Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen Ouest Toronto ON M5H 3S8

Citation: Hutchinson (Re), 2019 ONSEC 36
Date: 2019-10-23
File No. 2017-54

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

**REASONS AND DECISION**
**(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)**

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| **Hearing:** | February 11, 12, 13, 14, 15, 21 and 22;<br>March 20;<br>June 10 and 12, 2019 | |
| **Decision:** | October 23, 2019 | |
| **Panel:** | Timothy Moseley | Vice-Chair and Chair of the Panel |
| **Appearances:** | Matthew Britton<br>Raphael T. Eghan | For Staff of the Commission |
| | Joseph Groia<br>David Sischy | For David Paul George Sidders |
| | James D.G. Douglas<br>Caitlin Sainsbury<br>Ashley Thomassen | For Patrick Jelf Caruso |
| | No one appeared on behalf of Cameron Edward Cornish | |

**TABLE OF CONTENTS**

## REASONS AND DECISION

## I. OVERVIEW

[1] This proceeding involves allegations of insider tipping and insider trading. Staff of the Commission alleges that:

a. from October 1, 2011 to April 30, 2016 (the **Material Time**), the respondent Donna Hutchinson, a former legal assistant at Davies Ward Phillips & Vineberg LLP (**Davies**), a Toronto law firm, communicated material non-public information (**MNPI**) about eight potential corporate transactions to her friend, the respondent Cameron Edward Cornish;

b. Cornish, in turn, communicated some of that MNPI to his friends, the respondents Patrick Jelf Caruso and David Paul George Sidders; and

c. Cornish, Caruso and Sidders, while in possession of the MNPI, traded[1] securities of certain of the issuers that were involved in the transactions.

[2] In 2018, Hutchinson settled the allegations against her. This proceeding continued against Cornish, Caruso and Sidders. At the hearing on the merits, Caruso appeared in person and with counsel. Sidders appeared through counsel only. Cornish did not appear.

[3] Hutchinson testified at the hearing. She stated that she had an arrangement with Cornish to provide MNPI to him about transactions in which Davies was involved. For the reasons set out below, I find that Cornish traded in securities of two issuers while in possession of MNPI he received from Hutchinson, and that these trades constituted illegal insider trading. I dismiss Staff's allegation that Cornish illegally traded in securities of a third issuer.

[4] There was no direct evidence that Caruso or Sidders traded in securities of any of the subject issuers while they were in possession of MNPI. Staff's case against Caruso and Sidders was based on circumstantial evidence, including the frequency and timing of communications among the respondents, the nature of the various trades (including size and timing), and other factors.

[5] As I explain below, while in a number of instances the circumstantial evidence justifies suspicions that Caruso and/or Sidders may have engaged in illegal insider trading, in none of the instances does the evidence rise to the necessary level of clear, convincing and cogent evidence that makes it more likely than not that they did so. Accordingly, all of Staff's allegations against Caruso and Sidders are dismissed. Similarly, Staff's allegations that Cornish tipped Caruso and Sidders are also dismissed.

[1] The definition of "trade" in s. 1(1) of the *Securities Act*, RSO 1990, c S.5, does not explicitly include a purchase or acquisition. For convenience in these reasons, I use the word "trade" to refer to both purchases and sales of securities. Subsection 76(1) of the *Securities Act*, which prohibits illegal insider trading, refers explicitly to purchases and sales (see paragraph [98] below), and has as its heading "Trading where undisclosed change".

## II. THE RESPONDENTS

### A. Hutchinson

[6] Hutchinson was a legal assistant at Davies from 1983 to 2000 and then again from 2003 to 2017. During her time at Davies, Hutchinson worked with lawyers who practiced in different areas, including mergers and acquisitions. Typically, Hutchinson worked for lawyers directly, although for about 14 months during 2012 and 2013 she worked as a floater, covering assistants who were on holidays or sick.

[7] Davies terminated her employment in 2017 because of the matters described in these reasons.

[8] On April 24, 2018, the Commission approved a settlement agreement between Hutchinson and Staff.[2] In that agreement, Hutchinson admitted that she contravened s. 76(2) of the Act by participating in the scheme. She agreed to testify as a witness in this proceeding.

[9] Hutchinson testified that she lives with her mother and sisters. She says that she is unemployed and that she has had difficulty finding a job.

### B. Cornish

[10] Cornish did not appear at the hearing. Evidence in the record establishes that he is an experienced professional trader who spent over 25 years working at various brokerage and capital management firms.

[11] Throughout the Material Time, Cornish worked at Brant Securities. He traded securities in Brant's inventory account. He split any trading profits and losses equally with Brant.

[12] During Hutchinson's three-year break in her employment at Davies (from 2000 to 2003), Hutchinson worked at a bar in Toronto. She worked there with Cornish, who was a co-owner of the bar, and with whom she lived and had a personal relationship. That relationship ended after a few years, in about 2003 or 2004. Hutchinson and Cornish have remained friends since then. At one time, Cornish had trading authority in Hutchinson's brokerage account.

[13] During the Material Time, Hutchinson and Cornish communicated regularly by phone, and met in person, including over lunch and after work. For at least some part of the Material Time, Cornish struggled to make money and was broke. In 2016, he filed for consumer protection.

### C. Caruso

[14] Caruso testified at the hearing. He gave unchallenged and uncontradicted evidence that:

a. he worked in the investment industry since 1982 as a trader of bonds and equities, including in senior positions;

b. he completed the Canadian Securities Course, and the Officers and Directors Course, and obtained various designations related to options and futures;

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[2] *Hutchinson (Re)*, (2018) 41 OSCB 3499 (Order), (2018) 41 OSCB 3500 (Settlement Agreement) and 2018 ONSEC 22, (2018) 41 OSCB 3841 (Oral Reasons and Decision)

c. he met Cornish when they worked together at a securities firm in the early 1980s;

d. he socialized with Cornish outside of work, including with their wives;

e. he met Hutchinson through Cornish, and knew Hutchinson worked for a law firm, but did not know which firm or the practice area in which Hutchinson worked;

f. he is an active trader who is an avid reader of relevant news and articles;

g. he has traded through personal and corporate investment accounts;

h. trading had become his primary focus by the late 1990s;

i. he and Cornish spoke daily about various topics, including the securities industry generally, and news and commentary about the market and specific securities; and

j. by the beginning of the Material Time, he had somewhere between $5 million and $8 million to invest.

[15] Hutchinson confirmed that she met Caruso through Cornish. She testified that Cornish told her that Caruso traded stock and had money.

### D. Sidders

[16] While Sidders appeared through counsel, he did not attend the hearing. No agreed facts were tendered regarding his background, and Staff's investigator witness, Jamie Stuart, was unable to confirm suggestions put to him on cross-examination about Sidders's employment over the years. However, evidence in the record establishes that Sidders worked in the securities industry for over 25 years.

[17] In 2005, Sidders opened a trading account at Verdmont Capital Ltd. (**Verdmont**), a brokerage firm in Panama. In account documentation he completed at the time, Sidders stated that he intended to engage in active day trading, and that he planned to do between 20 and 40 trades per month. He indicated that his net worth was more than $500,000, and that his annual income was more than $150,000.

