Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
JOWDAT WAHEED and BRUCE WALTER

CONFIDENTIAL REASONS AND DECISION ON A MOTION TO QUASH SUMMONSES

[Editor's Note: Made public on January 16, 2013]

Hearing:	December 12, 2012	
Decision:	December 20, 2012	
Panel:	Christopher Portner	- Commissioner
Appearances:	Matthew P. Gottlieb	- For William Gula and Steven Harris
	R. Paul Steep	- For Jowdat Waheed
	Kent E. Thomson	- For Bruce Walter
	Lawrence Thacker Jennifer Lynch	- For Staff of the Commission

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ON A MOTION TO QUASH SUMMONSES

I. BACKGROUND

[1] By three Notices of Motion dated, respectively, December 4, 5 and 10, 2012, motions were brought by Jowdat Waheed ("**Waheed**"), Bruce Walter ("**Walter**") and both of William Gula ("**Gula**") and Steven Harris ("**Harris**") to quash summonses issued by Staff ("**Staff**") of the Ontario Securities Commission (the "**Commission**") to Gula and Harris directing them to attend at the Commission for compelled examinations. The motions were heard together in a hearing before the Commission on December 12, 2012 (the "**Motion Hearing**").

[2] Waheed and Walter (together, the "**Respondents**") are respondents in a proceeding commenced by a Notice of Hearing issued on January 9, 2012 in connection with a Statement of Allegations filed by Staff on the same date. In the Statement of Allegations, Staff alleges breaches by the Respondents of subsections 76(1) and (2) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") and conduct contrary to the public interest. Staff alleges at paragraph 1 of the Statement of Allegations that:

> This is a case of insider tipping and trading by a former consultant to [Baffinland Iron Mines Corporation ("**Baffinland**")], who three months after ceasing to be a consultant, breached his confidentiality obligations and acted contrary to the public interest by using material facts and confidential information about Baffinland to launch a hostile take-over bid for Baffinland with his close friend and colleague.

[3] The hearing to determine the merits of Staff's allegations against the Respondents (the "**Merits Hearing**") will begin on January 14, 2013.

[4] On June 8, 2011, Staff obtained an order pursuant to subsection 11(1)(a) of the Act in connection with an investigation relating to Baffinland. That order was subsequently amended on a number of occasions to add and remove the names of the individuals conducting the investigation. The matters to be investigated, as set out in the most recent order dated November 27, 2012, are as follows:

> A. Certain persons may have engaged in trading in securities of Baffinland with knowledge of material facts or material changes respecting Baffinland that had not been generally disclosed;
>
> B. Selective disclosure may have been made respecting material facts or material changes relating to Baffinland that had not been generally disclosed; and
>
> C. Disclosure documents required to be filed with the Commission by persons in connection with the offers to Baffinland securityholders may have contained statements that were misleading or untrue;

[5] On November 27, 2012, Staff contacted Gula to arrange for the service of a summons which required Gula to attend for an examination before the Commission on December 7, 2012 (the "**Gula Summons**"). The Gula Summons was issued and served on Gula's counsel on November 29, 2012. On November 30, 2012, a similar summons was issued to Harris and served on Harris's counsel which required Harris to attend for an examination before the Commission on December 14, 2012 (the "**Harris Summons**"). Both the Gula Summons and the Harris Summons were issued pursuant to section 13 of the Act in connection with Staff's investigation into the business, operations and securities activities of Baffinland, ArcelorMittal and Nunavut Iron Ore Acquisition Inc.[1] ("**Nunavut**") and their representatives and agents, past and present, including persons or companies that may have engaged in any activities with or relating to any of them.

[6] Gula is a former partner of the Davies Ward Phillips & Vineberg LLP law firm ("**Davies**"), and Harris is a current partner of Davies. Both Gula and Harris acted as counsel to Nunavut in connection with its take-over bid for Baffinland and were involved in providing legal advice to the Respondents.

[7] In June 2012, the Respondents advised Staff that they intend to rely on the defence of legal advice at the Merits Hearing and waive privilege solely over the portion of the Davies file "that is from the timeframe between July 26, 2010 and September 9, 2010 and has a bearing on the defence of legal advice in the OSC Proceeding (*i.e.* concerns the review by or with Davies of issues relating to Mr. Waheed's consultancy)" (June 28, 2012 letter from counsel for Walter to Staff) (the "**Limited Waiver**").

[8] The Respondents have indicated their intention to call Gula and Harris as witnesses at the Merits Hearing.

