Ontario Securities Commission
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
SEXTANT CAPITAL MANAGEMENT INC.,
SEXTANT CAPITAL GP INC., OTTO SPORK, KONSTANTINOS EKONOMIDIS, ROBERT LEVACK AND NATALIE SPORK

REASONS AND DECISION ON A MOTION

Hearing:	March 14, 2012	
Decision:	April 27, 2012	
Panel:	James D. Carnwath, Q.C.	- Commissioner and Chair of the Panel
Appearances:	Jay Naster Dena Smith (Student-at-Law)	- For Otto Spork, Konstantinos Ekonomidis and Natalie Spork
	Scott C. Hutchison Tamara Center Paul Jonathan Saguil	- For Staff of the Commission
	No one appeared	- For Sextant Capital Management Inc. or Sextant Capital GP Inc.

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I. INTRODUCTION

[1] Otto Spork, Konstantinos Ekonomidis and Natalie Spork (the "**Moving Parties**"), moved on March 14, 2012 for:

a) An order that the Ontario Securities Commission (the "**Commission**") does not have jurisdiction to complete the s.127 hearing currently scheduled to resume on April 18, 2012, before a single member of the Commission;

b) an order that the hearing scheduled to be completed on April 18, 2012, be heard before the same quorum of the Commission that has conducted the hearing since its commencement on June 7, 2010, further to a Notice of Hearing issued May 12, 2010;

c) such further order as counsel may request and the Commission may permit. (the "**Motion**")

[2] Enforcement staff of the Commission ("**Staff**") oppose the Motion.

[3] To understand the issues to be decided in the matter, a history of the events leading to the motion is necessary. That history is as follows:

(a) Further to a Notice of Hearing dated May 12, 2010, the Moving Parties received notice that the Commission would hold a hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "***Act***") commencing on June 7, 2010 at 10:00 a.m. to consider whether, in the Commission's opinion, it is in the public interest for the Commission to make an order pursuant to s.127(1) and s.127.1 of the *Act*.

(b) On June 7, 2010, the Moving Parties attended before Commissioners James D. Carnwath and Carol S. Perry (the "**Merits Panel**") for the commencement of the hearing. On June 7, 2010 an order was made adjourning the hearing for one week. On June 14, 2010, the parties made their opening addresses. The hearing continued over the course of approximately sixteen days between June 2010 and December 2010 (the "**Merits Hearing**").

> [Note: Commissioner Perry's appointment to the Commission expired on February 14, 2011.]

(c) The Panel issued Reasons for Decision respecting the merits of Staff's allegations on May 17, 2011. In particular, the Panel found that one or more of the Moving Parties breached ss.19, 116 and 126.1 of the *Act*, and thereby acted contrary to the public interest.

(d) By email dated May 26, 2011, the Secretary's Office advised as to the availability of the Commission to conduct the "Sanctions Hearing", and stated that Commissioner Carnwath proposed to sit alone on the Sanctions Hearing particularly following the recent amendments to s.3.5(3) of the *Act*. The

Secretary sought counsel's input as to whether this proposal was satisfactory. On June 2, 2011, counsel for the Moving Parties advised they were not in agreement with proceeding before only one member of the Commission.

(e) By email dated June 13, 2011, the Secretary's Office advised that a quorum would be available for the Sanctions Hearing and canvassed further dates with counsel. Following counsel's inquiry as to who the proposed panel members would be, on June 14, 2011, the Secretary advised Commissioners Carnwath and Kelly. In response, by email dated June 17, 2011, counsel for the Moving Parties advised they anticipated opposing the proposed change to the composition of the Panel.

(f) By letter dated June 21, 2011, the Secretary's Office advised that the Commission no longer intended to substitute Commissioner Kelly for Commissioner Perry as Commissioner Perry had consented to sitting in accordance with s.4.3 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "***SPPA***"). The Secretary's Office suggested proceeding on July 11 or 13, but also sought counsels' input for dates in the fall if the earlier dates were not acceptable. However, the Secretary's Office noted that if the matter went into the fall there was no guarantee that Commissioner Perry would be available, in which case, Commissioner Carnwath would complete the hearing and give a decision pursuant to s.4.4(1) of the *SPPA*.