[18] In 2008, Sidders completed documentation asking that an additional sub-account be opened under his primary account at Verdmont. This sub-account is described as the "Sub-B account". No documentation or other evidence was adduced regarding any other sub-accounts in Sidders's name.

[19] In June 2011, Sidders opened a trading account at Canaccord Genuity Corp. (**Canaccord**) in Canada. In account opening documentation that Sidders appears to have completed, he states that he was employed at the time as an "independent trader" at Tidal Asset Management in Bermuda and that he had been in that position for one year. Two different versions of the account information document were tendered; on one the information is mostly handwritten; on the other it is mostly typewritten. Both are dated June 2011. The information is substantially identical between the two versions, although on one, Sidders's net worth is stated to be $50,000 (net of $300,000 of "other liabilities"), and on the other it appears as $350,000 (with no "other liabilities" shown). No explanation was offered for the discrepancy.

[20] In June 2012, Sidders provided an account information update to Canaccord in which he stated that his net worth was $50,000.

[21] As is evidenced by Sidders's 2010 certificate of marriage, on which Cornish appears as a witness, the two have known each other since at least that time.

[22] Hutchinson testified that she met Sidders through Cornish. Cornish told her that Sidders used to trade stocks.

## III. PRELIMINARY MATTERS

### A. Cornish's failure to appear

[23] On September 21, 2017, the Secretary to the Commission issued the Notice of Hearing in this proceeding, fixing October 24, 2017, as the date of the hearing. Staff served Cornish with the Notice of Hearing and with Staff's Statement of Allegations by email on September 21, 2017, and by courier on September 25, 2017.[3]

[24] Cornish did not appear at the October 24 hearing. At the request of the Panel, Staff sent Cornish an email, asking whether he wanted to receive pre-hearing disclosure. Cornish replied that he did. Staff provided the disclosure. Cornish did not further respond and has neither appeared nor participated in any other way at any time during this proceeding.

[25] Where a party has been given proper notice of a hearing but does not attend, the tribunal may proceed in the party's absence and the party is not entitled to any further notice in the proceeding.[4] Even though Cornish was not entitled to further notice following the first attendance, Staff provided disclosure to him, and later sent to him the Commission's order of July 17, 2018, setting the dates for the merits hearing.[5]

[26] I concluded, based on Staff's service of the Notice of Hearing and Statement of Allegations, and based on the fact that Cornish replied to Staff's email to him, that he was given proper notice of the hearings in this proceeding, and that the hearing on the merits could proceed in his absence.

### B. Motion by Caruso and Sidders to preclude Staff from relying on testimony given by Cornish during the investigation, in support of Staff's case against Caruso and Sidders

#### 1. Overview

[27] On June 28, 2017, as part of its investigation, Staff examined Cornish under oath. The examination (the **Cornish Examination**) was conducted pursuant to s. 13 of the Act, which allows an investigator appointed under s. 11 of the Act (typically, as in this case, a member of Staff) to compel the attendance of an individual to give testimony regarding the matter under investigation.

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[3] Exhibit 1 (First Attendance Hearing), Affidavit of Service of Laura Filice sworn September 27, 2017

[4] *Statutory Powers Procedure Act*, RSO 1990, c S.22 (**SPPA**), s 7(1), and *Ontario Securities Commission Rules of Procedure and Forms*, (2019) 42 OSCB 6528, r 21(3)

[5] Exhibit 1, Affidavit of Service of Laura Filice sworn February 6, 2019; Exhibit 561, Affidavit of Laura Filice sworn February 14, 2019

[28] At the merits hearing, Staff sought to use portions of the Cornish Examination against Caruso and Sidders. Caruso and Sidders objected. The question was argued as a motion, on which it was common ground that:

a. whether Staff sought to adduce Cornish's testimony by reading in portions of the transcript of the Cornish Examination, or by way of oral evidence from the Staff investigator who conducted the examination, that evidence would be hearsay;

b. pursuant to s. 15 of the SPPA, the Commission has the authority to admit hearsay evidence; and

c. the result of this motion would be the same, whether Cornish's testimony was adduced by reading in from the transcript or by hearing from the investigator who conducted the examination.

[29] After hearing submissions, I gave an oral decision that Staff could not rely on Cornish's testimony as against Caruso or Sidders. I advised that my reasons for that decision would be included in my reasons at the conclusion of the merits hearing. The reasons for the motion decision are as follows.

## 2. Analysis

[30] The central issue is whether Staff can rely on one respondent's testimony, gathered by way of a compelled examination during the investigation, in support of its case against another respondent. Caruso and Sidders submitted that:

a. the Commission has previously decided that testimony given on a compelled examination by one respondent cannot be used against other respondents; and

b. these previous decisions reflect the principle that it would be unfair to allow Staff to rely on such testimony, given that it was obtained in a setting in which the respondents against whom it is to be used were unable to participate.

[31] In the Commission's 2012 decision in *Axcess Automation LLC (Re)* (***Axcess***),[6] the Commission stated that it "agree[d] with Staff's position… that the compelled testimony made by a respondent would only be used as evidence against that particular respondent."[7] While that statement suggests the result requested by Caruso and Sidders in this case, the words do not fully and definitively dispose of the issue on this motion, because it appears that in *Axcess* it was Staff's choice not to rely on one respondent's testimony in support of Staff's case against any other respondent. The Commission was therefore not required to resolve the question in the context of opposing submissions.

[32] The Commission was more definitive in its 2013 decision in *York Rio Resources Inc (Re)* (***York Rio***),[8] although once again the question does not appear to have been fully argued. The Commission noted that Staff did not seek to rely on a

[6] 2012 ONSEC 34, (2012) 35 OSCB 9019
[7] *Axcess* at para 94
[8] 2013 ONSEC 10, (2013) 36 OSCB 3499

compelled examination of any one respondent against other respondents. The Commission then stated:

> We accept that it would be inappropriate to do so, particularly in this case, given the conflicting evidence we received from the various Individual Respondents about the roles played by other Individual Respondents, and the inherent unreliability of such statements.[9]

[33] Caruso and Sidders also relied on two decisions of Ontario's Superior Court of Justice, both of which considered a similar question in the context of civil proceedings. In *Cain v Peterson*[10] and in *Urbacon Building Groups Corp v Guelph (City)*,[11] the Court considered Rule 31 of the *Rules of Civil Procedure*,[12] and specifically the possible use by one party of the examination for discovery of another party. While those cases recite well-settled principles about the relative unreliability of hearsay evidence, I did not find either case to be useful for this motion for two reasons:

a. s. 15 of the SPPA, which permits the admission of hearsay evidence, applies to proceedings before the Commission but not to proceedings governed by the *Rules of Civil Procedure*; and

b. the relationship between Staff and respondents in an enforcement proceeding such as this one is of a different character than that between parties to a civil action, and an enforcement proceeding engages procedural fairness considerations beyond those that are present in civil proceedings.

[34] In responding to Caruso's and Sidders's motion, Staff submitted that Cornish's testimony is necessary to prove the case against Caruso and Sidders. Staff asked that I dismiss the motion, that I admit Cornish's testimony, and that at the end of the merits hearing I consider any other evidence that corroborates Cornish's testimony and determine at that time what weight, if any, to attach to Cornish's testimony.