II. THE FACTS

[9] The Merits Hearing will commence on January 14, 2013, a little more than one month after the date of the Motion Hearing.

[10] Staff conducted seven compelled examinations under the authority of sections 11 and 13 of the Act during the period from July 25, 2011 to October 28, 2011, including examinations of each of Waheed and Walter which were conducted on August 11, 2011 and August 12, 2011, respectively. By October 13, 2011, the Respondents had both produced documents and Waheed had provided Staff with answers to undertakings he gave during his compelled examination.

[11] Staff has conducted interviews of other witnesses in preparation for the Merits Hearing. In communications with Respondents' counsel, Staff has indicated that the Respondents will receive Staff's witness information in accordance with the *Rules*. On October 16, 2012, counsel for Walter made the following request of Staff:

> We have reason to believe that Staff have interviewed one or more potential witnesses in connection with this matter and have neither disclosed to us nor

[1] The company formerly known as Nunavut Iron Ore Acquisition Inc. is now WW Mines Inc.

> McCarthys the fact of the interviews or the contents/subject-matter of the interviews.
>
> Please advise if this is the case.
>
> (October 16, 2012 email from counsel for Walter to Staff)

Staff replied:

> Staff is preparing for the hearing in January. In the event that Staff receives materials that have not been previously disclosed, such materials will be disclosed pursuant to our ongoing disclosure obligations. Otherwise, as discussed last week, Staff (along with the Respondents) will provide its witness list and will-says in accordance with the Rules.
>
> (October 16, 2012 email from Staff to counsel for Walter)

[12] Previously in this proceeding, Staff has made submissions on the distinction between investigation and hearing preparation. At a November 22, 2012 pre-hearing conference, at which counsel for the Respondents requested disclosure of information relating to interviews Staff had conducted, counsel for Staff stated:

> So if we interview a witness and they provide new material, our obligation is to provide disclosure of that material. It is not to provide the fact that we interviewed them. That is part – what my friends are looking for is our strategy and our preparation, and there is no obligation under the rules to provide our litigation strategy.
>
> (Pre-hearing conference transcript, November 22, 2012 at page 73, lines 2 to 9)

And:

> … There's a bright line that many [*sic*] friend is attempting to blur between the fruits of the investigation and litigation preparation.
>
> (Pre-hearing conference transcript, November 22, 2012 at page 73, lines 9 to 12)

[13] The Respondents and Nunavut have provided Staff with only those portions of the Davies file to which the Limited Waiver applies. Staff is attempting to compel counsel to the Respondents (at the relevant time) to submit to examinations by Staff knowing that Gula and Harris are bound by the law relating to privilege to keep certain communications relating to the subject of Staff's investigation in confidence.

[14] On June 5, 2012, the Respondents confirmed with Staff that they intend to rely on the defence of legal advice. Staff submit that:

> … The defence is that Walter and Waheed were given a legal opinion by Gula, Harris and/or other Davies' lawyers. There is no legal opinion in any of the

> Davies documents that were disclosed. The only possible opinion would have to have been given orally. Therefore, the only possible way for Staff to obtain that evidence, which bears directly on the question whether Waheed and/orWalter had "knowledge of material facts or material changes reflecting Baffinland that had not been generally disclosed" when they purchased the toehold shares and launched their hostile bid, is to conduct a section 13 examination of Gula and Harris. The lawyers who provided the advice legal opinion are the only source of the evidence about that advice.
>
> (Memorandum of Fact and Law of Staff of the Ontario Securities Commission at para. 82)

[15] The Applicants proposed to Staff that their pre-hearing examinations of Gula and Harris be conducted on a voluntary basis with counsel for the Respondents in attendance to assert any claims of privilege. Staff did not agree to the proposal.

III. RELIEF SOUGHT

[16] The Respondents and Gula and Harris (collectively, the "**Applicants**") are seeking:

(a) An order that the Gula Summons and the Harris Summons (together, the "**Summonses**") be quashed; and

(b) An order prohibiting Staff from obtaining or issuing further summonses to current or former lawyers or law students of Davies; or

(c) In the alternative, an order permitting counsel for the Respondents to attend any examination of Gula, Harris or any other current or former lawyer or law student of Davies by Staff, and to participate in such interview for the purpose of asserting and protecting the privilege of the Respondents and Nunavut.

[17] Staff requests an order dismissing the Applicants' motions in their entirety.

IV. STAFF'S POWERS TO INVESTIGATE

[18] Part VI of the Act sets out the Commission's powers in investigations and examinations. The relevant sections of Part VI, for the purposes of this Motion Hearing, are as follows:

> 11. (1) Investigation Order – The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,
>
> > (a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; …
>
> …
>
> 13. (1) Power of investigator or examiner – A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce

> the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court.
>
> (2) Rights of witness – A person or company giving evidence under subsection (1) may be represented by counsel and may claim any privilege to which the person or company is entitled.
>
> [Emphasis added]
>
> ...

[19] As noted above, the Act explicitly states that any person subject to a compelled examination by Staff may claim any privilege to which the person is entitled.

[20] The Applicants do not dispute that an investigation need not cease with the issuance of a notice of hearing by the Commission, but may continue (see *Re Boock* (2010), 33 O.S.C.B. 1589 ("***Boock***"), *Re YBM Magnex International Inc.* (2001), 24 O.S.C.B. 1061, aff'd [2001] O.J. No. 2039 (Div. Ct.) ("***YBM***") and *A&B*, May 8, 2000, unreported (Ont. Sec. Comm.) ("***A&B***")). As the Commission stated in *Boock*:

> … the authority of Staff to investigate under a section 11 order does not end when an adjudicative proceeding is commenced. There are many legitimate reasons why an active investigation may continue after the issue of a notice of hearing or a statement of allegations. The Commission stated in *Re X and Y Co.* that "there is no indication in the Act that a notice of hearing in any way changes Staff's ability to exercise its power under an order made pursuant to section 11 of the Act". Similarly, the Court stated in *Johnson v. British Columbia (Securities Commission)*, [1999] B.C.J. No. 522 (BC. S.C. [In Chambers])… that "the probable purpose of the further interviews is to obtain further information which may be used against Johnson at the Hearing itself. …
>
> (*Boock, supra* at para. 105)

V. ANALYSIS

A. Were the Summonses issued legitimately as part of Staff's continuing investigation?

[21] Given the late stage in the adjudicative proceedings against the Respondents and the particular circumstances of this case, the question arises as to whether the Summonses were in fact issued by Staff as part of a continuing investigation, or whether their purpose was not investigatory in nature but rather intended to aid Staff in their preparation for the upcoming Merits Hearing.

[22] The Applicants submit that "[t]he interviews sought by Staff are, in substance, witness interviews in aid of preparation for the merits hearing. They are not the proper subjects of a compelled examination pursuant to s. 13 *Securities Act*" (December 4, 2012 Notice of Motion of Waheed at para. 23).

[23] Staff submits that the Summonses were properly issued as part of their continuing investigation in this matter. Staff contends that the examinations of Gula and Harris are relevant to the investigation and notes that the relevance of evidence from Gula and Harris is essentially agreed since the Respondents have squarely placed their legal advice in issue by proposing to rely on it as a legal defence.

[24] Staff further submits that:

> ... the only possible way for Staff to obtain that evidence, which bears directly on the question whether Waheed and/or Walter had "knowledge of material facts or material changes reflecting Baffinland that had not been generally disclosed" when they purchased the toehold shares and launched their hostile bid, is to conduct a section 13 examination of Gula and Harris. The lawyers who provided the advice legal opinion [sic] are the only source of the evidence about that advice.
>
> (Memorandum of Fact and Law of Staff of the Ontario Securities Commission at para. 82)

[25] The Respondents submit that there is no valid purpose for the Summonses other than to conduct what are essentially examinations for discovery of witnesses for the Respondents for the purpose of preparing for the Merits Hearing.

[26] Staff have acknowledged that the Summonses were issued to obtain information with respect to a defence that the Respondents intend to raise at the Merits Hearing:

> The Respondents have advised that they intend to rely on the defence of legal advice. Staff is entitled to obtain information on this issue as part of our ongoing investigation. We seek to interview Mr. Gula as a witness as he is a person who gave legal advice to the Respondents. As you know, it is well settled law that there is no property in a witness. …
>
> (November 28, 2012 email from Staff to counsel for the Respondents)

[27] I accept that Staff's investigation in this matter may be ongoing and that there is no legal barrier to the investigation continuing. However, for Staff to be permitted to proceed with a compelled examination at this late stage in the proceeding, it is not sufficient for Staff to merely assert that the examinations are for the purpose of an ongoing investigation.

[28] In my view, Staff is attempting to exercise its investigative authority on the eve of the Merits Hearing in order to examine witnesses who will be testifying on behalf of the Respondents and I find that such an exercise of its investigative authority is inappropriate.