(g) By letter dated June 24, 2011, counsel for the Moving Parties advised the Commission that they were not available to proceed on July 11 and 13, but were available on September 22 and 23. Confirmation was also sought as to whether Commissioners Carnwath and Perry were available to proceed on that date. The Secretary's Office replied by letter dated June 28, 2011, advising that the matter was set down to be heard on September 22 and 23, 2011.

(h) By Notice dated June 28, 2011, the Commission announced that a Sanctions Hearing was set down for September 22 and 23, 2011. On September 20, 2011, the Commission issued a further notice adjourning the Sanctions Hearing on consent to December 7, 2011.

(i) On November 18, 2011, the Commission granted a motion by the then counsel for the Moving Parties to remove the counsel of record for the Moving Parties.

(j) By email dated November 24, 2011, the Secretary's Office notified the Moving Parties that the Secretary's Office had been instructed by Commissioner Carnwath to inform the Moving Parties that Commissioner Perry is unable to participate in the Sextant Sanctions Hearing, scheduled for December 7, 2011. Pursuant to s.4.4(1) of the *SPPA* – Incapacity of member, Commissioner Carnwath would complete the hearing and give a decision.

(k) By order issued December 5, 2011, at the request of counsel for the Moving Parties, the Sanctions Hearing scheduled for December 7, 2011 was adjourned, on consent, to April 18, 2012.

II. POSITION OF THE PARTIES

The Moving Parties

[4] The Moving Parties rely on the principle of *audi alteram partem*, often described as "he who hears must decide" and "he who decides must hear." They submit that to complete the hearing before only one member of the two-member Merits Panel, is contrary to this principle of natural justice.

[5] The Moving Parties submit that the provisions of the *SPPA*, and in particular s.4.4(1), does not authorize a tribunal to complete a hearing and give a decision where, as a consequence of a member being unable to complete the hearing, the remaining member or members of the tribunal do not constitute a quorum.

[6] The Moving Parties submit that the portion of the hearing to be completed, referred to as the Sanctions Hearing, is not a new or separate hearing, but rather the resumption of a hearing commenced further to the Notice of Hearing issued May 12, 2010. Therefore, amendments to the *Act* respecting quorum requirements which came into force subsequent to the commencement of the hearing (specifically an amendment to s.3.5(2) of the *Act*, which came into force on May 12, 2011) have no application to a hearing commenced prior to that date.

Staff

[7] Staff submit that a one-member panel can be constituted in a manner consistent with the *Act*, the *SPPA*, the rules, procedures and past practices of the Commission and the rules of the natural justice.

[8] Staff submit that the *SPPA* distinguishes between a "proceeding" (the overall case or matter in respect of which the tribunal is to exercise its ultimate statutory power of decisions) and a "hearing" (an individual step or stage within such a proceeding). Staff submit that following a finding of acts contrary to the public interest, the Secretary of the Commission can assign different Commissioners to the Sanctions Hearing, even though they did not preside at the Merits Hearing.

[9] In support of its position, Staff cite *Re MRS Sciences Inc.* (2011), 34 OSCB 12288 ("***MRS***").

III. ANALYSIS

[10] To understand the history of this matter leading to the Motion, the following sections of the *SPPA* must be borne in mind:

> **Expiry of term**
> **4.3** If the term of office of a member of a tribunal who has participated in a hearing expires before a decision is given, the term shall be deemed to continue, but only for the purpose of participating in the decision and for no other purpose.

Incapacity of member
4.4(1) If a member of a tribunal who has participated in a hearing becomes unable, for any reason, to complete the hearing or to participate in the decision, the remaining member or members may complete the hearing and give a decision.

