CITATION: North American Financial Group Inc. v. Ontario Securities Commission, 2025 ONSC 2326
DIVISIONAL COURT FILE NO.: 495/14
DATE: 20250501

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, R.D. Gordon and Matheson JJ.

BETWEEN:	
NORTH AMERICAN FINANCIAL GROUP INC., NORTH AMERICAN CAPITAL INC., ALEXANDER FLAVIO ARCONTI AND LUIGINO ARCONTI	*Raymond G. Colautti*, for the Appellants North American Financial Group Inc., North American Capital Inc. and Alexander Flavio Arconti
Appellants	*Karen Zuvlony*, for the Appellant Luigino Arconti
– **and** –	
ONTARIO SECURITIES COMMISSION	*Deborah E. Palter and Scott McGrath*, for the Respondent
Respondent	**HEARD at Toronto:** April 15, 2025

REASONS FOR DECISION

The Court:

[1] There are three motions before this Court, all arising within the context of the Appellants'[1] motions to set aside the judgment of this Court dated January 5, 2018 (the "Divisional Court Decision")[2]. In 2018, the Divisional Court dismissed the Appellants' appeal from the Ontario Securities Commission's decision to impose sanctions on them because of misrepresentations to investors and related findings.

[2] In December 2023/January 2024, the Appellants moved to set aside the Divisional Court Decision under r. 59.06 of the *Rules of Civil Procedure*.

[3] On the r. 59.06 motions, the Appellants rely on r. 59.06(2)(a) – fraud or facts arising or discovered after the Divisional Court Decision. In support of their r. 59.06 motions, in addition to lay evidence, the Appellants served seven expert reports.

[4] The three motions that are now before this Court are as follows:

(1) the Respondent Ontario Securities Commission ("OSC" or "Commission") moves to strike out the seven expert reports delivered by the Appellants;

(2) the Appellants move for leave under s. 12 of the *Evidence Act*, R.S.O. 1990, c. E.23, to rely on more than three experts; and,

(3) the Respondent moves for security for costs.

[5] The Commission's motions to strike and for security for costs are granted. Since we have granted the motion to strike all the expert reports, there is no need to deal with the Appellants' motion for leave under s. 12 of the *Evidence Act.* Our reasons follow.

Background

[6] The Appellants Luigino and Alexander Flavio Arconti are brothers who began a used car dealership business. They then incorporated the appellant North American Financial Group ("NAFG") to provide lease financing to customers.

[7] To expand their business, the Arcontis began advertising in Toronto newspapers for individual investors, promising returns of as much as 15%. They began selling NAFG non-prospectus qualified securities to investors. From July of 2005 to September of 2010, NAFG raised $5.7 million by issuing shares.

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[1] Although the appellant Luigino Arconti has different counsel than the other Appellants, and each group brought their own r. 59.06 motion, they took the same position on the three motions now before this Court. They are therefore referred to collectively as the Appellants.

[2] *North American Financial Group Inc. v. Ontario Securities Commission*, 2018 ONSC 136, leave to appeal to Ont. C.A. refused, M48762 (May 18, 2018), leave to appeal refused, [2019] S.C.C.A. No. 38245.

[8] In 2008, the Arcontis incorporated another company, the appellant North American Capital Inc. ("NAC"), to service investors who requested a particular type of product. They began selling NAC non-prospectus qualified securities to investors. From July of 2009 to April of 2010 NAC raised $1,042,000 by issuing shares. These funds were transferred to NAFG.

[9] The Arcontis also incorporated Carter Securities Inc. ("Carter") to act as NAFG's registered dealer. Carter then also acted as the registered dealer for NAC. The Arcontis jointly owned and were the actual and/or *de facto* officers and directors of the above companies. Alexander Flavio Arconti also became a registrant with the OSC.

