ABA SECTION OF PUBLIC UTILITY, COMMUNICATIONS AND TRANSPORTATION LAW

infrastructure

Vol. 47, No. 1, Fall 2007

"St. Mark": A cautionary tale for general counsel Part 2

By Peter V. Fazio Jr.

Editor's note: The author presented this article at the Section's program at the 2007 American Bar Association Annual Meeting in August 2007. Part 1 of the article was published in the Summer 2007 issue of Infrastructure. *The attachments referenced in the article are posted on the Section's Web site at www.abanet.org/pubutil/publications/.*

This article focuses on the Conrad Black trial and particularly the lessons it offers for general counsel of publicly held U.S. corporations following Enron. These lessons relate to the actions of one of the defendants, Mark Kipnis, the corporate counsel in Chicago. Part 1, published in the previous issue of *Infrastructure*, summarized the complex background of the case. Part 2 provides details on the corporation, the general counsel, and the ensuing litigation of the case.

Peter V. Fazio Jr.

The corporate family

Conrad M. Black, David Radler (the government's star witness under a plea agreement), Peter Y. Atkinson, and John A. Boultbee controlled (81.16% of the

(continued on page 6)

Fazio served as general counsel for NiSource Inc. until December 2007 and is Special Partner, Schiff Hardin LLP, Chicago, Illinois. *The author gratefully acknowledges the assistance of Tiffany Redding, Washington University School of Law, summer associate, and for assistance with access to documents filed in the case and other facts submitted into evidence, the Kipnis defense team at Schiff Hardin, Ronald S. Safer, Patricia Brown Holmes, Matthew B. Mock, Erika L. Csicsila, Jamal Sadat Muhammad, Elizabeth A. Blackwood, Kelly M. Warner, and Art Mitzel Jr.* *Fazio can be reached at pfazio@schiffhardin.com.*

INSIDE

- *Section chair's column p. 2*
- *Editor's note p. 2*
- *From aviation security to tax strategy patents: Section committee reports p. 3*
- *Spring Program April 7, 2008 p. 12*

"St. Mark": A cautionary tale for general counsel Part 2

continued from page 1

equity interest) the Ravelston Corporation Ltd., an Ontario corporation, which owned 100 percent of Argus Corp. Ltd., a Canadian corporation. Ravelston (16.5%), Argus (61.7%), and public shareholders (21.8%) owned Hollinger Inc., a Colorado corporation ("Inc."). Inc. controlled (30.3% equity interest; 72.8% voting interest) Hollinger International Inc., a Delaware corporation ("International"), in which public shareholders had a 69.7 percent equity interest and a 27.2 percent voting interest.[1]

The man[2]

"O.K. Who is Mark Kipnis?

"First and foremost, he is a husband and a father. He's 59 years old. He's been married to Kay, who is sitting right back there [indicating], for 28 years next.

"Next to her is one of their four children, Blair [indicating], who has been—all of their four children are grown. Lucky them.

"And Mark's mom [indicating] and sisters are sitting next to them.

"He's lived in the Chicago area his entire life. Before he came to Hollinger, he had held one job his entire life. And we'll talk a little bit about that.

"He's a stable person. He's not a smooth talker. He speaks plainly in sort of a halting fashion. He's not a spectacular guy. He doesn't have homes in nice places except for Northbrook, which is a very nice place.

"He spends, you know, time with his family; and he is, as I say, an unspectacular but solid person.

"Who is Mark Kipnis, the lawyer? When Mark was in law school, he worked for a law firm called Holleb & Coff, which was a real estate firm. And when he graduated—primarily a real estate firm.

"When he graduated law school, he went to work for that firm and he worked there all the way until he started at Hollinger.

"That law firm, as I said, was primarily a real estate firm. So, what is, what does a real estate firm do? They do house closings, etc. You know, sometimes small, sometimes huge, you know—I don't mean to make it sound simplistic, because sometimes these closings on real estate deals are very complex for commercial real estate—and Mark specialized in that.

"He also did corporate work—contract work for corporations—that, when a company wanted to buy something or lease something, Mark would do those documents. And that's what he worked on.

"What he did not work on and what Holleb didn't work on was public companies, proxy statements, shareholders, related-party transactions, audit committees. Those are concepts that only apply to public companies; that is, companies that sell their shares publicly so that anybody can buy them.

"Holleb did not represent public companies. And Mark had no experience with any of those areas in—when he worked at Holleb.

"He was, however, a very well-respected person in the Chicago legal community and at the law firm. He was elected to the Management Committee of the law firm to help run it. People had a lot of respect—and rightfully so—for his judgment, for his legal ability.

> **"I'm not a securities lawyer." —Mark Kipnis**

"Well, how did Mark come to work at Hollinger? After all, he didn't have public company experience. Because that wasn't the focus of this job. The securities work was expressly not—and when I say 'securities work,' I mean that's that—the proxy statements, the annual reports, the related-party things. That expressly was not the focus of his job.

"He received a call at the end of 1997 from a fellow he knew but hadn't been in touch with, named Ken Serota. Ken Serota was a younger lawyer at Holleb & Coff when Mark was a more senior lawyer, and Ken had a lot of respect for Mark and his judgments and his abilities. And he was leaving Hollinger and he called Mark and said, 'Hey, I was thinking of folks who might enjoy this job, might be good for this job. I thought of you. Are you interested?'

"And Mark talked to Ken Serota, he talked to Peter Atkinson [another defendant], he talked to Paul Healy before he took the job. And he told each of them, 'Hey, look, I'm not a securities lawyer and I have not—' and I'll get to the other things he said he's not, too, but, 'I'm not a securities lawyer.'

"And they said, 'Don't worry about that. We've got Cravath, Swain & Moore, this huge New York law firm who has people who specialize in that. They take care of all that. We've got KPMG, the world's largest accounting firm. They take care of all that. Don't worry about it. Your job with regard to that is really

very ministerial. It's really very just shuffling papers. It does not have to do with any of the tough stuff.'

"Now, he's also, by the way, not an environmental lawyer. He's not a labor lawyer. He's not a lot of those things. And that is typical for people who come inside in a company.

"You know, just like you wouldn't go—you know, you could say, 'Well, look, he's a lawyer. He ought to know about this stuff. He ought to know about securities law. After all, he went to law school.'

"It doesn't work that way. It's the same—you know, if you break your leg, you don't go to a brain surgeon. If you've got a lung problem, you don't go to a family practitioner.

"The same thing with lawyers. If you've got—if you're buying a house, you don't go to a divorce lawyer. If you've got a bankruptcy, you don't go to a real estate lawyer. There are specialists.

"And what companies do is, when they need those specialists, they hire them. And that's exactly what happened at Hollinger."[3]

The charges[4]

"There are two sets of counts against Mark. One is about the Non-Competition Agreements, that that was allegedly a fraud against Hollinger International; and the other is tax fraud directly related to those Non-Competition Agreements; that is, that if those Non-Competition Agreements were wrongful, then somehow—then the amount of income, not the amount of taxes, but the amount of income—that was reported was wrong, and that Mr. Kipnis supposedly knew that. That's it. Those are the charges against Mark Kipnis.

"And, so, both of them are fraud.

"And there will be little contest during this trial about what Mark did. So, your task with regard to Mark is going to be a little different because it is not about what he did. It is not finding out what his actions were. It was what was in his head and what was in his heart because something that was very, very, very important that's left off the government's chart—where it says 'defendants negotiate the sale, defendants make false incomplete statements to the board'—being wrong in talking to the board is not a crime.

"What they missed is intent. You must have an intent to defraud. You must have an intent to cheat, an intent to deceive. And Mark Kipnis did not have that.

"Fraud is not mistake. It is not negligence. It is not failure to connect the dots. The government must prove beyond any reasonable doubt that Mark had an intent to deceive and to cheat Hollinger International."

Practical problems

Mark took the job at International, knowing he did not have the necessary breadth of experience, based on assurances that he would be able to call on outside counsel to provide what he lacked. As it turned out, he did not call upon them as often as he should have, and, in certain cases, they made mistakes and gave him bad advice. This situation led to a statement used repeatedly by his defense counsel: "He did the best that he could with the information he had, given the experience that he brought to the job."

In the end this was not enough for the jury. Juror Monica Prince, quoted in the July 16, 2007, edition of the *Chicago Sun-Times* said, "Our hearts went out to him. I think he wanted to impress" Radler and Black and "hold on to his job." Still, "at the end of the day, he had to go down with the rest" because he had helped execute the fraud.

Kipnis's lack of experience was not enough for the jury.

When he took the job, it appears that he thought he was going to be the inside lawyer for a newspaper business. It does not look like he had any appreciation for the complexity of the corporate family or the unique issues raised by the management agreement and related-party transactions. Further, he was the inexperienced outsider working for a very aggressive, experienced, and celebrated management team located, for the most part, in Toronto.

He approached these challenges in much the way he had approached those earlier in his life, by taking extraordinary steps to learn the newspaper business, working very hard, and doing his best to impress his bosses with his efforts to make the management team successful.

It's clear that Atkinson, Boultbee, and Radler, in particular, took advantage of the situation. At times they outright lied by telling him that transactions had been approved by the Audit Committee when they had not, and at other times they implied that outside counsel had passed upon legal issues when they had not.

He had no reason to disbelieve his bosses at the time and no experience which would have led him to believe he should have independently verified some of the matters which turned out to be untrue.

Hindsight also seems to make it clear that Radler manipulated Mark into signing a number of things, some of which he had no legal right to sign, with the intent of making it appear that they were done independent of the senior management group, which benefited by them. In the end this seems to be what influenced the jury to find him guilty, although it is clear that he received nothing of value for these acts. He was acquitted on the counts which involve the transactions for which he was paid his two bonuses.

Juror Margaret Williams, a Chicago schoolteacher, was quoted in the July 16, 2007, edition of the *Chicago Sun-Times* to the effect that the jurors, though puzzled about his motivation, finally asked themselves, "Did this person knowingly break the law?" Explained Williams, "Ultimately, he did it knowingly." The real question is whether he did what he did with an intent to defraud. The issue was not whether he made mistakes or whether he was duped, but whether he knowingly participated in the scheme to defraud International and its shareholders.

The real question is whether he did what he did with an intent to defraud.

The closing[5]

"The true test of somebody's character, however, is not what they do in good times, but in bad. It is not what they do when there is no pressure. It is what they do under pressure.

"You saw the response that several witnesses in this case had to that enormous pressure that the government can apply. For some witnesses it was dramatic. For the Audit Committee members who were criticized by the shareholders, who were criticized by the public, who were criticized by the SEC, who were criticized by the government, the pressure was overwhelming. They could not all of a sudden remember anything they were told. Even when confronted with written document after document after document, that they had signed and reviewed and affirmed, they couldn't recall. They denied even hearing about the non-competes, let alone approving them.

"For David Radler, at a certain point he started confessing to everything the government asked him about, even though he had vehemently and vigorously denied those same exact points time and time and time again.

"Mark reacted differently. His character remained the same. Open, honest from the first days the Special Committee talked to him he cooperated fully with the Special Committee. He sat down for formal interviews. He sat down for informal interviews. He sat down with his attorneys present. He sat down without his attorneys present. He provided them with a mountain of documents. He told not even a single lie. He told no one a single lie.

"Mark made mistakes. And unfortunately you didn't get a full picture of his job performance because we didn't talk about 99.9 percent of what Mark did. But in the 0.1 percent of what Mark did, he made mistakes.

"And let me tell you, ladies and gentlemen, a not guilty verdict is not an endorsement of everything he did. It is—I expect you will conclude in your discussions that he could have done better, that he should have done better. His conduct when put under a microscope, when time is slowed down, when looked at with the benefit of hindsight, certainly could have stood improvement.

"A guilty verdict does not endorse everything he did—a not guilty verdict will not endorse everything he did. A not guilty verdict—when you return with a not guilty verdict, there will be no parades held for Mark Kipnis. It merely says the government has not proved beyond a reasonable doubt that he was part of any scheme, that he intended to cheat anyone. Mark Kipnis is a fine man with an impeccable character and a good heart.