Audi Alteram Partem

[11] In *International Woodworkers*, Gonthier J., writing for the majority in the Supreme Court of Canada, concluded at para. 76:

> I agree that, as a general rule, the members of a panel who actually participate in the decision must have heard all of the evidence as well as the arguments presented by the parties and in this respect I adopt Pratte J.'s words in *Doyle v. Restrictive Trade Practices Commission,* [[1985] 1 F.C. 362 (C.A.)], at pp. 368-369:
>
> > The important issue is whether the maxim "**he who decides must hear**" invoked by the applicant should be applied here.
> >
> > This maxim expresses a well-known rule according to which, where a tribunal is responsible for hearing and deciding a case, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said that this rule is a corollary of the audi alteram partem rule. This is true to the extent a litigant is not truly "heard" unless he is heard by the person who will be deciding his case … This having been said, it must be realized that the rule "**he who decides must hear**", important though it may be, is based on the legislator's supposed intentions. It therefore does not apply where this is expressly stated to be the case; nor does it apply where a review of all the provisions governing the activities of a tribunal leads to the conclusion that the legislator could not have intended them to apply. Where the rule does apply to a tribunal, finally, it requires that all members of the tribunal who take part in a decision must have heard the evidence and the representations of the parties in the manner in which the law requires that they be heard.
> >
> > (*International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 at para. 76 ("***International Woodworkers***"))

[12] *Audi alteram partem* and its relation to ss. 4.3 and 4.4(1) of the *SPPA* was considered by the Ontario Court of Appeal in *Piller v. Assn. of Ontario Land Surveyors* (2002), 160 O.A.C. 333 ("***Piller***"). At paras. 49 to 52 of *Piller*, Gilese J.A. found:

> **49.** Section 2 of the SPPA requires a liberal construction of s. 4.3. It provides that:

> This Act, and any rule made by a tribunal under section 25.1 shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.
>
> **50.** In addition, in determining the meaning to be given to the words "participating in the decision" as they appear in s. 4.3, the purpose of s. 4.3 is to be kept in mind. Like s. 26(11), its underlying purpose is to prevent a hearing from being disrupted by the expiry of a panel member's term of office. Many hearings take place over an extended period with lengthy adjournments or interruptions during which time a member's term of office may expire. The purpose of section 4.3 is frustrated if the expiry of a panel member's term of office during potentially lengthy preliminary proceedings were to require a new member to be appointed and the proceedings to start de novo. The deemed extension of a term is to enable the continued involvement and participation of a panel member seized of a matter that comes before the panel in which he or she is participating. It also meets the need for the expeditious and cost-effective determination of proceedings.
>
> **51.** Section 4.3 states that if the term of office of a member of a tribunal expires "before a decision is given", that term shall be deemed to continue. On its plain wording, this could occur at anytime before a decision is given. The words "after the evidence has been heard" do not precede the words "before a decision is given" in s. 4.3 and, in my view, ought not to be read in as to do so is inconsistent with the purpose of s. 4.3 and the dictates of s. 2.
>
> **52. Procedural fairness precludes a tribunal member from participating in the making of a decision if the member has not fully heard the matter**. In my view, the continuation of a tribunal member's term pursuant to s. 4.3 for the purpose of participating in the decision necessarily encompasses those activities required to meaningfully and lawfully participate in making the decision namely, participation in the completion of the hearing. For the sake of completeness, I note that hearing panel members may have other duties as, for example, attendance at Council meetings. The words in s. 4.3 limiting the extension of a tribunal member's term for the sole purpose of participating in the decision precludes the performance of such other duties by the member whose term has been extended by operation of s. 4.3. [Emphasis added]

[13] I conclude from Gilese J.A.'s statement in para. 52 of *Piller*, *above*, that the Legislature's intention in passing ss. 4.3 and 4.4(1) of the *SPPA* was to ensure that, where possible, the principle of *audi alteram partem* be recognized.

[14] Implicit in the Moving Parties' submissions is that the application of s. 4.4(1) of the *SPPA* to the facts of this case would result in my competency to preside at the Sanctions Hearing, were it not for the quorum requirements of s. 3(11) of the *Act*. I shall deal with the quorum issue later in these Reasons.

The "Separate Hearings"

[15] Staff submits that there is no breach of the *audi alteram partem* principle because the *SPPA* explicitly distinguishes between a "proceeding" (the overall case or matter in respect of which the tribunal is to exercise its ultimate statutory power of decision) and a "hearing" (an individual step or stage within such a proceeding).

[16] Staff submits the interpretation section of the *SPPA* provides, in relevant part, as follows:

> 1. (1) In this Act, […]
>
> "hearing" means a hearing **in any proceeding**; […]
>
> "proceeding" means a proceeding to which this Act applies; […]
>
> [Emphasis added]

[17] Staff further submits that, in most proceedings, there are multiple steps or stages which each can take the form of a discrete hearing. The practice in this Commission has been, for some time, to deal with a merits hearing, which terminates in Reasons for Decision. If findings against the respondents are made, a sanctions hearing is convened.