[10] After a compliance review in 2010, the OSC Director suspended Carter's registration. The OSC issued a temporary cease trading order and ultimately, NAFG made an arrangement in bankruptcy proceedings under which most investors received about half their money back. The OSC further gave notice of a hearing arising from allegations against the Arcontis, NAFG, and NAC under the *Securities Act*, R.S.O. 1990, c. S.5.

[11] In 2013, there was a hearing before the Commission pursuant to ss. 127 and 127.1 of the *Securities Act* to determine whether it was in the public interest to order sanctions and costs against the Arcontis, NAFG and NAC. As set out in its decision of December 11, 2013[3] (the "Merits decision"), the Commission concluded as follows:

(i) that the Arcontis directly or indirectly engaged or participated in acts, practices or courses of conduct relating to the securities of NAFG and NAC that they knew or reasonably ought to have known perpetrated a fraud on persons contrary to subsection 126.1(b) of the *Securities Act* and contrary to the public interest;

(ii) that the Arcontis authorized, permitted or acquiesced in the non-compliance with Ontario securities law by NAFG and NAC;

(iii) that Luigino Arconti engaged in or held himself out as engaging in the business of trading in securities without being registered to do so in circumstances in which no exemption was available, contrary to s. 25(1) of the *Securities Act* and contrary to the public interest; and,

(iv) that Carter's actions breached OSC rules, were contrary to the public interest, and that the Arcontis were deemed to have not complied due to their roles.

[12] The Commission found that the findings against the Appellants were very serious. As summarized in the Divisional Court Decision, at para. 75, the Commission found as follows:

[3] *North American Financial Group Inc. et al*., 2013 ONSEC 43.

> … fraud is one of the most egregious securities violations, which is an "affront" to the investors who were targeted and a threat to the confidence and efficiency of the market.
>
> Contrary to the submission of the Appellants, the Commission found that the Appellants were experienced in the marketplace. …
>
> A total of almost $4,000,000 was raised from the investors, which are losses that the Commission found were not at the most serious or the least serious end of the spectrum. They did, however, "have the capacity to result in a substantial loss of investor confidence in the integrity of the capital markets."
>
> …
>
> The Commission found that "[a] message must be sent to the [Appellants] and like-minded individuals that fraudulent schemes similar to the one involved in this case will result in severe sanctions."

[13] After a further hearing, the Commission rendered its penalty decision dated September 11, 2014[4] (the "Penalty decision"). As summarized at para. 76 of the Divisional Court Decision, the Commission imposed the following sanctions:

> (i) A permanent trading, acquisition and exemption application ban, with no carve-outs to the Arcontis for personal trading. A permanent director and officer ban was also imposed on the Arcontis.
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> (ii) Each of the Arcontis was ordered to pay an administrative penalty of $600,000, as was NAC. In view of NAFG's bankruptcy status no monetary sanctions were sought against it.
>
> (iii) … The Commission ordered the Arcontis to disgorge the amount of $2,052,691.16 to the Commission on a joint and several basis. It arrived at this amount by taking the $2,908,170 that was received from investors of NAFG and netting out the amount that was repaid to NAFG investors either in the insolvency arrangement or in redemption payments. …
>
> (iv) The Commission awarded costs in the amount of $200,000 on a joint and several basis as against NAC and the Arcontis.

[4] *North American Financial Group Inc. et al*., 2014 ONSEC 28.

Divisional Court Decision

[14] The Arcontis, NAFG, and NAC appealed to the Divisional Court. They also brought a motion to adduce fresh evidence regarding the conduct of the lawyer who represented them before the Commission, Ian Smith (the "Hearing counsel") in relation to one of their grounds of appeal.

[15] Before the Divisional Court, the Appellants raised these main issues:

(i) the Appellants submitted that the Merits and Penalty decisions should be set aside because the Commissioner who presided over the hearings was biased;

(ii) the Appellants challenged the finding of fraud;

(iii) the Appellants challenged the penalty; and,

(iv) the Appellants submitted that the Merits and Penalty decisions should be set aside because of a conflict of interest and ineffective assistance of their Hearing counsel, who they alleged was incompetent in his conduct of their case and had an undisclosed conflict of interest because his firm represented the OSC in other matters.

