

NO. S-169580  
VANCOUVER REGISTRY



IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

GXK VENTURES INC.

PLAINTIFF

AND

MEDINAH MINERALS, INC.

DEFENDANT

**NOTICE OF APPLICATION**

**Name of applicant: Medinah Minerals, Inc. ("Medinah")**

TO: GXK Ventures Inc. ("GXK")

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on Monday, the 6<sup>th</sup> day of March, 2017, at 9:45 a.m. for the orders set out in Part 1 below.

**PART 1: ORDERS SOUGHT**

1. A declaration that the law firm Kowarsky Ritson, LLP, and specifically Ori Kowarsky, is in a conflict of interest in this matter;
2. An order that the law firm Kowarsky Ritson, LLP, and specifically Ori Kowarsky, be restrained from continuing to act as solicitors in this matter;
3. An order that the law firm Kowarsky Ritson, LLP, and specifically Ori Kowarsky, be restrained from any oral or written communications with the Plaintiff's subsequent solicitors of record or legal advisors in this action, or any action concerning the Defendant, regarding any information, fact or matter communicated to the law firm by

the Defendant or by the Plaintiff or Leslie Price on behalf of or concerning the Defendant;

4. An order that the law firm Kowarsky Ritson LLP, and specifically Ori Kowarsky, be restrained from representing any parties in an action concerning Medinah that is concurrent with this matter;
5. An order that the law firm Kowarsky Ritson, LLP, and specifically Ori Kowarsky, deliver up to the solicitors for the Defendant all correspondence and other forms of records or communications, including any memoranda and notes or other documents made or obtained by the law firm and/or Mr. Kowarsky, in relation to the law firm's involvement with the Defendant; and,
6. Costs.

**PART 2: FACTUAL BASIS**

1. This application seeks the removal of GXK's counsel of record in this proceeding, Mr. Kowarsky, and his firm of Kowarsky Ritson, LLP.
2. Mr. Kowarsky commenced this proceeding on behalf of GXK against Medinah while representing Medinah and the director and controlling mind of GXK, Leslie Price, in a current, related action, as part of which he received confidential information relating to Medinah. Mr. Kowarsky did not seek or obtain Medinah's consent to do so.
3. Medinah learned of Mr. Kowarsky's concurrent representation upon receiving the Notice of Civil Claim. It immediately objected to Mr. Kowarsky's continuing representation of GXK in this matter based on his conflict of interest, but Mr. Kowarsky refused to withdraw and instead withdrew his representation of Medinah in the related action. Medinah will suffer significant prejudice if Mr. Kowarsky is permitted to remain as counsel of record to GXK, including due to the use in this action of confidential information relating to Medinah received by Mr. Kowarsky as a result of his and his firm's longstanding representation of Medinah.

### ***Medinah***

4. For the previous two decades, Medinah was a junior mining company, with its business activity centering primarily on Chile, and in particular the Altos de Lipangue mining district (the “ADL”), where it had ownership interests in certain prospective mining claims. Those claims were subsequently consolidated by another company with mineral claims in the ADL.

### ***Medinah’s relationship with GXX and Mr. Price***

5. Mr. Price resides in British Columbia. He is a shareholder in Medinah and was its CEO until in or around 2008, when he resigned to be replaced by Juan Jose Quijano Fernandez, who resided in, and is a national of, Chile.
6. Since resigning, Mr. Price has remained actively involved in Medinah’s affairs, including assuming roles relating to Medinah’s Chilean properties in the ADL. Over the years, Mr. Price has retained the services of Mr. Kowarsky and/or Mr. Kowarsky’s firm, Kowarsky Ritson, LLP to act on behalf of Medinah in relation to a number of different legal matters.
7. Following a recent change of management, Medinah began an investigation into Mr. Price’s involvement with the company. That investigation, which is ongoing, led it to commence an action against, *inter alia*, Mr. Price and GXX, filed in this court on December 23, 2016, in which Medinah alleges that Mr. Price and GXX, *inter alia*, defrauded the company, in part through the unauthorized issuance of shares on its behalf (the “Medinah Action”).

### ***The Godwin Action***

8. In or around February 22, 2008, a former director and a shareholder in Medinah, Mr. Godwin, and his company commenced an action against Mr. Price, Medinah and Mr. Fernandez (the “Godwin Action”). The Godwin Action seeks, *inter alia*, damages for breach of contract. It also alleges that a transfer of Medinah’s interest in claims in the ADL was fraudulent and seeks an order that it be set aside.