[18] Staff submits that the Commission has consistently approached the issues of expiry of terms of appointment and panel composition in accordance with the following principles:

> 1. A sanctions hearing is a distinct hearing which is temporarily and procedurally discrete from the merits hearing. While both hearings are part of a single proceeding, they are, as a matter of law, separate hearings.
>
> 2. Where the term of a Commissioner on a merits panel has expired before the sanctions hearing begins, the former Commissioner is ineligible to preside in the sanctions hearing and a new panel is appointed.

[19] The following excerpt from the submissions of Mr. Hutchison illustrate Staff's position:

> CHAIR: Again, forgive me for interrupting you, let me ask you this: [I]magine a hearing with commissioners A, B and C, goes, we'll say, for 30 days, lots of evidence, issues of credibility, making it as difficult as possible for you, Mr. Hutchison.
>
> …

> CHAIR: And so they come to a conclusion and they issue their decision on the merits and the secretary appoints commissioners D, E and F to hear the sanctions hearing, perfectly okay?
>
> MR. HUTCHISON: In my respectful submission, the Commission is allowed to exercise its jurisdiction. That's exactly what happened in MRS. In MRS, two commissioners hear merits. Neither of them is a commissioner by the time it gets to the sanctions. And a new panel is assigned.
>
> (Motion Transcript of March 14, 2012 at pp. 56-57)

[20] To my knowledge no one contested the practice of separating sanctions hearings from merits hearings until the hearing of the motion in *MRS*, heard November 2, 2011. The moving parties in *MRS, above,* at para. 11, argued they were denied procedural fairness because "a new Panel that is composed of Commissioners who were not on the MRS Merits Panel does not have jurisdiction to make a determination on sanctions and costs in this matter." The motion was denied and that decision appealed to the Divisional Court.

[21] In *MRS, above,* the motion panel found at para. 4:

> We find that it is within the jurisdiction of the Commission for the Secretary to appoint a Panel of Commissioners who did not participate in the hearing on the merits to preside over the sanctions and costs hearing.

[22] In *MRS,* as in this case, the linchpin of Staff's case was its analysis of the interpretation section of the *SPPA* to draw a distinction between a "proceeding" and a "hearing". At the opening of the Motion before me, I asked counsel why they had not referred me to Article 1.2 of the OSC *Guidelines for Members and Employees Engaging in Adjudication* (the "*Guidelines*"). Article 1.2 defines "Panel" as follows:

> **Article 1.2**
>
> **"**Panel" means the Member or group of Members assigned to hear and determine a Proceeding;

Mr. Hutchison, counsel for Staff in this matter, as he was in *MRS*, responded as follows:

> MR. HUTCHISON: I can only indicate, sir, with regret that it's an oversight and I'm happy to offer you a submission. With respect, I will say in my defence, I've been through this issue once with other counsel and other counsel didn't identify the definition either. So I'm happy to offer you a submission at the appropriate time with respect to that though.
>
> (Motion Transcript of March 14, 2012 at p. 8)

[23] Counsel for the Moving Parties, Mr. Naster, replied that he intended to suggest that Article 1.2 was problematic for Staff. I note that Article 1.2 of the *Guidelines* was not referred to

in counsels' submissions in *MRS,* nor did the MRS motion panel refer to it. I find the omission curious since, on the plain wording of the article, a Member is assigned to hear and determine a proceeding – that is to say, including the sanctions hearing. When asked to comment on this during his submissions, Mr. Hutchison acknowledged that "there is some imprecision of language that is found within this building." I cannot quarrel with that observation. There followed this exchange:

> CHAIR: So I want to be sure I've got it correctly. Your submission is that the meaning of proceeding here means a hearing.
>
> MR. HUTCHISON: It means a hearing. It means a session at which some part of the Commission's overall statutory power of decision is going to be exercised.
>
> CHAIR: I understand your submission.
>
> (Motion Transcript of March 14, 2012 at p. 64)

[24] Staff's case rests on a careful distinction between a "proceeding" and a "hearing". Nevertheless, when faced with Article 1.2 of the *Guidelines,* Staff's submission is they mean the same thing. Nevertheless, one can draw an inference that a Member was assigned to preside throughout the "proceeding", including the sanctions hearing. It is unfortunate that the *Guidelines* definition of "Panel" in Article 1.2 was not put before the MRS motion panel. It would have been helpful to have had its views.