[35] In support of its position, Staff cited the Alberta Court of Appeal decision in *Alberta Securities Commission v Brost* (***Brost***).[13] In that case, the Court considered the argument, made here by Caruso and Sidders, that respondents against whom evidence was proposed to be used were not able to be present during the taking of that evidence and therefore were unable to cross-examine the witness.

[36] The Alberta Court of Appeal rejected the argument, holding that the Alberta Securities Commission had not denied the parties the opportunity to test the evidence, because it was open to the parties to request the issuance of a summons to compel the witness's attendance at the hearing.[14] As Staff points out, the same is true in this case.

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[9] *York Rio* at para 77
[10] 2005 CanLII 38122 (ON SC)
[11] 2013 ONSC 5773
[12] RRO 1990, Reg 194
[13] 2008 ABCA 326
[14] *Brost* at para 36

[37] I note that while *Brost* was decided years before the Commission's decisions in *Axcess* and *York Rio*, it is not referred to in either of those two decisions for the point at issue here. This may be explained by the fact noted above, that the question on this motion does not appear to have been fully argued in those cases. However, I also note that *Brost* was before the Commission panel in *York Rio* on an unrelated point. While *Brost* clearly came to the panel's attention, it is unclear whether the panel adverted to it on the question at issue here.

[38] I have carefully considered *Brost*. However, I was not persuaded that I should follow it in the face of *Axcess* and *York Rio*. Those who are subject to the jurisdiction of this Commission are entitled, when governing their affairs, to rely reasonably on previous decisions of the Commission. While the Commission is permitted to depart from earlier decisions,[15] it should strive for consistency.[16]

[39] Arguably, that principle should be of less force in this case because of the fact that the question on this motion was not fully argued in *Axcess* and *York Rio*. In my view, however, the Commission's words in *York Rio* are sufficiently clear, in that they do not merely report a position adopted by Staff; rather, they explicitly characterize the contrary position as "inappropriate". I am loath to depart from that clear statement without a compelling reason to do so, and no such reason has been advanced in this case.

[40] Further, I refer to an important distinction between *Brost* and this case. As noted in paragraph [36] above, the Court in *Brost* observed that the appellants could have sought to compel the witnesses to testify at the hearing. The Court characterized the appellants' choice not to do so as "tactical decisions… fully within their control."[17] In contrast, there is nothing in the record before me to indicate whether Caruso or Sidders made a "tactical decision" not to attempt to call Cornish as a witness (and perhaps an adverse one) in order to challenge the testimony that he gave on his examination. Staff reported that despite many attempts it has been unable to maintain contact with Cornish, who apparently is outside Canada. Cornish failed to appear for this proceeding. I have no basis to conclude that either Caruso or Sidders would have had any more success in securing Cornish's attendance to testify, even assuming it was open to them to do so. I therefore cannot conclude, as was the case in *Brost*, that it was "fully within their control" to have Cornish available for cross-examination.

[41] I say "even assuming it was open to them to do so" in the previous paragraph because Sidders's counsel raised the question as to whether fairness concerns would preclude a respondent from seeking to compel the attendance of another respondent who had chosen not to appear at the proceeding. While this question was raised, the point was not argued, and I expressly decline to resolve it.

[42] In this case, reliability and procedural fairness are paramount concerns. To the extent that Cornish's testimony incriminates him, it is more likely to be reliable. To the extent that it implicates Caruso and Sidders, the same cannot be said. An

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[15] *Donnini (Re)*, [2003] O.J. No. 3541 (Div Ct) at para 35 (rev'd on other grounds: *Donnini v Ontario Securities Commission*, 2005 CanLII 1622); Sara Blake, *Administrative Law in Canada*, 5th ed (Toronto: LexisNexis Canada, 2011) at 140

[16] Robert W Macaulay, James LH Sprague & Lorne Sossin, *Practice and Procedure Before Administrative Tribunals*, (Toronto: Carswell, 1988) (loose-leaf updated 2019, release 5), ch 6 at 6-17

[17] *Brost* at para 36

individual in Cornish's position may perceive an advantage in pointing fingers at others. Caruso and Sidders were not present and did not have an opportunity to test whether Cornish was succumbing to that temptation.

[43] For all these reasons, I concluded that I ought to follow this Commission's decisions in *Axcess* and *York Rio*, and grant the motion brought by Caruso and Sidders. I will not consider any of Cornish's compelled testimony in support of Staff's case against either Caruso or Sidders.

### C. Motion by Staff to preclude Caruso and Sidders from relying on Cornish's compelled testimony

#### 1. Overview

[44] During the hearing, Caruso and Sidders advised that for the purpose of responding to Staff's case against them, they wished to rely on portions of the Cornish Examination. Staff submitted that given my decision not to permit Staff to rely on Cornish's testimony on that examination, Caruso and Sidders ought similarly to be precluded from doing so.

[45] As with the previous motion, the parties acknowledged that any excerpts from the Cornish Examination would be hearsay. That hearsay would be admissible pursuant to s. 15 of the SPPA.

[46] After hearing submissions, I decided that Caruso and Sidders could seek to rely on Cornish's compelled testimony in their favour, subject to my ability to decide what weight, if any, I would attach to that evidence. My reasons for the motion decision follow.

[47] Before turning to that analysis, I note that again on this motion, there was some discussion about the two forms in which Cornish's testimony at the Cornish Examination might be admitted at this hearing – as excerpts from the transcript of his examination, or as oral evidence from a Staff witness who was present at the examination and who reported what Cornish said. The outcome of this motion would be the same either way.

#### 2. Analysis

[48] I begin with Staff's submission that because it cannot rely on the Cornish Examination as against Caruso and Sidders, the reverse must necessarily be true, *i.e.*, Caruso and Sidders cannot rely on it either. I disagree. I accept Caruso's and Sidders's submission that they are in a different position from Staff, because Staff was able to question Cornish and test his responses in a way that amounts, effectively, to cross-examination. Neither Caruso nor Sidders had any such opportunity.

[49] As a result, I am permitted but not required to allow Caruso and Sidders to adduce Cornish's testimony. Should I do so?

[50] I agree with Staff's submission that neither the Commission's motion decision in *Agueci (Re)*[18] nor the Divisional Court's decision on the appeal in that proceeding[19] is of assistance on this question. While in that proceeding the Commission did permit some respondents to read in portions of another

[18] 2013 ONSEC 45, (2013) 36 OSCB 12133 at para 133
[19] *Fiorillo v Ontario Securities Commission*, 2016 ONSC 6559

respondent's transcript, the scope was broader there, in that two of the respondents were alleged to have made misleading statements contrary to s. 122 of the Act, and one of the respondents was alleged to have disclosed information regarding Staff's investigation, contrary to s. 16 of the Act. Further, it is unclear from the decisions precisely what use Staff had made of the transcript.

[51] In arguing that I should permit Caruso and Sidders to adduce portions of the Cornish Examination, Caruso submits that since Staff will rely on some parts of the Cornish Examination as against Cornish, I ought to be concerned about Staff "cherry-picking". Caruso ought therefore to be permitted to rely on other parts if necessary, in order to put into context the excerpts that Staff cites.