9. Through Mr. Price, Medinah, Mr. Price and Mr. Fernandez jointly retained Mr. Kowarsky to represent them as counsel in the Godwin Action. On behalf of Medinah, Mr. Kowarsky filed, amongst other things, on July 26, 2012:
  - (a) an Amended Response to Civil Claim, denying the allegations in the Godwin Action, including that it was indebted to Mr. Godwin;
  - (b) an Amended Counterclaim, seeking damages of close to \$3,000,000, for, *inter alia*, defrauding Medinah, in part through the unauthorized issuance of shares on its behalf, and for causing it to renegotiate the transfer of title and interest in the ADL claims from Mr. Fernandez at disadvantageous terms;
  - (c) an Amended Third Party Notice, in which Medinah claimed against the estate of another former director of Medinah, Gordon House, on whose debt Mr. Godwin was in part suing, including on the basis that Mr. House had defrauded Medinah.
10. Mr. Kowarsky took instructions from and communicated with Mr. Price, including on Medinah's behalf, in respect of the Godwin Action. As a result, Medinah is not apprised of all of the steps that have been taken in the Godwin Action or when they were taken. However, to the best of Medinah's knowledge, in addition to the filing of pleadings, Mr. Kowarsky has at a minimum engaged in document discovery and conducted an examination for discovery of Mr. Godwin on Medinah's behalf in the Godwin Action.
11. As late as September, 2016, Mr. Kowarsky was in communication with Gary Goodin, a director of Medinah, regarding the Godwin Action, and was copied on other correspondence between Mr. Goodin and Mr. Price regarding the Godwin Action.

***The GXK and Price Actions***

12. On or about October 18, 2016, Mr. Kowarsky filed the Notice of Civil Claim in the herein action on behalf of GXK (the "GXK Action"). In it, GXK claims, *inter alia*, over \$2,000,000 from Medinah on the basis of an alleged contract that GXK says was entered into in 2007 and approved by Directors' Resolutions between 2007 and 2008, around the time at which Mr. Godwin commenced the Godwin Action.

13. On or about November 22, 2016, Mr. Kowarsky filed a Notice of Civil Claim on behalf of Mr. Price against Medinah (the “Price Action”). In it, Mr. Price claims, *inter alia*, over \$260,000 on the basis of an alleged contract according to which Mr. Price alleges he was to act as Medinah’s trustee in relation to Medinah’s Chilean mining operations.
14. Mr. Kowarsky did not notify Medinah of his intention to act on behalf of G XK or Mr. Price in their respective actions against Medinah, notwithstanding that he continued to represent Medinah in the Godwin Action and that he and his firm represented Medinah in respect of multiple past actions, nor did he seek or obtain Medinah’s consent to do so. Medinah learned of his representation of G XK and Mr. Price in their actions only upon receipt of the respective Notices of Civil Claim. Upon realizing that Mr. Kowarsky was representing G XK and Mr. Price against it, Medinah demanded that Mr. Kowarsky withdraw as counsel of record in both of those actions. Mr. Kowarsky refused to do so, and instead filed a Notice of Withdrawal as counsel of record to Medinah in the Godwin Action. To Medinah’s knowledge, Mr. Kowarsky continues to represent Mr. Price and Mr. Fernandez in the Godwin Action.
15. No steps have been taken in the G XK or Price Actions since the pleadings closed.

### **PART 3: LEGAL BASIS**

#### ***I. Overarching duty of loyalty***

1. Lawyers owe their clients an overarching duty of loyalty, which in turn encompasses the following duties:
  - (a) the duty to avoid conflicting interests;
  - (b) the duty of commitment to the client’s cause; and,
  - (c) the duty of candour with the client on matters relevant to the retainer.

*R. v. Neil*, 2002 SCC 70 at para. 19

2. As set out below, Mr. Kowarsky is in breach of all three duties owed to Medinah.

3. Further, the requirements placed on members of the Law Society of British Columbia provide an indication of what a reasonable person is entitled to expect from their lawyer. In this respect, Medinah relies in particular on sections 3.7-1, 3.4-2, 3.4-4, and 3.4-10 of the *Code of Professional Conduct for British Columbia*, which it says Mr. Kowarsky also breached.

