Capital Markets Tribunal
Tribunal des marchés financiers
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Citation: *A1 Co (Re)*, 2023 ONCMT 45
Date: 2023-11-28
File No. 2023-26

IN THE MATTER OF
A1 CO., A2 CO., A3 CO. and A4 CO.

REASONS FOR DECISION

Adjudicators:	Timothy Moseley (chair of the panel) Mary Condon Geoffrey D. Creighton	
Hearing:	November 13, 2023	
Appearances:	Aaron Dantowitz Katrina Gustafson	For Staff of the Ontario Securities Commission
	Lawrence E. Ritchie Alexander Cobb Ankita Gupta	For A1 Co., A2 Co., A3 Co. and A4 Co. [pseudonyms]

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REASONS FOR DECISION

1. OVERVIEW

[1] Staff of the Ontario Securities Commission is investigating the conduct of four companies. To protect the confidentiality of the investigation, we have substituted A1 Co., A2 Co., A3 Co. and A4 Co. for the companies' real names. Staff has advised the companies that the Commission intends to ask a court to find the companies in contempt for failing to comply with a summons issued in the investigation.

[2] The companies applied to this Tribunal for disclosure-related orders in anticipation of that contempt proceeding. Staff brought a preliminary motion to dismiss the companies' application. These are our reasons for granting Staff's motion.

[3] Staff's investigation is aided by two orders the Commission issued under s. 11 of the *Securities Act* (the ***Act***).[1] An investigator appointed under those orders issued a summons, under s. 13 of the *Act*, requiring an officer of some of the companies to attend for an examination. The companies refuse to comply with the summons because, they say, the Commission does not have jurisdiction over them.

[4] The Commission has not yet brought the threatened contempt proceeding. In anticipation of that happening, the companies applied for orders under s. 17(1) of the *Act* relating to:

a. what information the Commission would be able to disclose in connection with its planned contempt proceeding; and

b. information that the companies might need to disclose in that proceeding, in response to the Commission's material and submissions.

[1] RSO 1990, c S.5

[5] The information at issue is protected by s. 16 of the *Act*, which prohibits its disclosure, subject to certain exceptions. One of those exceptions is a s. 17(1) order authorizing disclosure.

[6] Staff moved to dismiss the companies' application on a preliminary basis. Staff said the application was improper, because:

a. to the extent it relates to what the Commission might disclose, s. 17(6) of the *Act* authorizes the Commission to disclose what it chooses to in a contempt proceeding, so the application is an improper attempt to limit that disclosure in some way; and

b. to the extent it relates to what the companies might need to disclose in response, is premature.

[7] We heard Staff's motion in the absence of the public. Two days later, we issued a confidential order granting Staff's motion and dismissing the companies' application, for reasons to follow. As we explain below in our reasons for that decision, we agree with Staff that s. 17(6) applies to a contempt proceeding brought by the Commission, and that the companies' application in respect of any disclosure the companies might make is premature.

2. CONFIDENTIALITY

[8] As noted above, we held the motion hearing in the absence of the public.

[9] The departure in this case from the usual practice of holding public hearings is authorized by s. 9(1)(b) of the *Statutory Powers Procedure Act*[2] and Rule 22 of the Tribunal's *Rules of Procedure and Forms*. Those provisions contemplate a balancing of the desirability that Tribunal proceedings be open to the public, against other factors. In this case, the other factor is s. 16 of the *Act*, the purposes of which include protecting the confidentiality of: (i) investigation orders, (ii) the identity of subjects of the investigation, and (iii) information Staff obtains under those orders.

[10] At a preliminary attendance in this proceeding, the single-member panel inquired of the parties whether it would be practical to hold this motion hearing in public,

[2] RSO 1990, c S.22

with all involved ensuring that no one said anything that would compromise the interests that s. 16 protects. That panel accepted the parties' joint submission that doing so would be impractical, and that this hearing should be held in the absence of the public.

[11] We adopted that approach. Hearing this motion entirely in public would have unduly compromised the parties' confidentiality and privacy interests. We achieve sufficient transparency by releasing these reasons publicly, without identifying information, and by our order that the companies' application, Staff's motion, and the parties' written submissions be publicly available, with redactions to mask the identity of the companies.

3. ANALYSIS

3.1 Introduction

[12] This motion presents the following issues, each of which we address in turn:

a. Is it appropriate for the Tribunal to consider Staff's motion to dismiss on a preliminary basis, without letting the companies' application proceed to a full hearing?

b. When the Commission brings a contempt proceeding relating to a s. 13 summons, does it do so under the *Act* (as opposed to on some other basis), with the result that s. 17(6) of the *Act* allows the Commission to choose what to disclose in that proceeding?

c. Does s. 17(1) of the *Act* allow a potential respondent to a contempt proceeding arising from a s. 13 summons to seek an order that would affect what disclosure the Commission can make in that contempt proceeding?

d. Is it premature for the companies to seek a s. 17(1) order to permit them to disclose, in a yet-to-be-commenced contempt proceeding, information necessary to respond to that proceeding?

[13] As we explain below, we decided that:

a. it is appropriate for the Tribunal to consider this motion now, on a preliminary basis;

b. s. 17(6) applies to a contempt proceeding, and permits the Commission to disclose in that proceeding information protected by s. 16;

c. s. 17(1) does not allow a potential respondent to a contempt proceeding to seek an order that would affect the Commission's disclosure; and

d. it is premature for the companies to seek a s. 17(1) order regarding their own disclosure.

3.2 It is appropriate for the Tribunal to consider this preliminary motion

[14] We deal first with the question of whether we should consider Staff's motion to dismiss the application on a preliminary basis. The companies submitted that we should not, because doing so would pre-empt full argument and the consideration of a factual record. We disagree, because we can resolve each of the three remaining issues at this stage of the proceeding and on the record before us, and it would be efficient to do so.

[15] Of the three remaining issues identified in paragraph [12] above, the first is a pure question of statutory interpretation – does s. 17(6) apply to a contempt proceeding? The companies' application mentions no facts that would be relevant to that question. At the motion hearing, counsel for the companies did not identify any kind of facts that would be relevant. The companies submitted that the parties might seek to introduce legislative facts to help us interpret s. 17(6). However, despite having had ample opportunity to do that, the companies did not adduce any. In any event, as our analysis of this issue demonstrates below, we were able to reach our conclusions simply by examining the wording of s. 17(6). In so doing, we considered and rejected other potential sources of authority for a court's contempt power that the companies said might apply.

[16] The second of the three remaining issues is also a pure question of statutory interpretation. Does s. 17(1) allow a potential respondent to a contempt proceeding to seek an order that would affect what disclosure the Commission can make in that proceeding? Again, the companies were unable to identify any kind of facts that would bear on this question. We were able to resolve the issue based simply on the wording of the provision and on our conclusion about s. 17(6).

[17] As for the last issue, *i.e.*, the prematurity of the companies' request for authorization to disclose, our analysis below demonstrates that we can easily resolve it without reference to facts, other than the incontrovertible fact that the Commission has not yet commenced a contempt proceeding.

[18] We therefore concluded that we needed no further facts to hear Staff's motion. Further, we reject the companies' submission that the preliminary motion pre-empted full argument. The parties had a full opportunity to address the issues. It was efficient and cost-effective for us to deal with this motion now.

3.3 A contempt proceeding is brought under the *Act*, so s. 17(6) allows the Commission to disclose information protected by s. 16

[19] The second issue asks whether a contempt proceeding arises under the *Act*, as opposed to arising from some other source. If it is brought under the *Act*, then it falls within the words "a proceeding commenced or proposed to be commenced under this Act" in s. 17(6), and would, as a result, allow the Commission to disclose information protected by s. 16.