[52] I do not accept that submission. For the reasons set out above, Staff's reliance on the Cornish Examination is confined to the case against Cornish. None of Cornish's testimony can prejudice Caruso or Sidders, no matter what I decide with respect to Cornish. If I decide against Cornish on the merits, partly in reliance on his own compelled testimony, Staff must still independently prove its case against Caruso and Sidders based on evidence admissible against them, so my findings against Cornish are irrelevant. If I find in favour of Cornish, for some reason that might apply equally to Caruso and/or Sidders, then it is inconceivable that I would reach contradictory conclusions; there would be nothing to "put into context" and again, there is no risk of prejudice to Caruso and/or Sidders.

[53] Having said all of that, I concluded during the hearing that Cornish's testimony was potentially relevant to the matters in issue for Caruso and Sidders, that there was no legal impediment to my admitting and considering that testimony, and that its value might depend on later developments in the hearing. I therefore decided to exercise my discretion under s. 15 of the SPPA to admit the testimony.

[54] The question remains as to what weight, if any, I ought to give Cornish's testimony. I address this issue as necessary in my analysis below, in the context of specific elements on which Caruso or Sidders seek to rely.

## IV. ANALYSIS

[55] I turn now to my analysis of Staff's allegations against Cornish, Caruso and Sidders. I begin with a review of certain evidentiary matters, followed by consideration of several substantive issues that are applicable to all eight subject transactions. I then review each transaction in turn.

### A. Evidentiary matters

#### 1. Standard and burden of proof

[56] The standard of proof applicable to Commission proceedings is the balance of probabilities. Staff must prove, on the basis of clear, convincing and cogent evidence, that it is more likely than not that the alleged events occurred.[20]

[20] *FH v McDougall*, 2008 SCC 53 at paras 40, 46, 49; *Azeff (Re)*, 2015 ONSEC 11, (2015) 38 OSCB 2983 (***Azeff***) at paras 41-42

[57] If Staff fails to do so, or if a respondent presents an alternative explanation that is as likely as the explanation asserted by Staff, then Staff will not have met its burden.[21]

### 2. Hearsay

[58] As noted above in paragraph [28], s. 15 of the SPPA provides that a panel may admit as evidence any relevant oral testimony or document even if not given under oath or affirmation, or admissible in court. This extends to hearsay evidence.

[59] Hearsay evidence is not necessarily less reliable than direct evidence.[22] The panel hearing the evidence must determine the weight to be accorded to the evidence, and should "avoid placing undue reliance on uncorroborated evidence that lacks sufficient indicia of reliability".[23]

### 3. Circumstantial evidence and inferences generally

[60] As the Commission has previously observed, it is often the case that certain elements of insider trading and tipping cases must be proved by circumstantial evidence rather than direct evidence, because "the only persons who have direct knowledge of relevant communications are the wrongdoers themselves."[24] Circumstantial evidence can "fill an evidentiary gap" created by the absence of direct evidence.[25]

[61] Circumstantial evidence does not itself establish the alleged fact; rather, the panel may draw an inference from the circumstantial evidence. Those inferences must be reasonably and logically drawn from a fact or group of facts established by the evidence,[26] should be drawn from the combined weight of the evidence,[27] and cannot be drawn from speculated facts.[28]

[62] For an inference to be validly drawn, it need not be the only possible inference; nor does it need to be the most obvious or the most easily drawn.[29] However, as is suggested in paragraph [57] above, if the circumstantial evidence equally supports two opposing inferences, one in favour of Staff and one in favour of a respondent, Staff will not have met its burden of proof.

[63] Staff submits that I ought not to assess each individual piece of evidence on its own. Rather, as the Commission has previously done, I should base my conclusions "on the combined weight of the evidence".[30] I accept the latter proposition, but not the former as described by Staff. In my view, I must assess each piece of evidence on its own, to determine whether the evidence deserves

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[21] Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada, 2018) (***Lederman***) at 97

[22] *Rex Diamond Mining Corp v Ontario Securities Commission*, 2010 ONSC 3926 (Div Ct) (***Rex Mining***) at para 4

[23] *Starson v Swayze*, 2003 SCC 32 at para 115, cited in *Agueci (Re)*, 2015 ONSEC 2, (2015) 38 OSCB 1573 at para 33

[24] *Azeff* at para 43

[25] *Finkelstein v Ontario (Securities Commission)*, 2016 ONSC 7508 (Div Ct*)* (***FinkelsteinDiv***) at para 19

[26] *Finkelstein v Ontario Securities Commission*, 2018 ONCA 61 (***FinkelsteinCA***) at para 61

[27] *FinkelsteinDiv* at para 24; *Suman (Re)*, 2012 ONSEC 7, (2012) 35 OSCB 809 (***Suman***) at para 309

[28] *Azeff* at para 49; *R v Munoz*, 2006 CanLII 3269 (ON SC) (***Munoz***) at para 31

[29] *Suman* at para 308, citing *Munoz* at para 31

[30] *Suman* at para 309

weight, whether it supports a finding of fact, and if so, whether that fact alone or together with other facts then supports a suggested inference.

## 4. Adverse inferences

### *(a) Introduction*

[64] In civil cases, under certain circumstances, an adverse inference may be drawn against a party who, without explanation, does not testify. The party's failure to testify amounts to an implied admission that the party's evidence would not have been helpful to that party.[31]

[65] The Commission has previously drawn such an inference in respect of a respondent who failed to testify.[32]

[66] In this case, Caruso initially submitted that I may draw an adverse inference against Staff because a former Staff member who was the primary investigator did not testify. Caruso later refined that submission, as I explain below.

[67] Separately, Staff submits that I should draw an adverse inference against Cornish and Sidders for their failure to testify. I address each of these submissions in turn.

### *(b) Adverse inference against Staff*

[68] Caruso submitted that I may draw an adverse inference against Staff because Michael Bordynuik, the Senior Investigator originally assigned as the primary investigator on this case, did not testify at the hearing. As of March 2018 (after this proceeding was commenced), Bordynuik is no longer a member of Staff. Stuart, who testified as Staff's investigator, was assigned to the file after the investigation was already in progress. He assisted Bordynuik during the investigation.

[69] Stuart was asked on cross-examination, but did not know, why Staff did not call Bordynuik as a witness.

[70] Caruso submitted that it is within my discretion to infer that Bordynuik's testimony would be contrary to Staff's case, or that it would not support Staff's case, although Caruso did not explicitly submit that I should draw that inference. In oral submissions, Caruso's counsel refined the point by submitting that without evidence directly from Bordynuik (and because Stuart had no knowledge on the point), I ought not to draw any conclusions about how difficult it may have been for Staff to obtain records from foreign jurisdictions. As a result, argued Caruso, I am not in a position to conclude that Caruso was being secretive by having trading accounts in jurisdictions outside Canada.

[71] As I explain later in these reasons, I do not make any such finding against either Caruso or Sidders. Accordingly, I need not determine what the effect of Bordynuik's absence would be on this issue. I do note that Staff does not have exclusive control over Bordynuik, and I was provided with no authority for the proposition that an adverse inference against a party can be drawn with respect to the absence of a witness over whom that party does not have exclusive control.