*Cewe Estate v. Mide-Wilson*, 2009 BCSC 975 at para. 89

*(a) Duty to avoid conflicts of interest*

*(i) Effective representation*

4. The duty to avoid conflicts of interest protects against prejudice of at least two forms. The first form of prejudice is the undermining of effective representation. Threats to effective representation arise where the lawyer is tempted to prefer other interests, including those of a current client and the lawyer's own, over those of his or her client.

*Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 ("*CN Railway*") at paras. 25-26

5. A bright line applies where the immediate legal interests of clients are directly adverse in the matters on which the lawyer is acting. In those circumstances, regardless of whether the matters are legally and factually related, there is an irrebutable presumption that a conflict of interest exists.

*CN Railway* at paras. 27-28

6. In this case, the bright line applies. Mr. Kowarsky commenced an action against Medinah while representing Medinah in an ongoing proceeding. Medinah's immediate legal interests are directly adverse in these matters. Accordingly, there is an irrebutable presumption that there is a conflict of interest.
7. If the bright line is inapplicable, it is then necessary to determine whether concurrent representation gives rise to a substantial risk of impaired representation. This determination considers whether that representation is liable to create conflicting

pressures on judgment. In the alternative, if the bright line does not apply, which is not admitted but expressly denied, Mr. Kowarsky's concurrent representation gives rise to a substantial risk of impaired representation, for the reasons particularized below.

*CN Railway, supra* at para. 38

(ii) Confidential information

8. The second form of prejudice arising from conflicts of interest is the risk of misuse of confidential information. It is subject to a two part test: (i) whether the lawyer received confidential information attributable to a solicitor and client relationship relevant to the matter and hand; and (ii) whether there is a risk that it will be used to the prejudice of that client.

*CN Railway* at para. 24

9. If the new retainer is "sufficiently related" to the matters on which the lawyer worked for the client, there is a presumption that the lawyer possesses confidential information that raises a risk of prejudice.

*CN Railway* at para. 24

10. In this case, the matters are closely related. Mr. Kowarsky's firm has represented Medinah on a number of matters over the previous two decades. It is not clear to Medinah the extent to which those matters related to the GXK Action, although Mr. Price's involvement makes it likely that at least some were related. In respect of the Godwin Action alone, however, it is clear that the GXK Action is closely related, as both involve, *inter alia*, issues relating to:

- (a) the management of Medinah and the validity of its directors' resolutions at material times;
- (b) allegations of unauthorized and fraudulent transactions taking place to the detriment of Medinah;

(c) the role of Mr. Price, in his personal capacity or through his companies, in representing the interests of Medinah;

(d) Mr. Fernandez's role as President of Medinah; and,

(e) Medinah's assumption of debt in respect of former officers or directors and obligations to creditors.

11. There is no basis on which that presumption is to be rebutted. In particular, it is no answer to say that Mr. Price, as the controlling mind of GXK, is privy to the same confidential information, even if that could be proved. Mr. Price is not a lawyer and as such is not in the same position as Mr. Kowarsky to know the uses to which such confidential information could be put to harm Medinah's interests.

*(b) Duty of commitment*

12. The duty of commitment to the client's cause also imposes duties on counsel that are distinct, though related, to the duty to avoid conflicts of interest. It prevents a lawyer from undermining the lawyer-client relationship and entails a general rule that the lawyer should not summarily and unexpectedly drop a client simply to avoid conflicts of interest with existing or future clients.

*Canadian Railway, supra* at para. 44  
*Lotech Medical Systems Limited v. Kinetic Concepts Inc.*, 2008 FC 1195  
at paras. 46-47

13. A lawyer is bound to complete his or her retainer for a client unless the client discharged it or acted in a way that gives the lawyer cause to terminate the retainer. A lawyer cannot terminate a client relationship purely in an attempt to circumvent its duty of loyalty to that client.

*Canadian Railway, supra* at para. 55

14. Mr. Kowarsky's withdrawal as counsel of record to Medinah in the Godwin Action does not resolve his conflict of interest. On the contrary, it is a further instance of it. Mr. Kowarsky was not entitled to withdraw as counsel of record to Medinah upon being



notified that Medinah objected to his concurrent representation. Having represented Medinah in the Godwin Action since 2008, and having filed various pleadings, engaged in document discovery and conducted an examination of discovery of Mr. Godwin, the duty of commitment obliged Mr. Kowarsky to continue his representation of Medinah and not to prejudice it to serve his own interests and those of GXK and Mr. Price.