B. Should the Summonses be quashed?

[29] Once a proceeding has been commenced before the Commission, the Commission has the authority to determine its own procedures and practices in the proceeding (*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "***SPPA***") at s. 25.0.1; *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at para. 16; *Re ATI Technologies Inc.* (2005), 28 O.S.C.B. 9667 at para. 9; and *Re Hollinger Inc.* (2006), 29 O.S.C.B.7071 at para. 49). It is not the role of an adjudicative Panel of the Commission to direct an investigation by Staff and the procedural safeguards of the *SPPA* do not relate to the conduct of investigations (*YBM, supra* at para. 11 and *SPPA*, s. 3). However, the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "***Rules***") made under the *SPPA* set out a scheme for hearing preparation, provision of witness information and disclosure of documents on which the parties intend to rely at a hearing.

[30] Staff submits that "[a]lthough the purpose of the proposed section 13 examinations is investigatory, it would also be a permitted and valid purpose to discover what a witness' evidence is going to be at the hearing" (Memorandum of Fact and Law of Staff of the Ontario Securities Commission at para. 88).

[31] The circumstances under which the Summonses were issued in this case differ from the circumstances present in prior decisions in which the Commission has declined to quash summonses issued by Staff in the course of investigations (see *YBM* and *A&B*). In *A&B*, the Commission stated:

> Nor do we agree with "Mr. X's" argument that the Summons should be quashed because it was issued for a collateral or ulterior purpose because the real intent of the Summons was to obtain a *viva voce* deposition from a senior officer of "B" for the purpose of preparing for the hearing.
>
> If this means that the real purpose of the Summons is to obtain discovery of "B" through an officer of "B" then we are satisfied that this was not the purpose of the Summons. If it means no more than that the Summons is being used by Staff to determine whether or not to call "A" as a witness, and, if they do, what his evidence will be, then we see nothing wrong with this, nor do we see any unfairness in it. Part VI clearly, in our view, contemplates such a proceeding. … [Emphasis added]
>
> (*A&B, supra* at 11 to 12)

[32] It appears that the Panel in *A&B* was satisfied that the purpose of Staff's summons in that case was not to conduct a pre-hearing discovery. In this case, I am satisfied that the real purpose of the Summonses is to conduct an oral examination in preparation for the Merits Hearing. In that sense, the facts in *A&B* are distinguishable.

[33] Likewise, the facts of this case are distinguishable from the facts in *YBM* in which the Commission stated at paragraph 13:

> We disagree with the Applicant's contention that the Commission erred in its decision in *A&B*. The Section 13 summons was not issued to Mr. Middleton as a corporate officer produced for discovery but rather as a corporate witness being compelled to testify as to his personal knowledge about the facts in issue.

[34] As noted above, the procedure in investigations by Staff is separate from the procedure to be followed by parties to an adjudicative proceeding before the Commission. Rule 4.5 of the *Rules* requires that witness lists and summaries of the evidence witnesses are expected to give at the hearing be disclosed at least 10 days before the commencement of the hearing. If, as the Respondents have indicated, they intend to call Gula and Harris as witnesses at the Merits Hearing, they will be required to comply with Rule 4.5 of the *Rules*. Staff's opportunity to test the nature, extent and strength of any evidence Gula and Harris provide will be through cross-examination at the Merits Hearing.

[35] The parties made extensive submissions with respect to issues of privilege at the Motion Hearing. Given my finding below, it is not necessary to address issues of privilege.

VI. CONCLUSION

[36] The Applicants have made a compelling case that the purpose for issuing the Summonses to Gula and Harris is to provide Staff the tactical advantage of discovering the evidence of Gula and Harris prior to their testimony at the Merits Hearing. This, in my opinion, is not an appropriate use of Staff's broad investigative powers. It is not sufficient for Staff to simply rely on the breadth of their investigative powers, with no response to the alleged abuse of those powers.

[37] In the absence of any evidence of a legitimate investigative purpose for the issuance of the Summonses, I am satisfied on the preponderance of evidence that the Summonses were issued in aid of Staff's preparation for the Merits Hearing and not for a legitimate purpose related to their ongoing investigation into this matter. My conclusion is entirely dependent on the facts of this case.

[38] I therefore conclude that the Summonses should be quashed.

[39] I do not find it appropriate at this stage to make any further order with respect to any future summonses Staff may issue in connection with their ongoing investigation.

Dated at Toronto this 20th day of December, 2012.

"Christopher Portner"

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Christopher Portner