



NO. S-1611898  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN

MEDINAH MINERALS, INC.

PLAINTIFF

AND

LESLIE PRICE, PAMELA FITZPATRICK, GXK VENTURES INC., MMC MINES INC.,  
JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, JOHN DOE #5, JOHN DOE  
#6, JOHN DOE (COMPANY) #1, JOHN DOE (COMPANY) #2, JOHN DOE (COMPANY) #3,  
JOHN DOE (COMPANY) #4, JOHN DOE (COMPANY) #5, and  
JOHN DOE (COMPANY) #6

DEFENDANTS

**NOTICE OF APPLICATION**

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

TO: Leslie Price, GXK Ventures Inc. (“GXK”) and MMC Mines Inc. (collectively, the “Price Defendants”)

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 Price Defendants' subsequent solicitors of record or legal advisors in this action, or any action concerning the Plaintiff, regarding any information, fact or matter communicated to the law firm by the Plaintiff or by the Price Defendants 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 the Plaintiff 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 Plaintiff 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 Plaintiff; and,
6. Costs.

**PART 2: FACTUAL BASIS**

1. This application seeks the removal of the Price Defendants' counsel of record in this proceeding, Mr. Kowarsky, and his firm of Kowarsky Ritson, LLP.
2. Mr. Kowarsky filed the Response to Claim in this action within weeks of withdrawing as counsel of record for Medinah in an on-going, related action in this Court, in which Mr. Kowarsky was also representing the defendant Mr. Price, who is a co-defendant with Medinah in that action. At the time of filing the Response to Claim in this action, Mr. Kowarsky was representing Mr. Price and GXX in actions commenced by Mr. Kowarsky on their behalf against Medinah while representing Medinah and Price in the related action (the "GXX and Price Actions"). Mr. Kowarsky did not seek or obtain Medinah's consent to act on behalf of GXX or Price in the GXX and Price Actions, respectively, or the Price Defendants in this action.

3. Medinah learned of Mr. Kowarsky's concurrent representation in the Price and GXX Actions upon receiving the Notices of Civil Claim in those respective actions. It immediately objected to Mr. Kowarsky's continuing representation of Mr. Price and GXX based on his conflict of interest, but Mr. Kowarsky refused to withdraw and instead withdrew his representation of Medinah in the related action. Within weeks of doing so, Mr. Kowarsky filed the Response to Civil Claim on behalf of the Price Defendants in this action.
4. Medinah will suffer significant prejudice if Mr. Kowarsky is permitted to remain as counsel of record to the Price Defendants, 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***

5. 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, AURYN Mining Chile SpA.

#### ***Medinah's relationship with Price***

6. Mr. Price, who is the director of the defendants MMC Mines Inc. and GXX, 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.
7. 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.

8. 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 the herein action against, *inter alia*, the Price Defendants, filed in this court on December 23, 2016 (the "Medinah Action"). In the Medinah Action, Medinah alleges that the Price Defendants, *inter alia*, defrauded the company, in part through the unauthorized issuance of shares on its behalf.

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

9. 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.
10. 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.
11. 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.

12. 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***

13. On or about October 18, 2016, Mr. Kowarsky filed the Notice of Civil Claim in an 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.
14. On or about November 22, 2016, Mr. Kowarsky filed a Notice of Civil Claim to commence the action 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.
15. Mr. Kowarsky did not notify Medinah of his intention to act on behalf of GXK 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 GXK and Mr. Price in their actions only upon receipt of the respective Notices of Civil Claim. Upon realizing that Mr. Kowarsky was representing GXK 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.

16. No steps have been taken in the Medinah, GXK 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. Mr. Kowarsky breached this obligation in acting on behalf of Mr. Price and GXK in the Price and GXK Actions while representing Medinah in the Godwin Action, and while his representation of the Price Defendants in this action was not concurrent, it was close in proximity and effectively represents a continuation of his representation in the GXK and Price Actions.

(ii) Confidential information

5. 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

6. 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

7. 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 Medinah Action, although the potential scope of the Medinah Action, the allegations in which cover many years, and the Price Defendants’ involvement makes it highly likely that at least some were related. In respect of the Godwin Action alone, however, it is clear that the Medinah 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; and,

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

8. There is no basis on which that presumption is to be rebutted. In particular, it is no answer to say that the Price Defendants are privy to the same confidential information, even if that could be proved. The Price Defendants are not lawyers and as such are 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*

9. 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

10. 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

11. Mr. Kowarsky's withdrawal as counsel of record to Medinah in the Godwin Action does not resolve his conflict of interest. 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 Mr. Price and GXK in the Price and GXK Actions, nor to represent the Price Defendants in this action.

*(c) Duty of Candour*

12. 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

13. Mr. Kowarsky was bound by his duty of candour to inform Medinah of his intention to act on behalf of the Price Defendants in the three actions 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 GXK Action against Medinah, and allow Medinah to learn about his representation of Mr. Price and GXK only upon receipt of the Notice of Civil Claim. Nor, in the circumstances and knowing that Medinah objected to his representation of Price and GXK in their respective actions, was Mr. Kowarsky entitled to represent the Price Defendants without advising Medinah and seeking and obtaining its consent to do so.

**II. Remedy**

14. 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

15. 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

16. 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

17. For the reasons set out above, Mr. Kowarsky has violated the bright line in the GXK and Price Actions, which, given their close connection to the herein action, supports his disqualification. There is also a need to prevent misuse of confidential information, and no factors weigh against Mr. Kowarsky's disqualification.

18. 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 in the Price and GXK Actions as soon as it became aware of that breach, initially directly with Mr. Kowarsky and now by way of applications to court. 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 allegations being made, including that the Price Defendants have been defrauding Medinah and its shareholders, and the corresponding need for Medinah to maintain separation from the Price Defendants as the action proceeds.

19. By contrast, any prejudice to the Price Defendants from Mr. Kowarsky's removal as counsel will be minimal. The only steps taken in the proceeding have been the filing of the pleadings. Any advantage to the Price Defendants from Mr. Kowarsky's continued removal would arise from the same basis on which Mr. Kowarsky is in a conflict of interest and there is a serious risk of the misuse of confidential information, namely the familiarity of Mr. Kowarsky and his firm with Medinah and the Price Defendants' dealings with it.
20. Further, there was no reasonable basis on which Mr. Kowarsky could believe that his representation of the Price Defendants did not place him in a conflict of interest or in breach of 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 GXK action against it, and only two months prior to commencing the Price Action. Further, he had withdrawn from representing Medinah in the Godwin Action only weeks prior to filing the Response to Civil Claim in this action, knowing that Medinah objected to his representation of Mr. Price and GXK.

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

1. Affidavit #1 of Gary Goodin, made January 25, 2017, under file action no. S-169580, Vancouver Registry.
2. Affidavit #1 of Gary Goodin, made January 25, 2017, under file action no. S-1610825, Vancouver Registry.
3. The pleadings filed herein.

4. Such further and other relief as this Honourable Court may permit.

The applicant estimates that the application will take 2 hours.

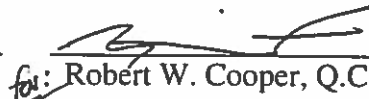
This matter is within the jurisdiction of a master.

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/Plaintiff

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

Order made

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

with the following variations and additional terms:

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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