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[31] Lederman at 406-407

[32] *Mega-C Power Corp (Re)*, 2010 ONSEC 19, (2010) 33 OSCB 8290 at paras 275-76

[72] Bordynuik's absence does become relevant with respect to Sidders's trading records. Some of the documentary evidence Staff adduced against him is incomplete. Stuart was not involved when those records were gathered, and he was unable to explain why they are incomplete. Bordynuik is more likely to have been able to explain. Sidders submits that rather than drawing an adverse inference, I should simply note the documents' limited usefulness. I agree. I return to that point in my analysis beginning at paragraph [216] below.

### *(c) Adverse inference against Cornish and Sidders*

[73] Staff submits that I should draw adverse inferences against each of Cornish and Sidders because neither of them testified, provided affidavit evidence or called a witness in this proceeding.

[74] While Sidders agrees that a panel may draw an adverse inference against a respondent who does not testify, Sidders submits that I may draw only a "confirmatory" adverse inference after Staff has already met its burden of proof. Sidders relies on the Commission's decision in *Sextant (Re)*, but in its reasons in that case the Commission first noted its "stand-alone findings" of fraud against an individual respondent. The Commission then added that it drew an adverse inference from the respondent's failure to testify, "as confirmatory of those findings."[33] The Commission's reasons did not suggest that the stand-alone findings were a necessary pre-condition to an adverse inference, and thus the reasons did not limit the availability of an adverse inference as Sidders has suggested. I reject Sidders's submission.

[75] Sidders further submitted that even if it were open to me to draw an adverse inference against him, I should not do so, since it was open to Staff to call him as a witness. That proposition is inconsistent with the authorities described above, and in my view is not supported by the decision of the Alberta Securities Commission that Sidders cited to me. In that case, the Alberta Commission declined to draw an adverse inference, but the potential witnesses that were not called were not aligned in interest with either party in the proceeding.[34] That is not the case here. I reject the submission.

[76] I therefore conclude that where Staff establishes a *prima facie* case regarding a particular factual conclusion, it would be appropriate for me to draw an adverse inference against Cornish and/or Sidders for their failure to testify, in respect of that conclusion. In other words, Staff must first adduce evidence that appears to be credible and reliable and that is sufficiently strong for the respondent to be called on to answer it; then, if Staff has done so, I may draw the adverse inference.[35] I apply this principle as appropriate in my analysis below, in the context of each transaction.

## 5. Credibility and reliability of witnesses

[77] In assessing the credibility and reliability of witnesses, I am guided by the decision of the Ontario Superior Court of Justice in *Springer v Aird & Berlis LLP*,[36]

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[33] *Sextant (Re)*, 2011 ONSEC 15, (2011) 34 OSCB 5829 at para 246
[34] *Ironside (Re)*, 2006 ABASC 1930 at paras 527-530
[35] *Dwyer v Mark II Innovations Ltd*, 2006 CanLII 9406 (ON CA) at para 4, cited in Lederman at 407
[36] (2009) 95 OR (3d) 325 (***Springer***)

in which Newbould J. adopted the following words from a British Columbia Court of Appeal decision:

> The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.[37]

[78] I need not necessarily come to one overarching conclusion about any particular witness's credibility or reliability. I may find a witness to have been credible in some respects but not in others. I may conclude that some aspects of a witness's testimony are reliable, but that other aspects are not.[38]

[79] Neither Caruso nor Sidders challenged the credibility or reliability of Stuart, Staff's investigator witness. I found Stuart to be candid and forthright, and I accept his evidence.

[80] I reach no overall conclusion with respect to the credibility or reliability of the remaining two witnesses, Hutchinson and Caruso. I make findings about the reliability of various aspects of their testimony, in the course of my analysis below.

## B. Analysis relevant to all transactions

[81] Before reviewing each transaction separately, I consider the following, each of which is potentially relevant to all of the transactions:

a. the origin of the alleged scheme generally;

b. Hutchinson's access to MNPI and her exchange of information for money;

c. the Act's prohibition against insider trading;

d. the Act's prohibition against tipping;

e. evidence of telephone communications;

f. the definition of "material fact";

g. proving knowledge of material facts;

h. special relationships; and

i. patterns.

### 1. The origin of the alleged scheme generally

[82] As to the origin of the alleged scheme, Staff relies primarily on Hutchinson's testimony at the hearing. That testimony contradicted what Hutchinson told Staff on the first of her two examinations during the investigation, at which time she denied the existence of the scheme. During the hearing, she explained that she lied during her first examination because she was afraid of losing her job, she did not have counsel, and she did not take the matter seriously enough. She said that after that examination she spoke to a friend, changed her mind, and decided to tell Staff the truth. Those steps led to her settlement of the allegations against her.

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[37] *R v Pressley*, [1948] 94 CCC 29 (BCCA) at para 12, cited in *Springer* at para 14
[38] *Meharchand (Re)*, 2018 ONSEC 51, (2018) 41 OSCB 8434 at para 62

[83] In her testimony at the hearing, Hutchinson said that in 2010 or 2011, Cornish was having financial trouble, and that he suggested to her that she give him information about pending corporate transactions in which Davies was involved. Cornish told Hutchinson that he intended to relay the information to Caruso, who would trade with the benefit of that information. Cornish would not do any trading himself, because he had little or no money, and because he wanted to minimize the risk of detection by distancing Hutchinson from the trading.

[84] Hutchinson's evidence about how the scheme came to be and how it would work was consistent with the admissions she made in her settlement with Staff. Her testimony was not seriously challenged on cross-examination and was uncontradicted, other than by Cornish's denials during the Cornish Examination.

[85] Because Cornish was not present at the hearing, his compelled testimony in the Cornish Examination is hearsay. It is admissible, but I must determine what weight it deserves.

[86] In my view, his compelled testimony lacks any indicia of reliability; indeed, I find it to be unreliable.

[87] There is no reason to prefer Cornish's self-serving denials, made during the investigation stage and not repeated in person during the hearing before me, over Hutchinson's candid and self-incriminating testimony. I accept her explanation about why she lied during her first examination, and I accept her evidence regarding the origin of the scheme. I do not accept Caruso's submission that Cornish had little motive to lie; nor do I accept Caruso's submission that I should assess whether Hutchinson's settlement was a "sweetheart" deal that would have motivated her to be untruthful. I return, beginning at paragraph [136] below, to consider Hutchinson's testimony about Caruso's involvement in the scheme.

[88] With respect to Sidders, Hutchinson testified that if he was involved in the scheme, she was unaware, and she was surprised to learn about Staff's allegations against him. Cornish did not mention Sidders's name to Hutchinson in any of their discussions. Similarly, Caruso testified that he had no knowledge as to whether Sidders traded in any of the issuers involved in the transactions. Staff's case against Sidders therefore depends entirely on documentary evidence.

### 2. Hutchinson's access to information and her exchange of information for money

[89] Hutchinson testified that while at Davies, she had access to the firm's email storage system (called **Decisive**) and the firm's document management system (called **DM**). She was able to search both systems. Her ability to search emails in Decisive did not depend on the lawyer or the file to which she might be assigned, and the system did not record who was accessing its contents. In contrast, her access to DM was limited depending on which files she was working on, and the system maintained a record of who accessed documents and on what date and at what time.

[90] Hutchinson stated that she often searched these systems to get information regarding pending corporate transactions. For some part of the Material Time, she also reviewed conflict checks circulated by the firm. She conducted these searches and reviews so that she could relay information to Cornish.

[91] It is clear from Hutchinson's evidence that she regularly had access to confidential information regarding transactions for which Davies had been retained. However, both in her examination-in-chief and on cross-examination, Hutchinson was candid in admitting that she had little or no specific recollection as to when she accessed the systems, when she became aware of specific information, or what she passed along to Cornish and when. She also agreed that when Davies used code names for parties involved, she may not have known the identity of the parties until toward the end of a transaction.

[92] Hutchinson and Cornish were friends and they saw each other regularly. When she gave him information about a transaction, she met with him face-to-face. She avoided texting or emailing him. In general, she told him about the parties to a transaction when she learned that information. She updated him about a transaction's status, timing, and purchase price, sometimes on her own initiative and sometimes in response to his request for an update. She testified that she would usually not find out the price until toward the end of the transaction.

[93] According to Hutchinson, from the inception of the scheme until it ended, she received approximately $17,000 for providing information to Cornish. She received her payments in cash, usually about $1,000 at a time so as not to attract suspicion. Cornish handed the cash to her, although on one occasion he gave it to her in a newspaper.

[94] Hutchinson's evidence regarding the access she had to the systems, the efforts she made to gather information, the manner in which she conveyed the information to Cornish, and the payments she received from him, was uncontradicted (other than by Cornish's denials on his examination, which I reject) and was not shaken on cross-examination. I accept it.

[95] Staff also relied on records obtained from Davies, which purported to identify individuals who had access to documents related to the transactions, and when those individuals accessed the system. Caruso and Sidders note that Staff did not call a witness from Davies to explain how the records were created, who created them, or when they were created. However, neither Caruso nor Sidders offered any reason to doubt the accuracy of the information shown in the records. I am satisfied that the records constitute reliable hearsay evidence, and I accept them for the truth of their contents.

### 3. The Act's prohibition against insider trading

[96] Staff alleges that each of Cornish, Caruso and Sidders engaged in prohibited insider trading.

[97] The Act's prohibition against insider trading aligns with two of the three fundamental purposes of the Act; namely, to provide protection to investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in capital markets.[39] The prohibition exists for three principal reasons:

a. fairness requires that all investors have equal access to information about an issuer that would likely affect the market value of the issuer's securities;

[39] Act, s 1.1

b. insider trading may undermine investor confidence in the capital markets; and

c. capital markets operate efficiently on the basis of timely and full disclosure of all material information.[40]

[98] The prohibition is found in s. 76(1) of the Act, which provides:

> No person or company in a special relationship with an issuer shall purchase or sell securities of the issuer with the knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed.

[99] None of Staff's allegations in this case relates to a material change, as opposed to material facts. For convenience, the balance of these reasons will omit any reference to material change.

[100] In order to establish its allegation that a respondent engaged in prohibited insider trading, Staff must therefore prove each of the following elements:

a. the respondent purchased or sold securities of the issuer;

b. at the time of the purchase or sale, the respondent had knowledge of a material fact about the issuer;

c. the material fact had not been generally disclosed; and

d. at the time of the purchase or sale, the respondent was in a special relationship with the issuer.

[101] With respect to the second of those elements, proof of knowledge of the information is sufficient. Staff need not prove that a respondent made use of the information when trading shares. [41]

### 4. The Act's prohibition against tipping

[102] The prohibition against tipping is found in s. 76(2) of the Act, which provides, in relevant part:

> No… person… in a special relationship with an issuer shall inform, other than in the necessary course of business, another person… of a material fact… with respect to the issuer before the material fact… has been generally disclosed.

[103] The only tipping allegation before me is that Cornish tipped Caruso and Sidders regarding the transactions. If Cornish did tip, it cannot be said that he did so "in the necessary course of business". Therefore, in order to establish its tipping allegation, Staff must prove all of the following:

a. Cornish informed Caruso and/or Sidders of a material fact with respect to the issuer;

b. at the time Cornish informed Caruso and/or Sidders, the material fact had not been generally disclosed; and

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[40] *FinkelsteinCA* at paras 23-25
[41] *Donald (Re)*, 2012 ONSEC 26, (2012) OSCB 7383 (***Donald***) at para 261

c. Cornish was in a special relationship with the issuer.

### 5. Evidence of telephone communications

[104] As part of the circumstantial evidence that Staff relies on in support of its allegations, Staff adduced the following cellular telephone records:

a. for Hutchinson, monthly invoices for five months in 2011 and for most of 2013 and 2014, which invoices:

i. itemize outgoing and incoming calls; and

ii. give total numbers of, but do not itemize (*i.e.*, specify date and time of) text messages;

b. for Cornish:

i. monthly invoices from August 2010 to November 2012, which specify the date and time of incoming and outgoing calls, and give total numbers of, but do not specify the date and time of, text messages;

ii. Excel worksheets that appear to specify details (including date and time) of communications for all months from September 2013 to September 2014, but that include a "call type" code for each item, which codes were not explained during the hearing; and

iii. printouts of Excel worksheets for each of November 18, 2013, and January 22, 2014, with the same characteristics as those described immediately above;

c. for Caruso, monthly invoices for most but not all months between September 2010 and October 2014, and between August 2015 and October 2015, all of which invoices:

i. itemize outgoing and incoming calls; and

ii. give total numbers of, but do not itemize (*i.e.*, specify date and time of) text messages; and

d. for Sidders, Excel worksheets showing calls (incoming and outgoing) and text messages (incoming and outgoing) from December 1, 2010, to December 30, 2011, and from October 7, 2012, to April 16, 2015.

[105] These records show the date and time of calls made, and in some instances text messages sent, to or from the particular phone. The records typically show the length of a voice call in minutes. The records do not indicate whether a particular call was answered or not, or, if the call went to voice mail, whether the caller left a message or not. The records do not give any information about the content of a call, voice mail, or text message.

[106] Many calls listed in the phone records indicate a length of one minute. Some may have been as short as a few seconds; others may have lasted a full minute. Each call may have been a live conversation, or a voice mail message, or neither (*i.e.*, the caller hanging up during the voice mail greeting). Calls that are longer than one minute are likely to have been either a live conversation or a voice mail message.

[107] Given all these varying characteristics, in what ways could phone records support Staff's allegations? As is typical in insider trading cases, Staff highlights two different aspects of the communications – frequency and timeliness.

[108] In many instances in this case, Staff notes that there were frequent calls between two individuals in the days or weeks leading up to trades that were conducted by the alleged tippee. However, it is not enough to say that the alleged tipper and tippee were in frequent contact. For the frequency during a particular period to have any persuasive value it must be uncharacteristically high. In no instance in this case did Staff provide an analysis of call frequency showing that the two individuals involved contacted each other by telephone any more frequently at opportune times than they did at times unrelated to the particular transaction.

[109] Further, Staff's position regarding frequency of communication, and whether that frequency supports the inference that a trading respondent was in possession of MNPI, was not entirely clear. On the one hand, Staff often asserted that the frequent contact between respondents supported such an inference – Staff made this point in opening submissions, Staff's investigator witness testified about the frequency of contact, and then Staff repeated the point in closing written submissions with respect to most of the transactions.

[110] On the other hand, however, in closing oral submissions Staff counsel acknowledged that the respondents were routinely in frequent contact with each other, and stated that the frequency of communication was "not what we're basing our case on".[42] Staff submitted that instead, it relied on the fact that there was "opportunity" for the respondents to transfer MNPI between them.

[111] Because it is not clear to me that in making those oral submissions Staff was fully abandoning the argument it had made repeatedly in written submissions, I have chosen out of an abundance of caution to assume that Staff was not abandoning the argument.

[112] Turning to timeliness, or opportunity, the same question must be asked as was relevant for frequency. In other words, for a particular communication to have some persuasive value because of the time at which it occurred, that timing must be noteworthy in some way. Where an alleged tipper calls a tippee one evening and the tippee trades the following morning, for example, that communication is suspect if the tipper and tippee do not normally speak by phone in the evening. If the two speak by phone every evening, then there is nothing about the communication that implicates the participants.

[113] Staff's submissions highlighted certain communications, but did so selectively. It is one thing to point to a call that occurred at an opportune time; it requires a further step to demonstrate that the call's timing was uncharacteristically opportune. As a practical matter, Staff left it to me, as the hearing panel, to do further analysis of records that were in different forms, overlapped in time, and had unintelligible elements. That is insufficient. In some insider trading cases, the basis for Staff's position would be abundantly clear, *e.g.*, when two individuals do not communicate at all for weeks, but suddenly communicate several times at a very opportune time. This is not that kind of case. Here, the call and message volumes are significant, not only during the time periods

[42] Hearing Transcript, Hutchinson (Re), June 10, 2019 at 23 lines 23-24

relevant to each of the subject transactions, but before and after those time periods as well.

[114] Leaving further analysis to the hearing panel is inconsistent with this tribunal's procedural fairness obligations to the respondents, who would be deprived of the opportunity to review that analysis and to make submissions about any errors or about how the information ought to be interpreted and weighed.

[115] I want to be clear about what, in my view, was missing here. The record did contain "raw material", *i.e.*, details of the many communications, but what I did not have was an aggregation or summary of those details (*e.g.*, on a weekly or monthly basis), from which one could draw conclusions about frequency or timeliness. That kind of aggregation or summary (which is purely factual and involves no opinion) is different from a witness's opinion about frequency or timeliness; as I advised counsel several times during the hearing, I was not prepared to give any weight to such an opinion from a fact witness, including Stuart, Staff's investigator.

[116] Staff bears the burden of proving its allegations. In the circumstances of this case, especially given the extremely high volume of communications among the respondents, that burden requires more than a bald submission that communications at a particular time were frequent, or that two respondents spoke by phone or exchanged text messages at a particular time. Context is essential.

[117] Accordingly, I attach little if any weight to the evidence of communications among the respondents. I return to this conclusion in my analysis below, in the context of each transaction.

### 6. Definition of "material fact"

[118] To establish a contravention of the insider trading provision, Staff must prove that a person traded with knowledge of a "material fact". Similarly, to establish a contravention of the tipping provision, Staff must prove that the tipper communicated a "material fact". Subsection 1(1) of the Act defines "material fact" as a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities.

[119] Materiality is to be determined objectively, taking into account all the relevant circumstances.[43] Several facts may be material when considered together, even when one or more of the facts do not appear to be material when considered alone.[44]

[120] I agree with the statement of the Alberta Securities Commission in *Holtby (Re)*, that information that an entity is seriously considering the acquisition of a publicly-traded issuer would generally have a significant effect on the target issuer's securities.[45]

### 7. Proving knowledge of material facts

[121] The second of the four elements of the insider trading provision (as set out in paragraph [100] above) is that the person traded with knowledge of a material

[43] *Rex Diamond* at para 6; *Donald* at para 199
[44] *YBM Magnex International Inc (Re)*, (2003) 26 OSCB 5285 at para 94, cited in *Donald* at para 203
[45] 2013 ABASC 45 at paras 510 and 511

fact about the issuer. To prove this element, Staff need not lead evidence of actual knowledge. Knowledge may be inferred based on circumstantial evidence of the person's ability and opportunity to acquire the information, and the characteristics of the person's trading. The following is a non-exhaustive list of characteristics that may suggest knowledge of material facts:

a. timely trades;

b. unusual trading patterns;

c. unusually risky trades, including because they represent a significant percentage of the portfolio;

d. highly profitable trades; or

e. a first-time purchase of the security.[46]

[122] As the Commission has previously held, insider trading and tipping cases "are established by a mosaic of circumstantial evidence which, when considered as a whole, leads to the inference that it is more likely than not that the trader, tipper or tippee possessed or communicated material non-public information."[47]

[123] In this case, there is no real controversy as to whether the respondents had the opportunity to acquire MNPI. In the case of Caruso and Sidders, with respect to whom there is no direct evidence of the transmittal of MNPI, the determination of whether either of them had actual knowledge of MNPI about an issuer will depend on the circumstantial evidence relating to his trading in securities of the issuer.

## 8. Special relationships

### *(a) Generally*

[124] The prohibitions against insider trading and against tipping both require the determination of whether a person was "in a special relationship" with an issuer. That term is defined in s. 76(5) of the Act (the **Special Relationship Definition**), which specifies the various relationships that would qualify. Those relationships include the following, which are particularly relevant here:

a. broadly speaking, firms that provide professional services to parties to a proposed merger or take-over bid involving the issuer[48] (Staff alleges, and it is not disputed, that this element of the definition includes Davies with respect to every transaction in this case);

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[46] *Suman* at para 307; *Azeff* at para 45

[47] *Azeff* at para 47

[48] Clause (b) of the Special Relationship Definition extends the class to "a person… that is engaging in any business or professional activity" on behalf of:

a. the issuer; or

b. a person or company that:

i. was considering or evaluating whether to make a take-over bid, or proposed to make a take-over bid, for securities of the issuer, or

ii. was considering or evaluating whether to become a party, or proposed to become a party, to a reorganization, amalgamation, merger or arrangement or similar business combination with the issuer.

b. employees of those professional services firms[49] (which includes Hutchinson in this case);

c. individuals who learn of a material fact from someone described in (b) above, and who know or ought reasonably to know that the tipper (*i.e.*, the person from whom they learned the fact) was in a special relationship with the issuer[50] (Staff alleges that Cornish falls within this description, in that he learned of material facts from Hutchinson); and

d. successive tippees who learn of a material fact from someone described in (c) above, and who know or ought reasonably to know that their tipper was in a special relationship with the issuer[51] (Staff alleges that Caruso and Sidders fall within this category).

