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Citation: Hutchinson (Re), 2019 ONSEC 9

Date: 2019-02-07

File No. 2017-54

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

**REASONS FOR DECISION ON MOTION**

**Hearing:** January 22, 2019

**Decision:** February 7, 2019

**Panel:** Timothy Moseley Vice-Chair and Chair of the Panel

**Appearances:** Raphael Eghan For Staff of the Commission  
Matthew Britton

Joseph Groia For David Paul George Sidders  
David Sischy

Caitlin Sainsbury For Patrick Jelf Caruso  
Ashley Thomassen

No one appeared on behalf of  
Cameron Edward Cornish

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## REASONS FOR DECISION ON MOTION

### I. OVERVIEW

- [1] Rule 27(3) of the *Ontario Securities Commission Rules of Procedure and Forms (OSC Rules)*<sup>1</sup> provides that a respondent in an enforcement proceeding must serve on every other party (including Staff of the Commission) a summary of the evidence of any witness that the respondent intends to call at the hearing on the merits (a **Witness Summary**). Rule 27(7), together with s. 5(1) of the *Ontario Securities Commission Practice Guideline*<sup>2</sup> (the **Practice Guideline**), expressly contemplates that respondents will serve their Witness Summaries well before the commencement of the hearing on the merits, on or before a date to be set by a Panel.
- [2] If a respondent has not decided, prior to the hearing, whether to testify at the hearing, must that respondent serve, before the hearing begins, a Witness Summary of his or her own anticipated evidence? What should the consequences be if the respondent does not serve a Witness Summary?
- [3] David Paul George Sidders (**Sidders**) and Patrick Jelf Caruso (**Caruso**) are respondents in this enforcement proceeding. They have not yet decided whether or not they will testify at the hearing on the merits, which is scheduled to begin on February 11, 2019. They resist Staff's request for an order requiring them to serve Witness Summaries before that date.
- [4] Staff's motion to compel delivery of Witness Summaries was heard before me on January 22, 2019. The following day, I issued an order, with reasons to follow. I ordered that neither Sidders nor Caruso may, without a Panel's permission, provide his own testimony at the hearing on the merits, unless he had delivered his Witness Summary on or before February 1, 2019. These are my reasons for that decision.

### II. BACKGROUND FACTS

- [5] This proceeding was commenced in September 2017. There are two other respondents in addition to Sidders and Caruso: Donna Hutchinson, who settled with Staff in April 2018, and Cameron Edward Cornish, who has not appeared at any stage of this proceeding.
- [6] By order of the Commission issued on February 26, 2018, the respondents were required to serve their Witness Summaries on or before March 28, 2018. On March 28, 2018, counsel for each of Sidders and Caruso wrote to Staff and advised that no decision had yet been made as to whether the respondent would testify at the hearing on the merits. In each case, counsel advised that if the respondent decided to testify, that respondent would provide a Witness Summary.
- [7] At an attendance on July 17, 2018, the Commission ordered that the hearing on the merits be held during the full week of Monday, February 11, 2019, and that it continue on the last two days of the following week.

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<sup>1</sup> (2017) 40 OSCB 8988

<sup>2</sup> (2017) 40 OSCB 9009

- [8] By January 4, 2019, neither Sidders nor Caruso had served a witness list or any Witness Summaries. On that date, Staff wrote to counsel for each respondent, asking them to advise whether the respondent would testify, and asking that Witness Summaries be delivered by January 18, 2019.
- [9] Each counsel replied separately, but with essentially the same position. Each respondent would decide, following the close of Staff's case, whether to testify. If so, that respondent would deliver a Witness Summary before testifying. Staff did not accept the respondents' position.
- [10] At an attendance before me on January 8, 2019, the parties advised of this disagreement. I decided to treat Staff's request (for relief relating to Sidders's and Caruso's failure to deliver Witness Summaries) as a motion. I asked that the parties arrange for a hearing of the motion and that they file materials in advance. On January 11, 2019, on consent of all parties present at that attendance, I ordered that the motion be heard on January 18, 2019, and that three additional days be set aside in the third week of March 2019 for the hearing on the merits.
- [11] On January 17, 2019, the day before the motion was to be heard, Sidders's counsel requested an adjournment due to the unavailability of counsel. On consent of Staff and Caruso, the motion hearing was set for and proceeded on January 22, 2019.