[20] We agree with Staff that a contempt proceeding is brought under the *Act*. The potential consequence of a court-imposed contempt order arises from s. 13(1) of the *Act*, the provision that empowers an appointed investigator to issue a summons to aid in the investigation. Subsection 13(1) provides that if a person or company refuses to comply with the summons, that refusal "makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court."

[21] Subsection 13(1) does not expressly specify the process by which the Commission may obtain a committal for contempt. Despite this, we conclude that it is s. 13(1) that provides the foundation for a contempt proceeding. We reach that conclusion for three reasons:

a. the words of s. 13(1) contemplate the relief, and do not specify some other mechanism by which the Commission should seek that relief;

b. the Superior Court of Justice has, in two cases, concluded that s. 13(1) provides that court with the authority to hold a person in contempt for failure to comply with a summons;[3] and

c. the companies did not identify any other provision, anywhere, or any other source of authority, that better suggests that it is the foundation for a contempt proceeding.

[22] On this third point, the companies submitted that a contempt proceeding is not brought under the *Act*; rather, it is brought under the *Courts of Justice Act*,[4] and, in particular, under rule 60.11(1) of the *Rules of Civil Procedure*.[5] We disagree. First, the companies pointed to no specific provision in the *Courts of Justice Act* that supports their position. Second, rule 60.11(1) provides that the contempt orders referred to in that rule "may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made." Our reading of rule 60.11(1) is that it relates to an existing order in an existing court proceeding. That does not apply here.

[23] The companies also submit that a court's contempt power flows from the common law. The companies referred us to a decision of the Alberta Court of King's Bench[6] to that effect, which in turn cites a decision of the Court of Appeal for Ontario.[7] Those decisions review the source of a court's authority to control its own process in the civil and criminal contexts. However, neither decision suggests in any way that a court's inherent jurisdiction or common law authority gives it contempt power over investigations by regulatory agencies.

[24] In the absence of any legislative or judicial pronouncement to that effect, it would be presumptuous, and, in our view, incorrect, for this Tribunal to find that courts have such a jurisdiction.

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[3] *Ontario Securities Commission v Hibbert*, 2011 ONSC 6534 at para 10; *Ontario Securities Commission v Robinson*, 2009 CanLII 58983 (ON SC) at para 20

[4] RSO 1990, c C.43

[5] RRO 1990, Reg 194

[6] *Schitthelm v Kelemen*, 2013 ABQB 42 at para 20

[7] *R v Cohn*, 1984 CanLII 43 (ON CA)

[25] A contempt proceeding regarding a s. 13(1) summons is, therefore, brought under the *Act*.

[26] As a consequence, because s. 17(6) permits the disclosure of compelled information where that disclosure is made in connection with a proceeding commenced or proposed to be commenced under the *Act*, that permission to disclose extends to contempt proceedings. The companies urged us to resist this conclusion because the disclosure the Commission may make in the contempt proceeding will not have been subjected to the scrutiny and balancing of interests that would happen in the context of a s. 17(1) proceeding before this Tribunal, where a party requires the Tribunal's authorization to disclose. That may be so. However, the legislature has clearly contemplated that the Tribunal does not have a role in governing the disclosure related to proceedings under the *Act*, if that disclosure is made by someone appointed under the s. 11 investigation order.

[27] We cannot, therefore, give effect to the companies' concern that the Commission may irrevocably disclose something it ought not to disclose. That concern cannot clothe this Tribunal with jurisdiction it does not have.

3.4 The companies may not seek a s. 17(1) order that would affect what disclosure the Commission can make in a contempt proceeding

[28] We turn now to the companies' primary claim for relief. The companies seek a s. 17(1) order addressing whether, in a contempt proceeding, the Commission can disclose information protected by s. 16. The companies also ask us to impose terms and conditions on how that disclosure can be made.

[29] We cannot accept the companies' submissions. It would be inappropriate for us to issue a s. 17(1) order to authorize disclosure that is already authorized by s. 17(6).

[30] We must examine s. 17(1) in the context of related provisions. Section 16 of the *Ac*t prevents disclosure except in accordance with s. 16(1.1) (not relevant in this case) or s. 17. Section 17 sets out three possible bases for disclosure:

a. s. 17(6), discussed above;

b. s. 17(5), relating to prosecutions under the *Provincial Offences Act*,[8] which is not relevant here; and

c. s. 17(1), which permits the Tribunal to "make an order authorizing the disclosure to any person or company" of information protected by s. 16.

[31] In the context of a contempt proceeding, the words of s. 17(1) do not permit a potential respondent to that proceeding to ask for "authorization" for someone else (*i.e.*, the Commission) to disclose something. The Commission does not need that authorization, given s. 17(6). Even if in a particular case the Commission or its Staff see a need for an order authorizing disclosure, then it is open to Staff to seek that order. It is illogical in these circumstances for one party to seek authorization for another.

[32] On this last point, we disagree with the companies' submission that we should apply the Tribunal's 2009 decision in *Re Y*.[9] That case:

a. arose in an entirely different context, in that the applicant sought disclosure of documents he had previously received but later returned, and he sought the disclosure for the purpose of defending himself in a criminal proceeding;

b. pre-dated the 2023 amendment to s. 17(6) that extended the application of that exception to all proceedings under the *Act*;

c. does not suggest that the point at issue in this case was argued before the panel in *Re Y*; and

d. featured Staff consenting to the third party's request, subject to some irrelevant exceptions.

[33] It is therefore appropriate for us to dismiss preliminarily the companies' request for a s. 17(1) order in relation to what disclosure the Commission can make. In doing so, we disagree with Staff that the companies' request for s. 17(1) relief amounts to an improper request for a declaration that s. 17(6) does not apply. It is true that this Tribunal cannot issue a declaration,[10] but we dismiss the

[8] RSO 1990, c P.33
[9] (2009), 32 OSCB 11271
[10] *B (Re)*, 2020 ONSEC 21 at para 17

companies' request for the reasons set out above and not because we see the request as being for a declaration.

[34] The companies joined their request under s. 17(1) with a request under s. 17(4). Subsection 17(4) contemplates that an order under s. 17(1) may be subject to terms and conditions we impose. Since we are not making an order under s. 17(1), the authority under s. 17(4) to add terms and conditions does not arise. Any disclosure the Commission chooses to make will be under s. 17(6), to which s. 17(4) does not apply. We therefore dismissed the s. 17(4) request as well.

3.5 It is premature for the companies to seek a s. 17(1) order relating to information they may need in order to respond to a contempt proceeding

[35] Finally, the companies seek a s. 17(1) order authorizing disclosure by them, so that they can properly respond to a contempt proceeding. We dismiss this request as being premature.

[36] The companies do not specify precisely what it is they seek authorization to disclose. This is understandable, since the Commission has not yet brought a contempt proceeding, let alone delivered material to which the companies may need to respond. It may turn out that there will be nothing the companies will want to disclose that the Commission will not already have disclosed in the contempt proceeding. Even if the companies require additional authority, Staff might consent to the necessary order. None of these considerations can be known at this time.

[37] The companies' request for relief is hypothetical, so we cannot grant it. Accordingly, we dismissed preliminarily this request, although we did so without prejudice to the companies' right to bring a further s. 17(1) application, authorizing them to disclose anything referred to in s. 16(1) of the *Act* should the need actually arise.

4. CONCLUSION

[38] For the above reasons, we granted Staff's motion and dismissed the companies' application, without prejudice to the companies' right to bring a further s. 17(1)

application, authorizing them to disclose anything referred to in s. 16(1) of the *Act*.

Dated at Toronto this 28th day of November, 2023

"*Timothy Moseley*"

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"*Mary Condon*"

Mary Condon

"*Geoffrey D. Creighton*"

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