[16] The Divisional Court Decision includes a lengthy account of the evidence that was before the Commission and the resulting Merits and Penalty decisions, as well as an analysis of the arguments put forward by the Appellants. In brief, the Divisional Court decided as follows:

(i) Bias:

[17] After a review of the record and applicable legal principles, which are not challenged in the r. 59.06 motions, the court concluded that there was no merit to the Appellants' bias argument. Further, the bias argument formed one of the bases for alleging incompetence of the Hearing counsel. The court concluded, at para. 103: "[s]ince the argument could not succeed, [Hearing] counsel appropriately decided not to pursue it."

(ii) Fraud:

[18] The Appellants conceded that the Commission correctly set out the essential elements of fraud as described by the Supreme Court of Canada, including the proof of a prohibited act and the knowledge component. The Appellants submitted that the Commission made two fundamental errors in its analysis: by failing to analyze what a reasonable person would consider to be a "dishonest act"; and, by failing to weigh all the evidence.

[19] The Appellants also argued that they had hired and relied on a senior compliance expert, David Gilkes (the "Appellants' compliance officer") to assist them since they did not have experience in the investment field. They argued that they relied on his expertise as a former Manager of Registrant Regulation at the OSC.

[20] The court considered the numerous arguments put forward in support of the above, including whether the applicable rules were unclear, the extent of the credibility findings made against the Appellants, whether their business was a "Ponzi" scheme, whether their business could be turned around, and whether the brochures were just "puffery".

[21] At para. 175, the court concluded that reading the Merits decision as a whole, it was clear that the Commission implicitly found that the non-disclosure in issue objectively rose to the level of dishonesty and that this finding could be easily justified on the basis of the record before it. The court noted that the Commission was not just concerned with non-disclosure, "[i]t also found that the Appellants had misled investors by publishing false information in their brochures and had used new investor money to pay old investors, which the Commission found to be an act of "deceit, falsehood or some other fraudulent means": at para. 174. The court found that the Appellants had not shown that the findings of fraud were unreasonable (the standard of review at the time): at para. 200.

(iii) Penalty:

[22] The Appellants argued that the Penalty decision failed to consider various relevant mitigating factors. The Appellants argued that they had relied on their Compliance officer and his evidence was that the rules were unclear. However, the court noted that the advice they received from him was a "key part of the Appellants' defence at the merits hearing, a defence that the Commission rejected" and they were attempting to reargue the issue: at para. 203. The other issues they raised were also considered and the court found them to be attempts to reargue the merits and the findings made on the evidence.

[23] The court concluded, at para. 217, that a review of the jurisprudence indicated that there was nothing unreasonable about any of the penalty orders. At para. 218, the court further held as follows:

> ... It is not unreasonable to decide that in order for that confidence to be restored the message must be sent that misrepresentation and non-disclosure that amounts to fraud will be punished severely. That is what the Commission did in this case.

(iv) Conflict/Ineffective Assistance of Hearing counsel:

[24] The court considered the allegations of conflict of interest and incompetence. On this ground, the court had to address a motion to adduce fresh evidence. The court considered the Appellants' proposed fresh evidence as well as responding evidence from their Hearing counsel.

[25] On the conflict of interest, the court summarized the fresh evidence at paras. 106-108, as follows:

> … At the same time that [Hearing counsel] was acting for the Appellants in the proceeding brought against them by the Commission, Mr. Fenton, his partner, was acting for the Commission in a totally unrelated proceeding. In addition, a number of years before being retained by the Appellants, [Hearing counsel] had acted for the Commission in another unrelated proceeding. The Appellants had no

> knowledge of any of these retainers until after the hearings that are the subject of this appeal.
>
> According to the Appellants, these retainers created a conflict of interest between [Hearing counsel] and themselves. This is particularly so because the written retainer agreement between the Commission and Fenton, [Hearing counsel] states that the Deputy Director of the Enforcement Branch of the Commission is to supervise the work of the firm in relation to their retainer with them. Thus, while [Hearing counsel] was acting for them, the firm was under the supervision of the Commission in relation to another retainer.
>
> The Appellants argue that this conflict of interest caused [Hearing counsel] to fail in his duty of loyalty to them. He preferred his own interests, particularly his interests in keeping the work of the Commission, over that of the Appellants. This caused him to compromise his defence of the Appellants in a number of ways...