### **III. ANALYSIS**

#### **A. Issues**

- [12] Staff's motion presents the following issues:
- a. Does the requirement in Rule 27(3) that a respondent serve, before the hearing begins, a Witness Summary for any witness the respondent intends to call apply to a respondent's own anticipated evidence?
  - b. With respect to non-party witnesses, does that requirement apply only to witnesses that a party has decided to call?
  - c. Is the conclusion any different for party witnesses?
  - d. Alternatively, should Staff's motion be dismissed on the basis that:
    - i. in the merits hearing in this case there will likely be a break of approximately one month between the conclusion of Staff's evidence and the commencement of the respondents' evidence, if any, and
    - ii. Sidders and Caruso have undertaken to provide Witness Summaries following the conclusion of Staff's case, if either or both of them decide at that time that they will testify?

#### **B. The requirement in Rule 27(3) to serve a Witness Summary before the hearing begins applies to a respondent's own anticipated evidence**

- [13] The Commission has previously addressed the question of whether the requirement to deliver Witness Summaries applies to a respondent's own

evidence. In *Furtak (Re)*,<sup>3</sup> the three individual respondents included their own names on their list of witnesses. However, they refused to provide summaries of their own evidence. Staff submitted that this refusal was contrary to the Commission's rules of procedure that were in force at that time (the **Former OSC Rules**).<sup>4</sup>

- [14] There is no material difference between the Former OSC Rules and the OSC Rules regarding the existence of an obligation to provide Witness Summaries. I address below, at paragraph [29], the difference in the language used in the two versions of the rules regarding the consequences of a failure to deliver a Witness Summary.
- [15] The respondents in *Furtak (Re)* submitted that the requirement in the Former OSC Rules to provide Witness Summaries applied to evidence of a "witness", but that "witness" did not include a party. Staff submitted in that case that the obligation applied to all witnesses whether they were parties or not.
- [16] The Commission accepted Staff's position, holding that while "different rights and obligations will apply depending on whether or not a witness is also a party... this reality does not exclude a party from also being a witness for the purpose of the Rules."<sup>5</sup> I respectfully agree with that conclusion, which in my view reflects a purposive interpretation of "witness". That interpretation is also supported by numerous instances of the word "witness" in the *Statutory Powers Procedure Act* (the **SPPA**)<sup>6</sup> and the *Rules of Civil Procedure*,<sup>7</sup> where it would be nonsensical to interpret "witness" as excluding parties.
- [17] At the hearing of this motion, Sidders's counsel and Caruso's counsel conceded that a party may also be a witness, although they maintain that a party does not become a witness until the party is called to testify. Accordingly, they submitted that the reasoning in *Furtak (Re)* does not dispose of this motion, because in *Furtak (Re)*, unlike the present case, a decision had already been made to call the parties as witnesses.
- [18] I agree that *Furtak (Re)* is properly distinguished on that basis. The question remains, therefore, whether Rule 27(3) applies to the evidence of potential witnesses in respect of whom no decision has yet been made whether they will testify.

**C. The requirement to deliver a Witness Summary before the hearing is not limited to witnesses that a party has decided to call**

- [19] In this case, Sidders and Caruso assert that no decision has yet been made as to whether either of them will testify. I accept that assertion.
- [20] Sidders and Caruso submit that even if this motion were about non-party witnesses instead of the respondents themselves, there ought to be no obligation to deliver a Witness Summary where no decision has yet been made to have the witness testify.

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<sup>3</sup> 2016 ONSEC 12, (2016) 39 OSCB 4037

<sup>4</sup> (2014) 37 OSCB 4168

<sup>5</sup> *Furtak (Re)* at para 15

<sup>6</sup> RSO 1990, c S.22; see ss. 10.1(b), 14 and 23(2), for example

<sup>7</sup> RRO 1990, Reg 194; see rules 36.04(3), 36.04(4), 52.06 and 53.07, for example

- [21] Staff disagrees, citing Rule 1 of the OSC Rules, which states that the objective of the OSC Rules “is to ensure that Commission proceedings are conducted in a just, expeditious and cost-effective manner.”
- [22] The requirement for mutual pre-hearing disclosure of anticipated oral evidence serves a number of purposes, all of which are consistent with the goals set out in Rule 1. For example, mutual pre-hearing disclosure:
- a. allows the parties to better understand the issues in the proceeding;
  - b. facilitates the narrowing of issues;
  - c. allows the parties to identify and resolve evidentiary issues that may arise at the hearing;
  - d. facilitates settlement;
  - e. permits more reliable estimates of the time required to conduct the hearing; and
  - f. as a result of all of the above, minimizes the time required, resources required, and cost of the hearing, to the benefit of the Commission and of the parties.
- [23] However, that conclusion does not fully answer the question of whether the obligation to serve Witness Summaries extends to the anticipated evidence of a potential witness, where no decision has yet been made to call that witness.
- [24] Sidders and Caruso emphasize that the words of Rule 27(3) extend the obligation only in respect of witnesses that a party “intends” to call. How, they ask, could the Rule apply to a potential witness, where no such intention has yet been formed?
- [25] In my view, this question can and ought to be resolved in a manner that preserves a respondent’s right to decide, no earlier than the conclusion of Staff’s case, which witnesses it will call (if any), while at the same time ensuring that any witness who is called has been the subject of a Witness Summary delivered before the hearing. Specifically, the Commission may order that no witness shall, without a Panel’s permission, testify at the hearing unless a Witness Summary for that witness has been delivered before the hearing, at a time determined in accordance with the OSC Rules and the Practice Guideline.
- [26] Rule 27(8) of the OSC Rules contemplates an outcome of that kind. The Rule provides that a “Party who fails to comply with a disclosure obligation in these Rules, the Practice Guideline or an order of a Panel shall not, without a Panel’s permission, be permitted to rely on material that was not properly disclosed.”
- [27] Staff submits that Rule 27(8) applies equally to disclosure of anticipated oral evidence as to disclosure of documents. Indeed, the Rule refers to “a disclosure obligation in these Rules”, which words clearly include the Rule 27(3) disclosure obligations relating to anticipated oral evidence. Sidders and Caruso point out, however, that the consequences referred to in Rule 27(8) refer to “**material** that was not properly disclosed [emphasis added]”. They submit that the word “material” cannot be read to include oral evidence.
- [28] I do not accept that submission. The word “material” must be interpreted in the context of the opening words of Rule 27(8) (which refer to all disclosure

obligations, including with respect to oral evidence) and in a manner consistent with the objectives of the Rules as set out in Rule 1. In my view, therefore, Rule 27(8) allows for the exclusion of oral evidence that was not the subject of a Witness Summary delivered before the hearing.

- [29] In reaching that conclusion, I am cognizant of the fact that Rule 4.5(4) of the Former OSC Rules explicitly provided that a party “who does not... provide a summary of the evidence a witness is expected to give... may not call that person as a witness without leave of the Panel...”. In my view, current Rule 27(8) is a more concise formulation that applies to disclosure failures generally. It incorporates the specific consequence set out in former Rule 4.5(4).
- [30] Even if that conclusion is incorrect, however, nothing in the OSC Rules prevents a Panel, before or during a hearing, from making such rulings as it considers appropriate for the just, expeditious and cost-efficient conduct of the hearing. I reject Sidders’s and Caruso’s submission that I lack jurisdiction to make orders affecting the conduct of the hearing on the merits. The OSC Rules and the Practice Guideline explicitly contemplate the making of such orders in advance of the hearing on the merits, and such orders are routinely made.
- [31] I also reject Sidders’s and Caruso’s submission that they are put in an untenable position by being required to decide, prior to the hearing, who they might call as witnesses at the hearing. The respondents have Staff’s Statement of Allegations. They have received disclosure of documents relevant to Staff’s allegations and Witness Summaries for witnesses that Staff intends to call. All of that information equips Sidders and Caruso to decide who they might call as witnesses.
- [32] If, at the hearing on the merits, Staff attempts to call evidence that is unanticipated by the respondents because it was not fully disclosed, the respondents can object to the admission of that evidence. If the evidence is admitted nonetheless, the respondents can ask the Commission for appropriate relief, which may include an adjournment, and/or the right to adduce evidence in response, even though the responding evidence was not included in a Witness Summary.
- [33] I therefore conclude that at least with respect to non-party witnesses, the requirement to deliver a Witness Summary before the hearing is not limited to witnesses about whom a decision has already been made to have the witness testify.

**D. The requirement to deliver a Witness Summary applies equally to respondents who may testify and does not violate the duty of fairness owed to respondents**

- [34] Should that conclusion apply equally to respondents as it does to non-party witnesses? Sidders and Caruso submit that such a result would violate the duty of fairness owed to respondents.
- [35] Commission proceedings are governed by the SPPA and the rules of natural justice and procedural fairness.<sup>8</sup> Those who may be affected by a decision must have an opportunity to put forward their views and evidence fully, using a fair

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<sup>8</sup> *YBM Magnex International Inc (Re)*, (2001) 24 OSCB 1061 at para 5

and open procedure, and to have those views and evidence considered by the decision-maker.<sup>9</sup>

- [36] Sidders and Caruso submit that these principles must be applied in a way that recognizes the distinction between parties (who are directly affected by the administrative decision) and non-party witnesses (who are not directly affected). They submit that consideration must also be given to the serious consequences that a respondent may suffer in a proceeding before the Commission.
- [37] There is indeed a distinction between parties and non-party witnesses, as the Commission found in *Furtak (Re)* (see paragraph [16] above). It is also beyond doubt that the respondents are exposed to the possibility of serious consequences. The question to be resolved here is whether, taking those facts into account, the obligation to deliver a respondent's Witness Summary before a decision has been made as to whether the respondent will testify hinders the respondent from fully and fairly presenting his or her case, or otherwise constitutes an impermissible infringement of the respondent's participatory rights.
- [38] Sidders and Caruso say that it does. They submit, and I agree, that the pre-hearing disclosure sought by Staff on this motion might well influence Staff's preparation of its case. Indeed, that is one of the main purposes of the requested disclosure, as discussed in paragraph [22] above. However, it does not follow that something that assists Staff in preparing its case prevents a respondent from presenting theirs fully and fairly. Nor does it follow, as was submitted, that the requirement to deliver a Witness Summary is inconsistent with a respondent's right to bring a motion at the conclusion of Staff's case for a dismissal of the allegations. The requirement to disclose anticipated evidence does not include a requirement to fill in gaps in Staff's case.
- [39] In determining whether a respondent suffers any prejudice as a result of the obligation to deliver a Witness Summary, it is important to recognize that witness lists and Witness Summaries are not part of the hearing record and are not available to the public.<sup>10</sup> They are provided only to Staff. A party is not obliged to call any or all of the witnesses who appear on the party's witness list, and where a particular witness is called, there is no obligation to lead all of the anticipated evidence described in that witness's Witness Summary. As a result, there are no consequences to a respondent other than those described in the preceding paragraph.
- [40] Sidders and Caruso also refer to the investigatory powers available to Staff under Part VI of the *Securities Act* (the **Act**),<sup>11</sup> including in particular the power to compel the attendance of an individual to give evidence. They submit that where Staff has chosen not to compel the attendance of a respondent, Staff must live with that decision, and no Witness Summary should be required.
- [41] That submission implies that Rule 27(3) bears different interpretations depending on whether the enforcement proceeding followed an investigation in which an order was issued under s. 11 of the Act (often referred to as a "formal investigation"). Nothing in the text of Rule 27(3) suggests that dependency. The