"He sat here while his name and his reputation have been dragged through the mud. He was likened to a bank robber, a street thug, a burglar. In a loud and clear way, he was accused of taking $150,000 to do the crime, an accusation that even the prosecution's star witness cannot say was true.

"And he will sit here while Mr. Sussman attempts to rebuild the case against Mark. And he will hear the accusations repeated in a vehement manner with a raised voice. And he will hear it with powerful language, maybe wielding a pen against some of these exhibits.

"But you should insist on evidence—not words, not calling it a theft—proving that there was a scheme and that Mark was a part of it to respond to the mountain of evidence of Mark's good faith.

"You have seen the power of the government's accusation. But there is an end to that power. That power ends at your jury room door. When the lawyers are finally done talking, that power and

responsibility shifts entirely to you. Then the power of the accusation stops. There is no presumption, never was a presumption that those accusations are true. There is only one presumption that the Constitution allows, and that is the presumption that those accusations are not true, that Mark is absolutely not guilty. And that presumption lasts until the government can—and they have not come close—prove Mark guilty beyond a reasonable doubt.

"The charge is not carelessness. The charge is not sloppiness. The charge is not forgetfulness. The charge is that he was a crook, that he stole money and intentionally helped others steal money.

"Only you can say there is no evidence of that, let alone evidence sufficient to meet the enormous burden of proof beyond a reasonable doubt. Do not compromise about Mark. Every count is a crime. Every count is of critical importance. He is not guilty of every one of those counts.

"You cannot give him back what he has lost. You cannot restore his prior life, livelihood, reputation. But you can give him a measure of his dignity back. You can give Mark and Kay a chance—nothing more, but a chance—to rebuild their lives.

"You can say that the government has not come close to meeting its awesome burden. Not—and say it not out of sympathy, not out of pity, but because the evidence requires it. The law requires it. Fairness requires it.

"Ladies and gentlemen, if justice means anything—and I believe with every fiber of my being that it does—you will return to this courtroom with pride filling your hearts as you announce your verdict of not guilty for Mark Kipnis on all counts.

"Thank you."

The job of in-house attorney has been called the most ethically challenged position in the legal profession.

The verdict[6]

Although the jury dubbed Kipnis "St. Mark" during their deliberations because he (as an individual) and his actions were so different from the other three defendants, they nonetheless convicted Kipnis along with Black, Radler, Boultbee, and Atkinson on three counts of mail and wire fraud relating to non-competition payments made by American Publishing Company (APC), an International subsidiary, to International officers that did not involve a transaction, and the Forum and Paxton transactions. Forum and Paxton were the smallest transactions involving only $600,000 of non-compete payments. APC was the most egregious since it was merely a payment for signing a non-competition agreement with a subsidiary of International, so that the defendants could receive a non-competition payment for agreeing not to compete against themselves.

In addition, Black was convicted of one count of obstruction of justice having to do with the spiriting of boxes of documents out of a building in Canada.

On all of the other counts that were tried, all of the defendants were acquitted.

This strange result, coupled with the fact that in the midst of its deliberations the jury came back to the judge with an indication that they were unable to reach a verdict on all of the counts (after which she sent them back to deliberate further), has led a number of commentators to conclude that it was a "compromise verdict." This term describes a verdict reached by agreement among the jurors, much as legislators do when they compromise to reach agreement on a bill.

Post-trial motions and briefing will conclude on October 1, 2007, after which we will see whether Mark Kipnis does better with the judge than he did with the jury. [*Editor's note: This is discussed in the postscript.*]

Public reaction

An August 6, 2007, article in *BusinessWeek*, headlined "In-house Attorneys, Watch Your Step," noted that, "while Kipnis was charged as a participant in the fraud, he was never accused of helping conceive or of getting a penny of the payments. Essentially, Kipnis, 59, was charged as an enabler of deals he knew were crooked." *BusinessWeek* notes that "for some observers, the Kipnis case sets disturbingly high expectations for in-house attorneys when it comes to recognizing when transactions are being used for corrupt purposes. Special-purpose entities like those used by Enron Corp. and non-compete deals like those in the Hollinger case can serve legitimate ends. Corporate counselors have long argued that they should not be presumed to be omniscient simply because they drafted documents. 'I think this jury essentially criminalized Mark Kipnis's negligence for failing to ask questions of his client, and I think it sends a very frightening message to corporate counsel,' says Hugh Totten, a litigation partner at Perkins Coie who observed much of the trial in order to provide commentary to the media." The author concludes that Kipnis's predicament

captures why Stephen Gillers, a New York University School of Law ethics professor, calls the job of in-house attorney "the most ethically challenged position in the American legal profession." That's because the client is the corporation, but the counselor gets told what to do by executives. "They have to be aware of the risk that their bosses are violating a duty to their clients, and it's a real challenge, because you don't want to accuse your boss of illegal activity," Gillers says.