[26] The court considered the new facts and the law regarding the duty of loyalty to clients, including the avoidance of conflicts of interest. The court held that even if it could be argued that the Appellants' concern about their Hearing counsel's firm's concurrent retainers was a reasonable one, the Appellants had to demonstrate that the existence of a conflict actually caused a miscarriage of justice. The court found that they could not do so given the analysis of the fraud and penalty issues summarized above.

[27] On ineffective assistance of counsel, the court found that the Arcontis' evidence concerning their Hearing counsel's alleged failures in preparation and defence strategy were not credible and did not meet the first prong of the test for admission of fresh evidence on the appeal.

Steps after the Divisional Court Decision:

[28] The Appellants unsuccessfully sought leave to appeal to the Court of Appeal and then to the Supreme Court of Canada.[5]

[29] The Arcontis also commenced a civil action against the OSC and two of its employees, which was discontinued. The Arcontis commenced eight more actions against parties other than the OSC, including an action against their Hearing counsel.

Unpaid Costs Orders

[30] The costs orders made against the Appellants in the above proceedings totaled over $240,000 plus interest, not including costs in any civil action. These costs orders were made over a period ending in February 2020.

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[5] Leave to appeal to Ont. C.A. refused, M48762 (May 18, 2018), leave to appeal refused, [2019] S.C.C.A. No. 38245.

[31] None of these costs orders have been paid, in whole or in part.

Security for Costs Motion

[32] There is no dispute that this Court may make an order for security for costs of the r. 59.06 motions, which is provided for under r. 56.01 and r. 61.06 of the *Rules of Civil Procedure*.

[33] The Commission must first establish that one of the prerequisites to a security for costs order is fulfilled. In this case, the Commission relies on r. 56.01(1)(c), specifically where it appears that the Appellants have an order against them for costs in the same or another proceeding that remains unpaid in whole or in part. This is amply shown on the record.

[34] The Appellants submit that their r. 59.06 motions excused them from paying the costs orders summarized above, suggesting that their motions have "effectively stayed" those orders. They have provided no authority for this position. The Commission orders and the court orders arising from the exercise of appeal rights were not automatically stayed after the Divisional Court Decision in 2018. Nor have the Appellants sought any interim terms staying those orders pending their r. 59.06 motions. There is no stay. Further, the Appellants did not pay those costs orders for more than three years before bringing their r. 59.06 motions.

[35] The Appellants also submit that since they will seek to have the costs orders set aside if successful on the r. 59.06 motions, the costs orders should be treated differently under r. 56.01. This does not defeat the first step in the analysis under r. 56.01, but we have considered it in the exercise of our discretion under the next step. The first step is satisfied.

[36] The onus then shifts to the Appellants to show that an order for security for costs would be unjust. Each case must be considered on its own facts. There are no rigid criteria. The justness of an order must be considered holistically: *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1 (C.A.), at paras. 24-25.

[37] For the justness of their case, the Appellants rely on the OSC delay and on the merits of their r. 59.06 motions. On delay, the Appellants submit that the OSC ought to have brought the security for costs motions more quickly. However, the chronology of the r. 59.06 motions in this Court does not assist the Appellants. Before the first case conference, the Appellants had only delivered notices of motion. The Appellants then failed to comply with the court's required schedule for the delivery of their motion records. The motion records that were ultimately delivered are thousands of pages long and contain the numerous expert reports that are now challenged. Once those motion records were delivered, the OSC notified the Appellants of its intention to bring this motion and proceeded promptly.

[38] The Appellants further submit that the OSC is overreaching because it had not taken steps regarding the costs orders and this "lulled" the Appellants into believing that the costs orders would not be an issue on the r. 59.06 motions. The Appellants submit that this is a litigation "tactic". The Appellants failed to provide a foundation for this submission and have also not paid any of the costs orders since being put on notice of the motion for security for costs.

[39] The Appellants then rely on the merits of their r. 59.06 motions and submit that the motions raise issues of public importance regarding the duties of the Commission and its former employees. The Appellant submit that they have a *prima facie* case under r. 59.06 that should be heard.

[40] These submissions suggest that the Appellants could not pay security for costs. However, the Appellants do not submit that they are impecunious, and they have put forward no financial evidence setting out their current financial circumstances. There are only conclusory statements that the decisions, beginning with the Merits and Penalty decisions, have impacted them severely both personally and financially. Further, the Appellants have been able to put forward their r. 59.06 motions, including thousands of pages of court documents and numerous expert reports, using multiple counsel. The Appellants' request that any order for security for costs be in instalments is, in turn, not supported by financial evidence.

[41] On the Appellants' reliance on the merits of their r. 59.06 motions, the Appellants' submissions must be considered within the context of the high threshold to succeed on such a motion. The Appellants must "demonstrate that the 'new evidence could not have been put forward by the exercise of reasonable diligence' and that the evidence is sufficiently cogent that it would have altered the original decision": *Berge v. College of Audiologists and Speech Language Pathologists of Ontario*, 2019 ONSC 3351 (Div. Ct.), at para. 20, citing *Tsaoussis v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), at paras. 41-45.

[42] On a r. 59.06 motion, the finality principle will not yield until the above threshold has been met, and, even if it is, "the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment: *Tsaoussis*, *supra*.

[43] Under r. 59.06, the "onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are exactly that, final": *Tsaoussis, supra.*

[44] On these r. 59.06 motions, the Appellants summarize their "facts discovered" after the Divisional Court Decision in this way:

(i) that there were several breaches of the OSC's internal Code of Conduct (which is posted on its website) by OSC staff, including David Gilkes, its former Manager of Registrant Regulation who approved the Appellants' licence and whom the Appellants relied on as their compliance advisor and witness. The Appellants should have been made aware of these breaches by both the OSC and Hearing counsel and, if they had been, this would have materially assisted them in their defence of the case against them;

(ii) that from 2003-2009, Hearing counsel acted as counsel for the OSC on the prosecution of another case, which was beyond his prior, disclosed work for the OSC; and,

(iii) that he continued to be involved with that other case until 2011, when he was a defendant in a lawsuit brought by St. James Securities Inc. and successfully defended that action.

[45] As noted by the OSC, the Hearing counsel's formal retainer did not take place until after the above events.

[46] In any event, the Appellants submit that when the Divisional Court considered the grounds of conflict of interest and ineffective assistance of counsel it was based on false evidence from the Hearing counsel, as well as material non-disclosure. This is further elaborated on in their statements of particulars on the r. 59.06 motions. The Appellants further rely on their expert reports, which must also be "facts discovered" after the Divisional Court Decision was made. There are other issues with those reports as well, addressed on the motion to strike them out below. The Appellants also rely on their Hearing counsel and his firm's consent to set aside the Merits decision, without context.

[47] For the purposes of this security for costs motion, we need not determine the merits of the r. 59.06 motions. As confirmed by the OSC, they are disputed. We have considered the Appellants' submissions about the merits in the exercise of our discretion under r. 56. We are not persuaded that the Appellants should be sheltered from a security for costs order because of the nature of the issues or because the r. 59.06 motions involve a regulator.

[48] We have considered the justness of an order for security for costs holistically in the exercise of our discretion. Having done so as summarized above, and considering the submissions and materials on quantum, we conclude that there shall be an order that requires the Appellants to pay $100,000 into court within 60 days from today, the terms for which are set out under "Orders" below.

Motion to Strike Out Expert Affidavits

The Test for the Admission of Expert Evidence

[49] In addition to affidavit evidence about the facts that are submitted as fresh evidence, the Appellants have submitted seven expert affidavits and/or reports.

[50] Determining whether to admit expert evidence involves a two-stage analysis. At the first stage, there are four threshold requirements that must be established, as outlined in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 23 citing *R. v. Mohan*, [1994] 2 S.C.R. 9:

(a) relevance, meaning logical relevance;

(b) necessity in assisting the trier of fact;

(c) absence of an exclusionary rule; and

(d) a properly qualified expert, which includes included the requirement that the expert be willing and able to fulfill an expert's duty to the court to provide evidence that is impartial, independent and unbiased.

[51] The second stage of the analysis involves balancing the potential risks and benefits of admitting the evidence. If the potential risks outweigh the potential benefits, the evidence should not be admitted: *White Burgess*, at para. 24.

[52] Of particular importance to the Commission's motion to strike is the "necessity" criterion. Expert evidence is not admissible just because it might be helpful to a court. Rather, the evidence must be necessary in the sense that it provides information that is outside the experience and knowledge of the court. Judges are presumed to know the law and therefore, the assistance of an expert on domestic law is not necessary: *Berry v. Pulley*, 2012 ONSC 1790, at paras. 362-363 (SCJ), aff'd 2015 ONCA 449, 335 O.A.C. 176.

[53] We will now consider each expert affidavit/report that the Appellants seek to rely on considering the relevant criteria for their admission.

Affidavit of John Braybrook sworn July 26, 2024

[54] John Braybrook is a retired police officer with 31 years of policing experience, last holding the rank of Detective Sergeant. At the time of the swearing of his affidavit, Mr. Braybrook was a Senior Investigator with Investigative Solutions Inc. He had been there since 2018 and in that capacity had conducted Criminal Case Reviews and numerous workplace Violence and Harassment investigations.

[55] In his report attached to his affidavit, Mr. Braybrook states that the Appellants retained him "to provide an expert opinion as to: a. Whether [the Hearing counsel] committed the offence of Perjury before the Divisional Court (decision dated January 5, 2018) and in the civil proceedings in *Arconti v. Smith* CV 15-527178 based on his evidence in these proceedings." At para. 29 of his report, Mr. Braybrook gives his opinion that "all the elements of Perjury have been met."

[56] The Commission seeks to strike out this evidence on three bases: (1) lack of the necessary qualifications; (2) lack of relevance, and (3) lack of necessity.

[57] We agree that Mr. Braybrook's affidavit should be struck out. If the court hearing the set aside motion decides that it has to determine whether the Hearing counsel committed the offence of perjury (which is far from clear), the court has far more expertise than Mr. Braybrook to do so. Thus, his evidence is not necessary and should not be admitted.

Bruce Elman Ethics Opinion Letter dated May 7, 2004

[58] Mr. Elman is a law school professor and former law school dean. He has also acted as an Integrity Commissioner for several towns.

[59] The focus of Mr. Elman's report is to opine on whether Mr. Smith breached his duty of loyalty to his client. In his opinion, the Divisional Court never fully dealt with the conflict of

interest argument "apart from, and outside of , the contexts of the Appellant's ineffective assistance of counsel submissions." In his view, the Divisional Court erred in failing to do so as the "conflict of interest argument is…more fundamental than the more procedurally and strategically oriented arguments regarding ineffective assistance of counsel."

[60] The Divisional Court judgment is a final judgment. Both the Court of Appeal and the Supreme Court of Canada denied the Appellants leave to appeal. Mr. Elman's opinion that the judgment was wrong is irrelevant as a court on a set aside motion has no jurisdiction to set aside a judgment because they disagree with it. Mr. Elman does not rest his conclusion on any new evidence. Rather, as expressed, it is his opinion that the Divisional Court judgment was wrong at the time.

