, the Hearing Panel should assume that the Respondents are on notice that he is constrained by his “duty of loyalty” and “duty of confidentiality” to Mr. Bevis and that they should have a contingency plan.

14. While Mr. Awad does not indicate what this contingency plan is, he submits that the Hearing Panel should not dictate what it will be and it is not proper for Staff to intervene to suggest what it should be.

15. In Reply, Staff submits that the difference between the expected evidence of Mr. Bevis and the Respondents does not go to an “immaterial” issue in the proceeding but to “a central issue.”

16. Staff submits that “any cross-examination, let alone attacking the credibility of a former client, is inappropriate.”

B. THE LAW

17. Rule 1.5 of the MFDA Rules of Procedure provides that a Hearing Panel may issue directions or make interim orders concerning the practice or procedure to be followed during a proceeding, on such terms as it considers appropriate.

18. It is also clear that an MFDA Hearing Panel has the jurisdiction to hear Motions for the removal of counsel due to conflicts as well as to impose conditions on the examination of witnesses.

Re: AiT Advanced, *supra*, at para. 29.

Re: Arbour Energy Inc. (Re), 2009 LNABASC 211 (Alberta Securities Commission)

19. In MacDonald Estate v. Martin (1990) 77 D.L.R. (4th) 249, the Supreme Court of Canada held that in determining whether a disqualifying conflict of interest exists, two questions must be answered: (1) did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) is there a risk that it will be used to the prejudice of the client?

20. The Supreme Court stated that once it is shown that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, it should be inferred that confidential information was imparted unless the solicitor can satisfy the Court that no information was imparted which could be relevant. The degree of satisfaction must withstand the scrutiny of a reasonably informed member of the public. The Court stated that this would be a difficult burden to discharge.

21. The Supreme Court held that a lawyer who has relevant confidential information is automatically disqualified from acting against a client or former client.

22. With respect to the lawyer's partners or associates, a rebuttable inference should be drawn that lawyers who work together share confidences.

C. DECISION

23. It is clear that Mr. Awad had a solicitor-client relationship with Mr. Bevis relevant to the matters at issue in these proceedings.

24. It is anticipated that Mr. Bevis will be called by Staff as a witness.

25. With the exception of Mr. Bevis, there has been no suggestion that Mr. Awad has any other conflict or potential conflict.

26. Consequently, it would be inappropriate for this Hearing Panel to deprive the Respondents of their solicitor of choice.

27. However, with respect to Mr. Bevis, there is, in our view, a conflict of interest vis-à-vis Mr. Awad, should he appear as a witness on behalf of Staff.

28. In our view, this Hearing Panel must craft a remedy which is consistent with the public interest and the best interests of the administration of justice. It should also be a remedy which will ensure that should Mr. Bevis be called as a witness by Staff, he will not feel that any question put to him during the Respondents' examination of him had its genesis in his prior solicitor-client relationship with Mr. Awad.

29. Consequently, we hereby order that if Mr. Bevis testifies at the Hearing on the Merits on behalf of Staff:

- (a) any examination of him on behalf of the Respondents shall be conducted by counsel who is independent from Mr. Awad and his law firm, Burchells LLP;
- (b) there shall be no consultation between Mr. Awad and the Independent Counsel with respect to the nature of the evidence or the defence in the proceeding herein;
- (c) there shall be no communication between Mr. Awad and the Independent Counsel with respect to any matter pertaining to the examination of Mr. Bevis on behalf of the Respondents.

30. Like the Ontario Securities Commission Hearing Panel in AiT Advanced, we believe that the public, represented by the reasonably informed person, would be satisfied that this Order ensures that no unauthorized disclosure of confidential information will occur.

31. We further believe that this Order is protective of the public interest and the administration of justice, while respecting the right of the Respondents to be represented by Mr. Awad in all other respects.

32. In his submissions, Mr. Awad indicated that he had discussed the “conflict issue” with the Respondents as early as December of 2011, advising them that they should have a “contingency plan.” As the commencement of the Hearing on the Merits is more than a month away, this will provide the Respondents ample time to take whatever additional steps may be necessary to comply with the terms of our Order.

DATED this 27th day of February, 2014.

“Thomas J. Lockwood”

Thomas J. Lockwood, Q.C.,
Chair

“Ann Etter”

Ann Etter,
Industry Representative

“Darrell Bing”

Darrell Bing,
Industry Representative