BusinessWeek goes on to quote juror Tina Kadisak: "We definitely came to the conclusion that he did know what was going on." The jurors also felt bad for him, she says. "He got himself into something and then couldn't find a way out. . . . As much as you need to follow directions and do your job, if something doesn't seem right to you, you have to speak up or not do it." She also was quoted in the July 16, 2007, *Globe and Mail*: "It was very difficult, to be honest. A lot of us felt very bad for Kipnis . . . but he was right there in the middle of it."

The Honorable E. Norman Veasey, former chief justice of the Delaware Supreme Court, in a July 2007 interview for the *Metropolitan Corporate Counsel* commented on the lawyers at Enron: "It appears that some attorneys considered officers as their clients. Also, some of the attorneys may have seen their roles as implementers, not counselors. Rather than raising known issues for more analysis to the Enron board, these lawyers would focus only on how to address a narrow question or to implement a decision." Frankly, this would seem a good summary of Mark's conduct as well. Commenting further in the article on the skills required for a good in-house lawyer, Judge Veasey said, "It is important that the general counsel and members of the legal department have the ability to recognize issues involved in specialized areas (such as accounting, intellectual property, environment, etc.) even if they are not specialists in those areas. General counsel working with the legal department should collectively have enough specific knowledge relevant to the company's business to recognize when specialized lawyers are needed in-house and when to seek help from outside counsel."

In a July 15, 2007, article, ChicagoTribune.com termed the successful prosecution of Conrad Black a byproduct of the Enron era. It quoted Robert Mintz, former federal prosecutor: "On an order of magnitude, this case doesn't compare to Enron or WorldCom. But . . . it's another example of federal prosecutors aggressively pursuing a once-powerful CEO and successfully convincing jurors that his conduct amounted to an intentional fraud. That's not an easy thing to do. Five years ago, that was almost unthinkable." The same article quotes David Ruder, a former chair of the SEC: "Black got caught up in intensified Justice Department white-collar criminal activity and he suffered from it. Maybe it wouldn't have gotten to that point without the accelerated push against corporate crime." And it further quotes Bernard Harcourt, a professor of law at the University of Chicago Law School, as saying Black's case differs from Enron because it wasn't about him running Hollinger with pervasive, fraudulent behavior. "I would view this more as the greedy CEO who is just trying to stuff his pockets at the end of what was a pretty successful career."

General counsel should recognize when to seek help from outside counsel.

Commentators have begun to focus on the criminalization of conduct traditionally not so characterized. In 2004 the Cato Institute published *Go Directly to Jail: The Criminalization of Almost Everything,* by Gene Healy (ed.). An article in the April 2005 *Policy Perspective* published by the Texas Public Policy Foundation is entitled "Not Just for Criminals, Overcriminalization in the Lone Star State." A November 1, 2004, article in the *Puget Sound Business Journal* headlined "Criminal Practice: Firms Expand into White-Collar Defense" notes, "Over the past two decades, there's been an ongoing criminalization of business activities that weren't considered criminal in the past, from compliance to government contracting to fraud allegations." The topic has also spawned its own Web site, Overcriminalized.com.

Conclusion

Apart from forging a check or a wire transfer instruction, there is no way to transfer money out of a public corporation that will not involve the work of a lawyer drafting an agreement or a closing document or a supporting memorandum or corporate minutes and subsequent required disclosure documents.

While much is being written these days about the expanded role of the general counsel in light of the increased focus on corporate governance following

Enron and WorldCom, this case shows us that, before embarking on efforts to enhance the position, general counsel should revisit the basics. In this case it was inattention to basic issues of corporate and contract law that led Kipnis to a career-ending result.