*(c) Duty of Candour*

15. The duty of candour obliges lawyers to disclose factors relevant to the lawyer's ability to provide effective representation. It provides for a general rule that a lawyer should advise an existing client before accepting a retainer that will require him to act against his or her client. This rule applies even if the lawyer considers the situation to fall outside the scope of the bright line rule. Further, if the potential client refuses to grant his or her consent to the lawyer to provide full disclosure regarding the existence, nature and scope of the new retainer, the lawyer must decline to accept that retainer. Learning of a new retainer upon receipt of the Notice of Civil Claim is precisely the situation that the duty of candour is intended to prevent.

*Canadian Railway, supra* at paras. 45-46 and 59

16. Mr. Kowarsky was bound by his duty of candour to inform Medinah of his intention to act on behalf of GXK in its action against Medinah and seek its consent to do so. He was not entitled to keep Medinah in the dark about his intentions, particularly when he was involved in communications regarding the Godwin Action the month before commencing the action against Medinah, and allow Medinah to learn about his representation of GXK only upon receipt of the Notice of Civil Claim.

**II. Remedy**

17. Courts have inherent jurisdiction to remove law firms and lawyers from pending litigation. Disqualification will be justified (i) to avoid the improper use of confidential information; (ii) to avoid the risk of impaired representation; and/or (iii) to maintain the repute of the administration of justice.

*Canadian Railway, supra* at para. 61

18. Where either there is a need to prevent misuse of confidential information or a risk of impaired representation, disqualification is generally the only appropriate remedy. Where the concern is the protection of the integrity and repute of the administration of justice, disqualification can serve to ensure public confidence in lawyers and deterring other lawyers from similar practices. In this respect, termination of retainers does not necessarily suffice to protect the administration of justice from harm.

*Canadian Railway, supra* at paras. 62-64

19. Violation of the bright line supports disqualification. Consideration may also be had to other factors, such as (i) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification; (ii) significant prejudice to the new client's interest in retaining its counsel of choice, and that party's ability to retain new counsel; and (iii) the fact that the law firm accepted the conflicting retainer in good faith, reasonably believing that the concurrent representation fell beyond the scope of the bright line rule and applicable law society restrictions.

*Canadian Railway, supra* at para. 65

20. For the reasons set out above, Mr. Kowarsky has violated the bright line, which supports his disqualification. There is also a need to prevent misuse of confidential information, and no factors weigh against Mr. Kowarsky's disqualification.

21. Medinah has engaged in no behaviour that would disentitle it to seek Mr. Kowarsky's removal. Medinah sought to resolve the issue of Mr. Kowarsky's breach of his duty of loyalty as soon as it became aware of that breach, initially directly with Mr. Kowarsky and now by way of this application. There has been no delay and Medinah is not objecting to Mr. Kowarsky's breach for tactical reasons. Medinah's concern regarding its interest is real and substantial and it will suffer significant prejudice if Mr. Kowarsky is permitted to remain as counsel. Mr. Kowarsky's removal is particularly important in light

of the Medinah Action, which alleges, *inter alia*, that Mr. Price has been defrauding Medinah and its shareholders, and the corresponding need for Medinah to maintain separation from Mr. Price as that action proceeds.

22. By contrast, any prejudice to GXK from Mr. Kowarsky's removal as counsel will be minimal. The only steps taken in the proceeding have been the filing of the pleadings. The claim is one in debt and new counsel could become familiar with it without undue difficulty.

23. Further, there was no reasonable basis on which Mr. Kowarsky could believe that his concurrent representation fell beyond the scope of the bright line or the applicable law society restrictions. Mr. Kowarsky was involved in communications with Medinah as late as September, 2016, as its counsel in the Godwin Action less than one month prior to commencing the action against it. In the circumstances, Mr. Kowarsky must have been aware that his representation of GXK fell squarely within the application of the bright line.

#### **PART 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Gary Goodin, made January 25, 2017.
2. The pleadings filed herein.
3. Such further and other relief as this Honourable Court may permit.

The applicant estimates that the application will take 2 hours.

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

- (a) file an Application Response in Form 33
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

DATED: February 16, 2017

  
for: Robert W. Cooper, Q.C.  
Counsel for the Applicant/Defendant

**To be completed by the court only:**

Order made

in the terms requested in paragraphs .....  
of Part 1 of this Notice of Application

with the following variations and additional terms:

.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

DATED: \_\_\_\_\_

Signature of  Judge  
 Master

## APPENDIX

### THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts