ALBERTA SECURITIES COMMISSION

REVOCATION APPLICATION: DECISION

Citation: Re Kostelecky, 2017 ABASC 44 **Date: 20170315**

Joseph Anton Kostelecky

Panel:	Tom Cotter Maryse Saint-Laurent
Representation:	Graham McLennan, Q.C. Kate Whittleton for the Applicant, KPMG LLP Daniel J. McDonald, Q.C. Marika Strobl for Matthew Cory MacKenzie Don Young for Commission Staff
Application Heard:	February 21, 2017
Decision:	March 15, 2017

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I. BACKGROUND

A. Application

[1] KPMG LLP (**KPMG**) has applied, pursuant to s. 214(1) of the *Securities Act* (Alberta) (**Act**), for the revocation of an earlier decision by an Alberta Securities Commission (**ASC**) panel (**Panel**) (cited as *Re Kostelecky*, 2016 ABASC 297 (**Decision**)) that temporarily restricted public access to certain exhibits entered into evidence in an ASC hearing.

[2] KPMG, through its counsel, submitted a letter to the ASC dated January 16, 2017, along with background documents and authorities, in support of its revocation application. KPMG later provided written submissions to the ASC, as did Matthew Cory MacKenzie (**MacKenzie**), the individual who applied for and was granted the order made in the Decision. KPMG's application was heard on February 21, 2017, at which time we heard from counsel for KPMG, MacKenzie and ASC staff (**Staff**) (who took no position on the application). We reserved our decision at the conclusion of the hearing and advised the parties that we would issue reasons in due course.

[3] Our decision, and the reasons for it, follow. In essence, we consider KPMG's application to be an appeal which falls outside the intended scope of s. 214(1) of the Act. We therefore dismiss KPMG's application to revoke the Decision.

B. Kostelecky Proceeding

[4] As part of a Staff investigation into potential securities law violations, Staff interviewed MacKenzie, the chief financial officer of Poseidon Concepts Corp. (**Poseidon**), on February 27, 28 and March 19, 2014. Other individuals were also interviewed as part of Staff's investigation, including representatives of KPMG, Poseidon's former auditor.

[5] Staff issued a Notice of Hearing on February 6, 2015 alleging several contraventions of Alberta securities laws by Poseidon, MacKenzie, Lyle Dennis Michaluk, Clifford Leroy Wiebe and Joseph Anton Kostelecky (**Kostelecky**, and collectively, the **Respondents**). Those allegations generally relate to the integrity of Poseidon's continuous disclosure when it was a reporting issuer and when its securities were listed or quoted on various exchanges.

[6] The subject matter of the ASC allegations has also given rise to numerous civil lawsuits. We were told that there are currently at least ten class action and other lawsuits filed in Alberta and other jurisdictions, involving Poseidon and the other Respondents, as well as KPMG in its capacity as Poseidon's auditor (the **Other Litigation**). We understand that KPMG and MacKenzie are adverse in interest in most, if not all, of these actions (and that some of the Respondents themselves may be adverse in interest to one another). Indeed, counsel represented that KPMG seeks indemnity or contribution from MacKenzie in the approximate amount of $650 million.

[7] MacKenzie (and presumably the other Respondents) received prehearing disclosure from Staff. All but one of the Respondents (Kostelecky) entered into settlement agreements with Staff to resolve the allegations in the Notice of Hearing. MacKenzie's settlement agreement, dated June 15, 2016, included admissions by MacKenzie to certain breaches of Alberta securities laws. The agreement also refers to "civil claims in Canada and the US against Poseidon and its directors, officer and employees".

[8] On December 7, 2016, the Panel commenced a hearing into the allegations against Kostelecky as the sole remaining respondent (the **Kostelecky Hearing**). At the outset of the Kostelecky Hearing, the Panel directed that all evidence and submissions received in the course of the hearing would form part of the record and that once a final decision was issued in the proceeding, those materials would be available for public viewing (subject to any redactions to protect personal privacy).

[9] In the course of the Kostelecky Hearing, Staff adduced into evidence the transcripts from Staff's investigative interviews of MacKenzie (the **MacKenzie Transcripts**). We understand that Staff initially tendered excerpts of the MacKenzie Transcripts, but the Panel directed (consistent with ASC practice) that the entire transcripts be entered into evidence.

[10] We were not told whether MacKenzie was provided with prior notice of Staff's intention to tender the MacKenzie Transcripts as evidence, but he apparently learned of this development because his counsel sent a letter to the ASC dated December 8, 2016 applying for an order that the MacKenzie Transcripts "be treated as confidential and not form part of the public record pending further Order" of the Panel. MacKenzie's counsel appeared before the Panel the following day and made submissions in support of the application for a sealing order.