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<sup>9</sup> *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at para 22

<sup>10</sup> OSC Rules, r 27(3)

<sup>11</sup> RSO 1990, c S.5



Rule does provide that a Witness Summary need not include evidence that was “previously disclosed”, but that is merely a convenience to avoid duplication.

- [42] Furthermore, even if, in any formal investigation, Staff chose to use the authority under s. 13 of the Act to compel the attendance of an individual who ultimately becomes a respondent in the proceeding, it does not necessarily follow that the resulting transcript would fully reflect what the respondent would choose to say at a hearing. While there would undoubtedly be overlap between the evidence given on the compelled examination and the evidence given at the hearing, the scope of the latter might well exceed that of the former.
- [43] The OSC Rules, including Rule 27(3), are promulgated pursuant to ss. 25.0.1 and 25.1 of the SPPA. Those provisions empower the Commission to determine its own procedures and practices, and to establish rules governing the practice and procedure before it. I am not persuaded that Rule 27(3), validly enacted, and interpreted as Staff suggests it should be, results in an unfairness to Sidders or Caruso.
- [44] In my view, that conclusion is reinforced by s. 5.4 of the SPPA, which provides that if a tribunal’s rules “deal with disclosure” (as is the case with the OSC Rules), “the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for... the exchange of witness statements...”. Because the word “witness” does not exclude a respondent who testifies (see paragraph [16] above), that statutory language expressly contemplates that a respondent before a tribunal may be required to deliver a Witness Summary, and it precludes a finding that such a requirement would be procedurally unfair.

**E. Staff’s motion should not be dismissed on the basis that there is ample time in the hearing schedule for Sidders and Caruso to deliver Witness Summaries after the close of Staff’s case**

- [45] Counsel for Sidders and Caruso made the alternative submission that even if a respondent is required by Rule 27(3) to deliver a Witness Summary, an order giving effect to that requirement is unnecessary in this case. They note that Staff’s case is expected to conclude in February and that almost a month will elapse between the conclusion of Staff’s case and the resumption of the hearing for the purpose of receiving the respondents’ evidence, if any. They submit that if, after the conclusion of Staff’s case, they decide to testify, they will promptly deliver Witness Summaries. They submit that Staff would have the summaries with ample time to prepare for the respondents’ case.
- [46] In my view, that proposed outcome is inconsistent with the mutual pre-hearing disclosure regime contemplated by the OSC Rules, the Practice Guideline, and the order of February 26, 2018, in this matter. Specifically, the proposed outcome fails to meet the obligation imposed by Rule 27(3). Allowing a respondent to withhold delivery of a Witness Summary until after the conclusion of Staff’s case would seriously undermine the important goals described in paragraph [22] above.

**IV. CONCLUSION**

- [47] Proper pre-hearing disclosure by all parties, in compliance with the OSC Rules, the Practice Guideline, and any orders of a Panel, is essential to the just, expeditious and cost-effective conduct of Commission proceedings. A respondent who determines, after reviewing Staff’s disclosure, that he or she might elect to

testify, must comply with the disclosure obligation imposed by Rule 27(3), or risk being prohibited from testifying at the hearing, absent permission of a Panel.

- [48] The order I issued following the hearing of this motion is framed in terms similar to those contained in Rule 27(8) of the OSC Rules. The order provided that neither Sidders nor Caruso may, without a Panel's permission, adduce his own evidence at the hearing on the merits in this matter, unless he were to deliver a Witness Summary on or before February 1, 2019.

Dated at Toronto this 7<sup>th</sup> day of February, 2019.

"Timothy Moseley"

Timothy Moseley