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Citation: Hutchinson (Re), 2018 ONSEC 40
Date: 2018-07-24

IN THE MATTER OF
DONNA HUTCHINSON, CAMERON EDWARD CORNISH,
DAVID PAUL GEORGE SIDDERS and PATRICK JELF CARUSO

REASONS FOR DECISION ON MOTION FOR SEVERANCE

Hearing:	July 17, 2018	
Decision:	July 24, 2018	
Panel:	Mark J. Sandler	Commissioner and Chair of the Panel
Appearances:	Matthew Britton Raphael Eghan	For Staff of the Commission
	David Sischy	For David Paul George Sidders
	Ashley Thomassen	For Patrick Jelf Caruso
		No one appeared on behalf of Cameron Edward Cornish

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REASONS FOR DECISION ON MOTION FOR SEVERANCE

I. INTRODUCTION

[1] The Respondent, David Paul George Sidders (**Sidders**), brought a motion to the Ontario Securities Commission (the **Commission**) for an order severing his hearing from the hearing of Respondents Cameron Edward Cornish (**Cornish**) and Patrick Jelf Caruso (**Caruso**). Donna Hutchinson (**Hutchinson**), originally a Respondent in the same proceeding, entered into a settlement agreement, which was approved by the Commission,[1] and is now contemplated to be a witness called by Staff at the hearing(s) of the remaining Respondents.

[2] Sidders submits that the allegations against him should be heard separately for several reasons. He maintains that most of the allegations contained in the Statement of Allegations do not involve him.[2] The allegations against him are said to involve different questions of fact than those relating to the other Respondents. He submits that he should not be exposed to the additional time and expense or delay associated with a joint hearing. He is concerned that if the hearings are not severed, his case may be unfairly tainted by any findings made against the other Respondents.

[3] Staff of the Commission (**Staff**) opposes the motion for severance and submits that the allegations against the Respondents Sidders, Caruso and Cornish involve many of the same questions of fact, that Sidders has failed to demonstrate prejudice, and that it is in the interests of justice and will be more efficient to proceed with a hearing involving all Respondents. Counsel for Caruso appeared on the motion, but takes no position on the relief sought by Sidders. Cornish did not appear or participate on the motion.

[4] The motion for severance was heard on July 17, 2018. After hearing the parties' submissions, I ordered that the motion was dismissed, with written reasons to follow. These are the reasons for that order.

II. THE APPLICABLE TEST

[5] It is undisputed that the party requesting severance bears the burden of establishing, on the balance of probabilities, that the interests of justice require severance. Previous jurisprudence has identified various factors to be considered in determining whether, in a particular case, a requesting party has met that burden.

[6] In *R v Last,*[3] the Supreme Court of Canada considered whether a trial judge committed a reversible error in dismissing a severance application brought by the accused in criminal proceedings. The accused was charged in one indictment with counts relating to two separate incidents involving sexual assaults on two different victims. Subsection 591(3) of the *Criminal Code*[4] provides that the court may, where it is satisfied that the interests of justice so require, order that the

[1] *Hutchinson (Re),* 2018 ONSEC 22, (2018), 41 OSCB 3841 (Oral Reasons for Approval of Settlement) and *Hutchinson (Re)* (2018), 41 OSCB 3499 (Order Approving Settlement).
[2] An Amended Statement of Allegations was filed on May 28, 2018, amending the Statement of Allegations dated September 21, 2017.
[3] *R v Last*, 2009 SCC 45, [2009] 3 SCR 146.
[4] *Criminal Code,* RSC 1985, c C-46.

accused or defendant be tried separately on one or more of the counts contained in the same indictment; and where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

[7] The Court noted that a number of factors have been identified that can be weighed when deciding whether to grant a motion for severance. It stated that "the weighing exercise ensures that a reasonable balance is struck between the risk of prejudice to the accused and the public interest in a single trial."[5] Those factors include the following:

a. the legal and factual nexus between the counts;

b. the general prejudice to the accused;

c. the complexity of the evidence;

d. whether the accused intends to testify on one count but not another;

e. the possibility of inconsistent verdicts;

f. the desire to avoid a multiplicity of proceedings;

g. the use of similar fact evidence at trial;

h. the length of the trial having regard to the evidence to be called;

i. the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and

j. the existence of antagonistic defences as between co-accused persons.[6]

[8] While there are obvious differences between the principles applicable in criminal and regulatory proceedings, the criminal jurisprudence provides some important guidance for the Commission in evaluating a severance motion brought by a Respondent in the regulatory context.