[11] The Panel issued the Decision on December 13, 2016. The Decision sets out MacKenzie's position that the requested order would "protect an important public interest in procedural fairness", based on his concern that he and other co-defendants could be prejudiced or disadvantaged if the MacKenzie Transcripts were made publicly available before the conclusion of the Other Litigation. Staff took "no formal position" in respect of MacKenzie's application. The Panel granted MacKenzie's application and ordered that the MacKenzie Transcripts be held in confidence and not be made available to any other person or company until the later of: (a) the issuance of a final decision bringing the Kostelecky Hearing to an end; and (b) the conclusion of all Other Litigation, in any jurisdiction, in respect of MacKenzie's involvement (actual or alleged) with Poseidon. The Panel's reasons indicated that it did not consider the issuance of the order to be prejudicial to the public interest "for as long as Other Litigation is outstanding".

II. ISSUES

[12] KPMG's application raises the following issues:

1) Should the ASC exercise its discretion under s. 214(1) of the Act to consider the application?

2) If so, are there sufficient grounds to revoke the Decision?

[13] KPMG's contention that it had standing as "an affected party" was not contested by MacKenzie or Staff.

III. SUBMISSIONS

A. KPMG

[14] KPMG submitted that it had standing to bring this application as a "party affected" by the Decision and that its application under s. 214(1) of the Act was not an appeal. Its counsel argued that the provision is broadly worded such that it applies to any ASC decision.

[15] KPMG stated that the test set out in s. 214(1) – allowing for the revocation or variation of a decision where the ASC considers that doing so would not be prejudicial to the public interest – is met in the circumstances. It argued that revoking the Decision would not be prejudicial to the public interest, and that allowing the Decision to remain would be prejudicial to the public interest by favouring MacKenzie's private interests at the expense of the "open court" principle. In KPMG's submission, there is a presumption that all evidence (including exhibits) tendered in a hearing is publicly available, and persons seeking to restrict access have the onus of establishing that certain stringent criteria are met – in general, these criteria are subsumed under what has become known as the *Dagenais/ Mentuck* test (from *Dagenais v. Canadian Broadcasting Corp.*, 1994 SCC 102 and *R. v. Mentuck*, 2001 SCC 76). KPMG also argued that MacKenzie's interest in the Other Litigation is merely a private interest that does not justify restricting access to the MacKenzie Transcripts, and they should not be shielded from the public given his admitted securities laws contraventions and his central role as Poseidon's chief financial officer.

B. MacKenzie

[16] MacKenzie's position was that KPMG simply disagrees with the Panel's exercise of discretion. In his submission s. 214(1) "is not intended to be used as a backdoor to a re-hearing or as an alternative to an appeal of a decision". MacKenzie argued that even if the jurisdiction existed to revoke the Decision under s. 214(1), such authority should be used sparingly and only in the rarest of cases, with considerable deference owed to the Panel.

[17] MacKenzie contended that the application of the open court principle to administrative proceedings is limited, as administrative tribunals require a more flexible, adaptive approach that is fair for all parties. He argued that our broad discretion to determine the public interest, informed by the regulatory purposes of the Act, differs from the open court principle as applied to court proceedings. It was submitted that MacKenzie's compelled testimony was obtained by Staff (under s. 42 of the Act) for the purpose of regulating the capital market and that allowing it to become publicly available would enable third parties to exploit that evidence for purposes collateral to securities regulation, such being contrary to the public interest. KPMG's interest in gaining access to the MacKenzie Transcripts was said to be "precisely the reason a confidentiality order was needed in the first place". MacKenzie maintained that the Panel applied the proper test, using a flexible approach that properly balanced the various interests by issuing a confidentiality order that was limited in duration.

C. Staff

[18] Staff, in oral submissions, acknowledged that they were a disinterested party to the dispute. Staff considered KPMG's application to have been properly brought under s. 214(1), apparently based in part on the fact that KPMG was not provided notice of MacKenzie's initial application and that there was probably no other "avenue under the Act that [KPMG] could use to make this application".

IV. ANALYSIS

[19] Section 214(1) of the Act provides:

> The Commission may, if the Commission considers that it would not be prejudicial to the public interest to do so, make an order revoking or varying any decisions made by the Commission under this Act or the regulations or any former *Securities Act* or regulations.

A. Intended scope

[20] Section 214(1) is typically used in circumstances where new facts emerge or a new law is enacted that compels a change to an existing order; see for example *Re Juniper Fund Management Corp.* (2011), 34 O.S.C.B. 12103 at para. 33. The provision should be used sparingly, and not resorted to as an alternative to an appeal or to retry a case where there is disagreement with the result. Accordingly, a preliminary or threshold issue is whether KPMG can avail itself of s. 214(1) to obtain the remedy sought.