To once again put it into the human realm, consider the following quote from the *Chicago Tribune* speculating on the fate that would greet Conrad Black when he was sentenced to jail: "If St. Eve denies him bail, Black, found guilty of three fraud counts and obstruction of justice and facing 35 years in prison, would be handcuffed in court by U.S. marshals and led to a holding area, where he would be strip-searched, a standard practice.

"Authorities also would remove his tie, belt and shoelaces but allow him to carry one form of identification, a small amount of cash and his wedding band, said John O'Malley, chief deputy of the U.S. marshal's office in Chicago. Black likely would be held in the Metropolitan Correctional Facility, where he would wear an orange jumpsuit like all other inmates."

If the judge had not intervened, a similar fate awaited Mark Kipnis.

Inattention to basic issues of corporate and contract law led Kipnis to a career-ending result.

Postscript

On December 10, 2007, Judge St. Eve sentenced Mark Kipnis to five years of probation, six months of electronic home monitoring, and 275 hours of community service. "You were clearly the least culpable person in this scheme," she told him. In his presentencing statement, Kipnis said he never did anything at Hollinger International that he considered criminal. But he also said, "I understand you don't get to relive life or have do-overs. . . . I could have done better, and I should have done better. In the future, I will continue to be punished in oh-so-many ways."[7]

The Illinois Attorney Registration & Disciplinary Commission will file a petition seeking Kipnis's suspension from the practice of law as soon as it receives a certified copy of the sentence. Kipnis's attorney said he will surrender his license rather than fight the suspension. In 2006, Kipnis bought a Sign-A-Rama franchise in Elgin, Illinois, and has been operating it with his wife and his son, Blair.

Endnotes

1. See Attachment A for a graphical representation of the corporate family. [*Editor's note: Attachment A is posted at www.abanet.org/pubutil/publications/.*]

2. Opening Statement, Black v. Hollinger Int'l., 844 A.2d 1022, 1063-64 (Del. Ch.), aff'd, 872 A.2d 559 (Del. 2005).

3. Transcript of Trial Proceedings at 1065-69, U.S. v. Black, No. 05 CR 727 (N.D. Ill. filed Aug. 18, 2005) (opening statement of Ronald Safer on behalf of Mark S. Kipnis).

4. See Attachment B, Excerpts from Superseding Information to Complaint, U.S. v. Black, No. 05 CR 727 (N.D. Ill. filed Aug. 18, 2005) for details about the actions of the defendants from the government's point of view, which relates to Counts I, VI, and VII, the only counts on which all four defendants were convicted. See Attachment C for the statutes upon which the charges were based. [*Editor's note: Attachments B and C are posted at www.abanet.org/pubutil/publications/.*]

5. Transcript of Trial Proceedings at 14,887-891, U.S. v. Black, No. 05 CR 727 (N.D. Ill. filed Aug. 18, 2005) (closing statement of Ronald Safer on behalf of Mark S. Kipnis).

6. See Attachment D for a list of the Counts and the verdict on each. [*Editor's note: Attachment D is posted at www.abanet.org/pubutil/publications/.*]

7. Conrad Black was sentenced to 78 months in prison, fined $125,000, and ordered to forfeit $6.1 million. Jack Boultbee (former CFO) was sentenced to 27 months in prison plus three years of probation and ordered to pay restitution of $152,000. Peter Atkinson (Canadian lawyer) was sentenced to 24 months in prison plus three years of probation.

infrastructure

Section of Public Utility, Communications and Transportation Law
American Bar Association
321 N. Clark Street
Chicago, IL 60610

Nonprofit Organization
U.S. Postage
PAID
American Bar Association

SECTION ANNUAL SPRING MEETING

SAVE THE DATE April 7, 2008 9:00 a.m.–4:00 p.m.

Innovation and Change in Regulated Industries

PEPCO CONFERENCE CENTER 701 Ninth Street NW Washington, DC

JOIN YOUR COLLEAGUES FOR A FULL DAY OF CLE

For registration information, please contact the Section office at 312/988-6238 or kozs@staff.abanet.org