[9] The ten factors articulated in *R v Last* were considered by the Commission in *Black (Re)*.[7] In relation to the length of a hearing, the Commission stated at paragraph 7 that

> [t]he case law has recognized that inconvenience resulting from a lengthier trial does not constitute undue prejudice in the context of a severance, and although cost is an issue, it is not determinative. Specifically, courts have denied severance where it has been determined that any prejudice was largely confined to having to attend a longer trial, and the courts have recognized that such prejudice could be mitigated by the case management process…[8]

[10] The parties indicate that they have not found any other Commission decisions that addressed the appropriate test for severance. Counsel for Sidders did refer me to two decisions from the Alberta Securities Commission (**ASC**), which apply

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[5] *R v Last* at para 17.
[6] *R v Last* at para 18.
[7] *Black (Re)*, 2014 ONSEC 33, (2014), 37 OSCB 9697.
[8] *Black (Re)* at para 7.

a different test. In *Belvedere (Re)*[9] and *Stock (Re)*,[10] the ASC granted severance after applying the following test:

> … first assess whether there is a common question of fact or law or a common transaction or series of transactions linking the groups of parties and if so, whether severance or continuance as a single proceeding would give rise to material prejudice, and where the balance of convenience lies.[11]

[11] The ASC applies a threshold test focused on one factor (i.e. "whether there is a common question of fact or law or common transaction or series of transactions linking the groups of parties") and then, only if this threshold is met, the ASC considers whether there is "material prejudice and where the balance of convenience lies." Conversely, the Supreme Court of Canada's approach in *R v Last* does not prescribe a single determinative factor or precondition on which the discretion to sever depends. Also, *Belvedere (Re)* draws a distinction between the test to be adopted when considering whether to sever parties and the test when considering whether to sever issues. I am not convinced that this distinction should survive the Supreme Court of Canada's decision in *R v Last.* In fairness, the approach taken in *Belvedere (Re)* (which was followed in *Stock (Re)*) predates the decision in *R v Last*.

[12] In my view, it is appropriate to apply the test for severance articulated by the Supreme Court of Canada in *R v Last* and adopted by the Commission in *Black (Re)*. By following this approach, the Commission will have flexibility to consider each factor on a case-by-case basis and will not be constrained by a threshold test solely or primarily focused on one factor.

[13] Even if I followed the ASC's approach, the result of this motion would not change, as the facts of *Belvedere (Re)* and *Stock (Re)* are distinguishable. *Belvedere (Re)* involved unconnected market manipulation allegations against separate groups of respondents. In *Stock (Re)*, the respondent seeking severance faced an allegation only of interfering with the regulatory investigation, while a number of respondents faced allegations of insider trading.

III. THE UNDERLYING ALLEGATIONS AND HUTCHINSON SETTLEMENT

[14] In this case, Staff has made allegations of insider trading and/or insider tipping against four individuals. Staff's Statement of Allegations against all Respondents includes the following allegations:

a. Quadra FNX Mining Ltd. (**Quadra**) – Hutchinson tipped Cornish as to material information not generally disclosed. During the period when this information was to remain confidential, there was frequent communication between Hutchinson and Cornish, between Cornish and Sidders and between Cornish and Caruso. During this time frame, Cornish accumulated Quadra securities through an institutional account. Sidders and Caruso purchased Quadra shares and liquidated their positions at a profit after the material information was generally disclosed.