[25] If Staff's view of separate hearings is correct, the need for ss. 4.3 and 4.4(1) of the *SPPA* is diminished, a result which runs counter to the intention of the *SPPA* and the *ratio* in *Piller,* as articulated by Gilese J.A.

[26] Regardless of whether Staff's position on separate hearings is right or wrong, does the Motion fail?

[27] Assuming, without deciding, that *MRS* was correctly decided, Staff submits my assignment by the Secretary to hear the Sanctions Hearing is proper, due to the recent amendment to the *Act* which permits a single Commissioner to hear all matters before the Commission. Subsection 3.5(3) of the *Act* states:

> **3.5 (3) Power of one commissioner -** Despite subsection 3(11) and subject to subsection (4), any two or more members of the Commission may in writing authorize one member of the Commission to exercise any of the powers and perform any of the duties of the Commission, including the power to conduct contested hearings on the merits, and a decision of the member shall have the same force and effect as if made by the Commission.

[28] The Moving Parties concede this point, as reported in the following exchange:

> CHAIR: May I ask you, Mr. Naster, if your friend's view of the two hearings, separate and apart, prevails, then does it follow that since the

appointment of the panel to hear this matter follows the amendment, that is one person, cures the quorum problem?

MR. NASTER: If we are dealing with a brand new hearing --

CHAIR: Yes.

MR. NASTER: -- then I assume all the rules and laws that are applicable as of the point in time when this brand new hearing is commenced would apply. I couldn't very well suggest otherwise and maintain any --

CHAIR: It seems to follow.

MR. NASTER: It does follow. And that's why I have anticipated my friend would be arguing the separate hearing context and why, in my submission, it's not tenable.

(Motion Transcript of March 14, 2012 at pp. 42-43)

[29] Shortly put, if I agree with Staff, the motion fails.

The Quorum Argument

[30] Assuming, without deciding, that I do not accept Staff's submission on separate hearings, what then follows? Mr. Naster submits this leaves me as a single Commissioner competent to preside at the Sanctions Hearing in accordance with s. 4.4(1) of the *SPPA* save for one important exception – s. 3(11) of the *Act* prescribes that two members of the Commission constitute a quorum for the purpose of conducting a contested hearing on the merits. His submission on this point is correct. Subsection 3(11) of the *Act* provides:

3(11) Quorum - Two members of the Commission constitute a quorum.

[31] Mr. Naster correctly submits that s. 3.5(3) of the *Act* does not apply to a hearing which started before the section came into effect on May 12, 2011. Therefore, submits Mr. Naster, if s. 3(11) of the *Act* requires a quorum of two and s. 4.4(1) of the *SPPA* permits a single panel member to continue, there is an apparent conflict.

[32] The resolution of this conflict is found in s. 32 of the *SPPA*, which provides:

Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over Regulations, rules or by-laws made under such other Act which conflict therewith.

[33] It is acknowledged that Commissioner Perry is unable to complete the hearing. That leaves "a member" of the Merits Panel able to continue the hearing, pursuant to s. 4.4(1) of the *SPPA.* The conflict between the *Act* and the *SPPA* must be resolved in favour of the *SPPA*, pursuant to s. 32 of the *SPPA*. The quorum argument fails.

[34] Therefore, whether Staff's view of the law on "separate hearings" is right or wrong, the motion fails.

[35] It is not uncommon, following a decision by a merits panel, for the term of a member of that panel to expire before the sanctions hearing. When that happens, I suggest the better practice would be to first apply provisions 4.3 and 4.4(1) of the *SPPA* and thereby avoid, where possible, the assignment of a panel member who did not preside at the merits hearing.

IV. CONCLUSION

[36] The motion is denied. If Staff wishes to seek costs, a motion may be brought.

Dated this 27th day of April, 2012.

"James D. Carnwath"
James D. Carnwath, Q.C.