[61] Further, to the extent that Mr. Elman's evidence speaks to whether the Hearing counsel had a conflict of interest with his client, this is a matter of domestic law, for which no expert opinion is needed.

[62] Therefore, Mr. Elman's report struck is struck out on the basis of lack of relevance and lack of necessity.

Affidavit of Allan C. Hutchinson dated July 29, 2024

[63] Mr. Hutchinson is a professor of law. As put by him, he was asked to address the following questions:

> Did the Intervenor ([the Hearing counsel]) bear the onus at Divisional Court of disclosing the full facts of his relationship with the OSC or did the Appellants bear the onus of uncovering such facts?
>
> Did the Respondent (the OSC) bear the onus at Divisional Court of disclosing the facts of their relationship with Smith or did the Appellants bear the onus of uncovering such facts?
>
> Did [the Hearing counsel]'s Divisional Court evidence and/or submissions on the history of his relationship with the OSC deny the Appellants a fair opportunity to have the conflict issue determined at Divisional Court?
>
> In light of the fresh evidence of [the Hearing counsel]'s relationship with the OSC were the Appellants exposed to a miscarriage of justice?

[64] The first two questions are questions of domestic law that the court can answer without expert evidence. The last two are questions of mixed fact and law. To the extent that Mr. Hutchinson purports to make findings of fact in his report that is the job of the court on the set aside motion and they do not need expert evidence to help them fulfill that function. To the extent that Mr. Hutchinson is opining on questions of law, they are questions of domestic law and thus, his opinion is not necessary. His affidavit is therefore struck out.

Affidavit of Paul Daly dated July 29, 2024

[65] Mr. Daly is a lawyer and a Professor of Administrative Law. According to his affidavit he was retained to provide an expert opinion on the following:

> 1. Did the OSC breach its duty of fairness to the Arcontis by failing to adhere to the OSC Code of Conduct?
>
> 2. If yes, was the breach of the duty of fairness material?
>
> 3 If yes, what would the appropriate remedy be, applying the principles of administrative law?

[66] Answering these questions involves opining on matters of domestic law, something that is within the expertise of the panel who will decide the set aside motion. To the extent that Mr. Daly's opinion includes legal argument, the Appellants are free to advance those arguments before the panel without calling expert evidence. This affidavit is therefore struck out.

Affidavit of Patricia Taylor dated July 26, 2024

[67] Ms. Taylor is a lawyer and a former employee of the British Columbia Securities Commission. According to her affidavit the Appellants retained her to provide an expert opinion on the following:

> a. Was the OSC Code of Conduct relevant and material to the Arcontis' dealings with David Gilkes after he left the OSC?
>
> b. If yes, would [the Hearing counsel] have known, or ought to have known, about the OSC Code of Conduct?
>
> c. If yes, would [the Hearing counsel] have known, or ought to have known, that the conflict provisions of the OSC Code of Conduct were relevant to the Arcontis' dealings with David Gilkes?
>
> d. If yes to question 4, should [the Hearing counsel] have investigated any breaches of the OSC Code of Conduct as an available defence for the Arcontis?
>
> e. Should [the Hearing counsel] have disclosed to the Arcontis David Gilkes' breach of the OSC Code of Conduct.

[68] The OSC seeks to strike Ms. Taylor's affidavit on three bases: (a) lack of expertise as her experience is with the British Columbia Securities Commission, not the Ontario Securities Commission; (b) the report attached to the affidavit is not an opinion, but a series of factual findings grounded in speculation; and (c) the opinion is not necessary as it is an opinion on domestic law.