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[9] *Belvedere (Re)*, [2003] ASCD No 1120.
[10] *Stock (Re)*, 2001 ABASC 306.
[11] *Belvedere (Re)* at para 22; *Stock (Re)* at para 12.

b. X Company (**X Co.**) – Hutchinson tipped Cornish as to material information not generally disclosed. During the period when this information was to remain confidential, there was frequent communication between Hutchinson and Cornish, between Cornish and Sidders and between Cornish and Caruso. Both Sidders and Caruso purchased shares of X Co., and Caruso (or a related entity) purchased put options on the firm acquiring X Co. and call options on X Co.

c. Rainy River Resources Ltd. (**Rainy River**) – Hutchinson tipped Cornish as to material information not generally disclosed. During the period when this information was to remain confidential, Hutchinson and Cornish, and Cornish and Sidders were in telephone contact. Cornish bought and sold shares of Rainy River on the day prior to the material information being generally disclosed.

d. Osisko Mining Corp. (**Osisko**) – Hutchinson tipped Cornish as to material information not generally disclosed. On the same day Hutchinson became aware of this information, she called Cornish twice and Caruso called Cornish once. The following day, Cornish and Caruso exchanged multiple text messages, Caruso telephoned Cornish and Hutchinson telephoned Cornish twice. During this same period, Caruso accumulated Osisko shares which he sold for a profit once the material information was announced.

e. Allergan Inc. (**Allergan**) – Hutchinson tipped Cornish as to material information not generally disclosed. The day prior to the announcement of the material information, Hutchinson telephoned Cornish twice; Caruso telephoned Cornish three times and Caruso purchased Allergan shares. Once the material information was announced, Caruso sold the shares for a profit.

f. Aurora Oil & Gas Ltd. (**Aurora**) – Hutchinson tipped Cornish as to material information not generally disclosed. During the period when this information was to remain confidential, there was frequent contact between Cornish and Hutchinson, and between Cornish and Caruso. Commencing on the same date of that contact, Sidders purchased Aurora shares, which he liquidated for a profit once the material information was announced.

g. Tim Hortons Inc. (**Tim Hortons**) – Hutchinson tipped Cornish as to material information not generally disclosed. Hutchinson's law firm was retained on the subject transaction on February 24, 2014. That same day and the following day, Cornish and Hutchinson communicated four times by telephone. On February 24, 2014, Cornish initiated communications with both Sidders and Caruso; Cornish and Caruso communicated through multiple text messages and Cornish placed a short call to Sidders. On February 25, 2014, Caruso purchased call option contracts, and through his net accumulation of call option contracts and share purchases in Tim Hortons, made well over $1 million. Through his institutional trading account, Cornish also made a net accumulation of multiple Tim Hortons shares prior to the public announcement of material information, after which he sold those shares for a profit.

h. Xtreme Drilling and Coil Services (**Xtreme**) – Hutchinson tipped Cornish as to material information not generally disclosed. During the period when this information was to remain confidential, Caruso accumulated a large number of Xtreme shares which he sold at a profit after the material information was announced.

[15] I reiterate that these are, at this point, allegations only.

[16] As previously indicated, Hutchinson entered in a settlement agreement. In that agreement, she acknowledged that she provided material information, not generally disclosed, to her good friend, Cornish, respecting M & A transactions being handled by the law firm where she was employed as a legal assistant. Hutchinson admitted that she tipped Cornish in relation to transactions involving the following companies:

a. Quadra;

b. X Co.;

c. Rainy River;

d. Osisko;

e. Tim Hortons; and

f. Xtreme.

IV. ANALYSIS

[17] As stated above, the party requesting severance bears the burden of establishing, on the balance of probabilities, that the interests of justice require severance. In determining whether the interests of justice require severance, I am guided by factors articulated in *R v Last*. Below, I have addressed each of the ten factors to explain why severance is not appropriate in this case.

A. The legal and factual nexus between the transactions

[18] In his written submissions, Sidders asserted that he was mentioned in only three of the eight subject transactions. He observed that the settlement agreement with Hutchinson related to only six of the subject transactions. At the hearing of the motion, Sidders' counsel acknowledged that there were at least limited common questions of fact between Sidders and the other Respondents. However, he said that the real questions that need to be answered to determine Sidders' liability are whether Cornish tipped Sidders with material non-public information on the Quadra, Aurora and X Co. deals and whether Sidders traded on that information.

[19] I respectfully disagree with these submissions. First, Sidders is mentioned in five of the eight subject transactions, not three, which counsel for Sidders acknowledged at the hearing of the motion. It is accurate to say that Sidders is alleged to have engaged in insider trading in three transactions. However, the Statement of Allegations also contends in relation to the Rainy River and Tim Hortons transactions that he was in communication with Cornish contemporaneously with Cornish's communications with Hutchinson and Caruso. A hearing panel may conclude that although these two transactions do not allege insider trading on Sidders' part, they do permit an inference that Cornish was tipping him in relation to these transactions which in turn, might be relevant to

the issues between Staff and Sidders, including the nature of the relationship between Cornish and Sidders. Counsel for Sidders agreed at the hearing of the motion that such an inference might be available to the Commission.

[20] Second, there are significant common questions of fact involving all of the Respondents, including Sidders. Was Hutchinson providing to Cornish material information that had not been generally disclosed? If Staff is unable to prove that Hutchinson was doing so, the case against all remaining Respondents likely fails. It follows that all the alleged interactions between Hutchinson and Cornish may be relevant to whether an improper tipper-tippee relationship existed between them, and hence relevant to the cases involving all remaining Respondents. The extent to which Cornish was tipping Caruso on some transactions may circumstantially support the conclusion that Cornish was also tipping Sidders on those same transactions, on the theory that it might defy coincidence that Cornish is tipping Caruso but not Sidders, though Sidders' and Caruso's communications take place contemporaneously. Again, I am making no assessment of the merits of Staff's position; I only observe that the issues arising in relation to Cornish and Caruso are, in many respects, interwoven with the issues pertaining to Sidders. Finally, I observe that, at least in relation to the transactions allegedly involving Sidders, the materiality of the subject information and whether it was generally undisclosed at the time of the subject transactions, represent questions of fact common to Sidders and the other remaining Respondents.

[21] Third, the fact that Hutchinson's settlement agreement addresses only six of the eight transactions contained in the Statement of Allegations is of little persuasive value on this severance motion. Staff has the burden to prove in relation to the remaining Respondents all the allegations made in the Statement of Allegations, irrespective of what Hutchinson and Staff agreed to in a settlement agreement.

[22] Four, Sidders observes that the Supreme Court of Canada ordered separate trials in *R v Last*. However, in that case, two separate unrelated complainants made allegations of sexual crimes against the accused. Each of the allegations did not qualify as similar fact evidence vis-the-vis the other. That is to say the evidence in relation to one sexual crime was not admissible for the purpose of inferring that the accused committed the other sexual crime. Moreover, the matter was being heard by a jury. In a jury trial, there is a heightened concern that the jury might misuse or be tainted by the evidence on one count in deciding the case on another count. This misuse of evidence may involve improper propensity reasoning: that is, concluding that by virtue of criminal conduct evidencing an accused's bad character, he or she is more likely to have committed another crime. Judges and adjudicators are trained to avoid improper propensity reasoning and are well equipped to evaluate the merits of each allegation without risk of "cross-pollination."

B. General prejudice to the Respondent Sidders

[23] I am unconvinced that a hearing on all of the allegations against the remaining Respondents will cause general prejudice to Sidders, largely for the reasons already given and described further under the factors below. A hearing panel is well situated to evaluate each allegation on its own merits, and only using evidence in relation to other allegations in ways that are legally permissible.

C. The complexity of the evidence

[24] There is no suggestion that the evidence here is of such complexity that a hearing panel will have difficulty sorting it out or differentiating between different allegations.

D. Whether the Respondent intends to testify on one allegation, but not another

[25] There is no suggestion that Sidders intends or would prefer to testify on one allegation, but not another. Accordingly, it is unnecessary to consider whether this factor should figure prominently, or at all, in the regulatory context. There are special reasons, unique to criminal accused, including certain constitutional protections, that may explain or give heightened importance to the inclusion of this factor.

E. The possibility of inconsistent verdicts

[26] Contrary to Sidders' position, there is a real possibility of inconsistent verdicts should multiple hearings be held in this matter. One hearing panel could decide that Hutchinson never tipped Cornish and that therefore, Cornish could not have tipped Caruso. Another hearing panel could decide, in a separate hearing, that Hutchinson did tip Cornish who in turn tipped Sidders. The potential of inconsistent verdicts should be avoided where possible.

F. The desire to avoid a multiplicity of proceedings

[27] This factor favours denial of this severance motion. Otherwise, there would be at least two separate hearings and conceivably, based on the success of Sidders' motion, a rationale for three separate hearings for each of the remaining Respondents.

G. The use of similar fact evidence at trial

[28] It will ultimately be the merits hearing panel's decision as to the use that can be made of evidence pertaining to one allegation in evaluating the merits of another allegation. However, for the reasons already given, I am unconvinced that the only evidence admissible against Sidders relates to the three transactions respecting which he allegedly engaged in insider trading. At the very least, the evidence pertaining to the five transactions in which he is mentioned may be relevant to the case against him. Indeed, the three transactions in which he is not mentioned may have some relevance to the issues pertaining to him: such as whether they circumstantially support the existence of an improper relationship between Hutchinson and Cornish, which may be relevant to whether Cornish tipped Sidders, and thus, whether Sidders engaged in insider trading. Again, that will be for the merits hearing panel to decide. Even if such evidence is admissible against Sidders, the panel is entitled to consider any limitations on the use to be made of that evidence vis-à-vis Sidders.

H. The length of the hearing having regard to the evidence to be called

[29] In considering this point, it is appropriate to address the added time and expense that may be associated with a joint hearing. Sidders submits that a hearing of the allegations against him alone would require no more than three days, while a hearing of the allegations against all Respondents would require

eight to ten days. After the hearing of the motion, Staff and counsel for each of the Respondents Sidders and Caruso agreed that seven days was sufficient for the merits hearing. This is reflected in my order dated July 17, 2018.

[30] For the reasons already given, I am unconvinced that the evidence relevant to Sidders is as narrowly focused as he contends. Staff intends to call three witnesses, including Hutchinson. Sidders acknowledges that Staff's three witnesses would likely need to be called at each hearing. Therefore, separate hearings would also result in an increased use of Commission resources and increased costs to the Commission.

[31] In any event, the fact that some of the evidence may ultimately be irrelevant to Sidders or of limited relevance is insufficient to overcome the other factors which, viewed together, overwhelmingly favour a joint hearing of the subject allegations. As well, Staff is prepared to work with counsel for the Respondents to ensure that they are aware, to the extent practicable, of the anticipated evidence to be called on any particular day. This will enable Sidders and his counsel to make appropriate arrangements to mitigate costs associated with the joint hearing. I am also confident that the hearing panel will accommodate any reasonable requests for absences during the hearing if the evidence is truly irrelevant to Sidders. This is not a case in which the Respondent would suffer undue prejudice as a result of participating in a joint hearing.

I. The potential prejudice to the Respondent with respect to the right to be tried within a reasonable time

[32] I accept that a joint hearing may mean that the hearing will only take place in early 2019, rather than the fall of 2018, when Sidders and his counsel are available. In the regulatory context, there is no constitutional right to a trial within a reasonable time, as exists for criminal accused. In any event, the delays contemplated here are not so pronounced as to support this severance motion.

J. The existence of antagonistic defences as between Co-Respondents

[33] There is no suggestion that this is an issue here. Accordingly, it is again unnecessary to consider the extent, if any, to which this factor should figure prominently in a regulatory context, rather than in criminal proceedings.

V. CONCLUSION

[34] The decision whether to grant a severance motion is a discretionary one, based on weighing of all relevant considerations. In my view, the relevant considerations strongly favour denying severance in this case. Accordingly, I issued the order dated July 17, 2018 dismissing the motion.

Dated at Toronto this 24th day of July, 2018.

"Mark J. Sandler"

Mark J. Sandler