[21] We were not referred to any ASC decisions interpreting the scope of s. 214(1). MacKenzie's submissions relied on *Re Rankin* (2011), 34 O.S.C.B. 11797 (affirmed (*sub nom Rankin v. Ontario Securities Commission*) (2013), 113 O.R. (3d) 481 (Div. Ct.)) (**Rankin**), where the Ontario Securities Commission (**OSC**) reviewed prior decisions construing the Ontario equivalent of s. 214(1) (s. 144 of the *Securities Act* (Ontario)). In *Rankin*, the OSC referred to *Re Ultramar PLC* (1991), 14 O.S.C.B. 5221 (**Ultramar**), a case analogous to the present application insofar as it involved a third party seeking to revoke a decision to which it had not been a party. The OSC in *Ultramar* was of the view that the following conditions should obtain before consideration is given to revoking or varying the initial order:

> After hearing the submissions of all counsel, we concluded that when an application is brought . . . for an Order revoking or varying a decision made by the Commission, and that application is disputed by the part[y] that applied for and received the Order or Ruling, we should, except in the most unusual circumstances, before we consider rescinding or varying the Order or Ruling, find that the original applicant had either misrepresented a fact to the Commission or omitted to state a material fact, or alternatively that there was, unknown to that applicant, a material fact which was not therefore brought to the attention of the original panel. We should also consider whether or not the knowledge of such a material fact by the original panel would in our opinion have been likely to have affected the Order or Ruling made.

[22] *Rankin* also referred to *Re Universal Settlements International Inc.* (2003), 26 O.S.C.B. 2345 (**Universal Settlements**), where the OSC (in an oral ruling) stated:

> Section 144 is appropriate to be used to vary or revoke a decision of the Commission when new facts come to light, or new law is enacted, making it desirable to change the decision that has been rendered. I am not aware of a section 144 proceeding being used to review and second-guess a decision of another panel of the Commission, although there is nothing in section 144 that would prevent us from doing that if we decided it was the right thing to do.

[23] That statement was subsequently qualified by the OSC in *Re X Inc.* (2010), 33 O.S.C.B. 11380 (**X Inc.**), in circumstances where the Executive Director (who had no right of appeal) sought to rely on the Ontario provision to revoke or vary an OSC decision:

> With respect, the statement on its face is wrong in law. Only if the words "in accordance with applicable law" are added following the words "the right thing to do" can any useful meaning be ascribed to the statement. We do not say there can never be a situation where the Executive Director can apply under s. 144 to revoke or vary a Panel decision that went against Staff. We do say that only in the rarest of circumstances should such an application be considered. <u>If the s. 144 application is, in effect, simply an appeal, it should be rejected as contrary to the intention of the *Act* and contrary to the public interest.</u> [Emphasis added]

B. Test

[24] We consider the *Rankin* case, including its review of other OSC decisions (*Ultramar*, *Universal Settlements* and *X Inc.*) to correctly establish the overarching test: is the application at

its core an appeal? More specifically, we agree with the statement in *Ultramar* that an application by a non-party to revoke or vary an ASC decision should only be considered, except in the most unusual circumstances, where there was a misrepresentation of a material fact (including the failure to raise a material fact), or if the applicant did not know and failed to bring to the panel's attention a material fact, and the unknown fact would have affected the panel's decision.

C. Application to this case

[25] The Decision did not refer to the open court principle, the primary focus of KPMG's submissions. KPMG did not assert any misrepresentation on the part of MacKenzie in this regard, nor that the Panel was unaware of s. 29(l) of the Act and s. 11.1 of ASC Rule 15-501 which provide that hearings are presumptively public (including documents entered as exhibits during the hearing). Indeed, the Panel's direction at the commencement of the Kostelecky Hearing – that all evidence and submissions would be public upon the issuance of a final decision – indicates to us that the Panel was well aware of the open court principle and that MacKenzie was seeking a restriction on accessibility to certain evidence as an exception to the general rule.

[26] KPMG also did not assert, and we do not find, any new fact or circumstance that was unavailable to the Panel in the original application. That KPMG did not have notice of MacKenzie's application and was therefore unable to make submissions concerning the open court principle does not warrant reconsideration under s. 214(1). The Panel did not direct that notice of MacKenzie's application be provided to any parties named in the Other Litigation, nor was it suggested that the Panel ought to have required that notice be provided (whether under the test set out in s. 29(b) of the Act or otherwise). In our view any such direction would be highly impractical given the number of proceedings and litigants spread over the continent.

[27] In considering the totality of KPMG's submissions, we are of the view that the application is at its core an appeal of the Decision on the ground that the Panel erred in making the impugned order. Essentially we are being asked to second guess the Panel’s public interest finding, and substitute our own views on that issue. That is not the intended purpose of s. 214(1).

V. CONCLUSION

[28] We therefore dismiss KPMG's application. In light of our decision, we consider it unnecessary to address the public interest arguments also raised in this application.

March 15, 2017

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Maryse Saint-Laurent