[69] We agree that there is reason to question Ms. Taylor's expertise. However, of more concern is the fact that to the extent that Ms. Taylor is purporting to make findings on what the Hearing counsel knew or ought to have known, these are findings that the court hearing the set aside motion will have to make, and they do not need Ms. Taylor's opinion to do so. To the extent

that the opinion speaks to the relevance of the Code of Conduct, whether the Hearing counsel should have investigated any breaches of that Code as a possible defence and whether Hearing counsel should have disclosed Mr. Gilkes' breach to the Arcontis, these are all questions that the court is equipped to answer without the benefit of Ms. Taylor's opinion. Any legal issues are domestic legal issues. Therefore, the affidavit should be struck out on the grounds of lack of necessity.

Affidavit of Brett Code dated October 15, 2024

[70] Mr. Code is a lawyer in Alberta and the former Director of Enforcement of the Alberta Securities Commission. The Appellants retained him to provide an expert opinion on the following:

> 1. At Divisional Court did the onus lie on the OSC to disclose any breaches of the OSC Code of Conduct that it knew, or ought to have known, were material and relevant to the Arcontis dealings with David Gilkes? 2. Did there exist breaches of the OSC Code of Conduct that OSC prosecutorial and investigative staff knew, or ought to have known, were material to the Arcontis' case and 3. If so, did the OSC have a duty to prevent, resolve, report and/or disclose such breaches?

[71] This affidavit should be struck out for the same reasons as the Taylor affidavit. First, there is some reason to question Mr. Code's expertise, given that he has no experience in Ontario. However, more importantly, to the extent that he makes factual findings about what the OSC knew or ought to have known, these are findings that the court hearing the set aside motion can make without his opinion. Second, to the extent that Mr. Code expresses an opinion on the OSC's duty to prevent, resolve, report and/or disclose breaches of the OSC Code of Conduct, these are matters of domestic law. Thus, if the court hearing the set aside motion finds it necessary to deal with those issues, it can do so without Mr. Code's opinion.

Expert Report of Andre Marin dated July 29, 2024

[72] Mr. Marin has practiced law in Ontario for over 33 years. Among other things he was the Ombudsman for Ontario for over 11 years.

[73] As his report sets out, the Appellants asked him to address three questions:

> 17.1 Was there a public expectation that the Ontario Securities Commission (OSC) would be alert to, and take active measures to prevent and/or to resolve breaches of its Code of Conduct?
>
> 17.2 When a member of the public is impacted by any breach of a Code of Conduct by a governmental organization, does the organization owe a duty to report the breach and/or disclose any breach to the affected individuals?
>
> 17.3 Does the public posting of a Code of Conduct absolve a governmental organization from correcting and/or reporting a breach of its Codes in the absence of any complaints filed by affected members of the public?

[74] First, Mr. Marin is not qualified to speak on behalf of the Ontario public. His role as an Ombudsman does not give him the necessary expertise. Second, his report is not relevant. What the public expectation was and how those expectations were affected by the public posting of the Code of Conduct are not questions that the panel hearing the set aside motion will have to address. Third, to the extent that his report speaks to the consequences of a purported breach of the OSC Code of Conduct, it is not necessary. This is a matter of domestic law which the court hearing the set aside motion can determine without Mr. Marin's opinion. This affidavit is therefore struck out.

Conclusion re: Motion to Strike Out

[75] For these reasons the OSC's motion to strike out the seven expert affidavits/reports is granted.

Motion for Leave to Adduce more than Three Expert Reports

[76] In view of our decision to strike out all seven reports, there is no need to address this issue.

Orders

[77] This Court orders as follows:

(i) The motion for security for costs is granted. The Appellants shall pay into court the total sum of $100,000, within 60 days from today, failing which the Commission may bring a motion under r. 56.06 to have the r. 59.06 motions dismissed for failure to comply with this order.

(ii) The motion to strike out the expert reports is granted.

(iii) The motion for leave to adduce more than three expert reports is dismissed as unnecessary.

(iv) As agreed by the parties, the Appellants shall pay the OSC its costs fixed in the amount of $15,000.00.

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Sachs J.

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R. D. Gordon J.

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Matheson J.

Date: May 1, 2025