[125] As the Commission has previously observed, the purpose of extending the definition to those mentioned in (c) and (d) of the preceding paragraph is:

> …to proscribe the abusive activities of an indefinite chain of indirect tippees. By using both the subjective element of "knows" and the objective test of "ought reasonably to have known" the intent of the legislature was to encompass a broad spectrum of actors who impair confidence in the capital markets by using confidential information not available to all investors. At the same time, the legislature provided safeguards so that there would not be a regime of indefinite liability.[52]

[126] That definition requires Staff to establish two connections between the tipper and the tippee:

a. an "information connection": *i.e.*, that the tippee learned of a material fact from a person in a special relationship (as opposed to, for example, that he already knew the information); and

b. a "person connection": *i.e.*, that the tippee knew or ought reasonably to have known that the tipper was in a special relationship.[53]

[127] With respect to the person connection, and the question of whether a tippee ought reasonably to have known that the tipper was in a special relationship, the Commission has identified factors to be considered:

a. the relationship between the tipper and the tippee;

b. the professional qualifications of the tipper and of the tippee;

c. the specificity of the MNPI that is conveyed;

d. the time elapsed between the communication of the MNPI and the trading by the tippee;

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[49] Subclause (c)(iv) of the Special Relationship Definition
[50] Clause (e) of the Special Relationship Definition
[51] Clause (e) of the Special Relationship Definition
[52] *Azeff* at para 57
[53] *FinkelsteinCA* at paras 44-49

e. intermediate steps taken by the tippee before trading, to verify the information received;

f. whether the tippee has traded the issuer's securities before; and

g. whether the tippee's trade was significant in the context of the tippee's portfolio.[54]

[128] There is considerable overlap between these factors (relating to whether the tippee ought to have known that the tipper was in a special relationship with the issuer) and the characteristics listed in paragraph [121] above (relating to whether the tippee traded while in possession of MNPI). This overlap makes sense. For example, an uncharacteristic, risky and profitable trade, executed shortly after communication between an alleged tipper and tippee, and before public announcement of a transaction, could tend to indicate both that the tippee possessed MNPI and that the tippee ought to have known that the tipper was in a special relationship.

[129] With these general principles and factors in mind, I will now consider how they may apply to each of Cornish, Caruso and Sidders.

### *(b) Cornish*

[130] I accept Hutchinson's evidence that in some instances, she communicated material facts to Cornish before those facts were generally disclosed, thereby establishing the "information connection". I say "some instances" because I do not reach that conclusion with respect to all eight of the subject transactions. I explain below the findings I make with respect to each particular transaction.

[131] To the extent that the information connection is established with respect to a particular transaction, I find that the person connection is established as well. This is so because Cornish knew about Hutchinson's job and about her access to confidential information, and he solicited the confidential information from her.

[132] My conclusion that Cornish was in a special relationship with one or more of the issuers in any given transaction leaves unanswered the question of when he became a person in a special relationship. I return to that question in the context of each transaction below.

### *(c) Caruso*

[133] To prove that Caruso was in a special relationship with the issuers in which he carried out impugned trading, Staff must establish the information connection (that Caruso learned of material facts from Cornish), and the person connection (that Caruso knew or ought reasonably to have known that Cornish was in a special relationship).

[134] In submitting that the evidence proves those connections, Staff relies first on Hutchinson's testimony, in which she implicated Caruso in the scheme when she reported what she says Cornish said to her. In order for me to find that Hutchinson's testimony should implicate Caruso, I must address two issues:

a. whether I believe Hutchinson's account of what Cornish said to her about Caruso's involvement; and

[54] *FinkelsteinCA* at para 48

b. second, even if I do believe what Hutchinson says, should I accept the hearsay evidence as truth of what Cornish said?

[135] A careful analysis is warranted, given the potentially serious consequences for Caruso.

[136] As to the first issue, *i.e.*, whether I believe the portion of Hutchinson's testimony that implicates Caruso, I have found Hutchinson to be generally credible and reliable. I am troubled by the specific reference to Caruso, however. In particular, I heard no convincing explanation for why Cornish would implicate Caruso in the way that Hutchinson said he did, while at the same time not mentioning Sidders's involvement at all. One possible explanation, suggested by Caruso and Sidders in closing submissions, is that Hutchinson implicated Caruso in an effort to minimize the consequences she faced as a result of her own misconduct. I am not prepared to make that finding, but the absence of a better explanation leaves me skeptical about the reliability of her evidence on that point.

[137] Even if I were to believe her testimony about Caruso's involvement, it is hearsay. Caruso did not have the opportunity to cross-examine Cornish. While Hutchinson's hearsay evidence is admissible pursuant to s. 15 of the SPPA, I must determine what weight it deserves.

[138] In this instance, determining that weight is a difficult exercise that requires consideration of competing factors. On the one hand, I must ask whether there are sufficient indicia of reliability for me to accept that what Cornish told Hutchinson about Caruso's involvement was true. On the other hand, one could reasonably ask what reason Cornish might have to lie to Hutchinson about Caruso's involvement. In pondering that question, I start by noting that Cornish lied under oath to Staff. While that shows that Cornish was willing to lie, there is nothing surprising about that, given what was at stake and given Cornish's interest in protecting himself.

[139] I find it more significant that, if Hutchinson has accurately reported Cornish's statements to her, he lied to her too, in that he told her that he was not doing any trading himself when in fact he did, in three of the subject transactions.

[140] Perhaps Cornish lied to Hutchinson in a misguided effort to shield her from future liability. Perhaps he did so on the mistaken assumption that her lack of knowledge of his trading might weigh in his favour if the scheme were to come to light. But my use of "perhaps", and the speculation that the word invokes, reveal the potential frailties of hearsay evidence. While it is true, as I noted above in paragraph [59], that hearsay evidence is not necessarily less reliable than direct evidence, it often is less reliable. Hutchinson's evidence regarding Cornish's statements to her is an example. When the truth of a statement is in question, but the author of the statement is not present to testify, or to be cross-examined, about what motivated the author to make the statement, we are left to engage in impermissible speculation or to draw inferences.

[141] It is tempting to yield to the question asked above: Why would Cornish tell Hutchinson that Caruso was involved, if that weren't true? But that question leads back to another question asked above: If the scheme was as Staff says it was, why did Cornish tell Hutchinson about Caruso but not about Sidders? And if Cornish was trying to limit Hutchinson's knowledge or his own exposure, why

was he comfortable with her knowing that he was engaging in illegal tipping? Why did he feel the need to tell Hutchinson the identity of one of the people to whom he was passing information, as opposed to keeping that identity to himself? Perhaps there are good explanations, but none was suggested, and without Cornish present, there was no opportunity to explore those questions.

[142] Further, the circumstances in which Cornish made that statement to Hutchinson lack indicia of reliability. For example, the statement was neither self-incriminating nor made while he was in a state of shock or surprise.

[143] Hutchinson's incentive to implicate someone else in the hope she would face less serious consequences, as well as the unanswered questions, the lack of indicia of reliability, and the lack of compelling evidence of necessity, together cause me enough discomfort that I cannot rely on Hutchinson's hearsay evidence as to Caruso's involvement.

[144] I will therefore turn to consider other evidence cited by Staff.

[145] Staff notes that Cornish and Caruso were good friends during the Material Time, that they discussed securities almost daily, and that Caruso had approximately 25 years' experience in the securities industry. In my view, these facts are no more consistent with Caruso having been involved in the scheme than they are with his innocence. I do not rely on them to implicate Caruso.

[146] Staff also seeks to rely on the nature of the MNPI that Staff says Cornish conveyed to Caruso. There is no direct evidence of Cornish having conveyed MNPI, so any finding of fact I make in that regard would have to be an inference based on circumstantial evidence.

[147] Finally, Staff cites the characteristics of the various transactions, as listed in paragraph [121] above (*e.g.*, timing, riskiness). In my analysis below, I return to consider these factors in the context of each transaction.

### *(d) Sidders*

[148] As noted above, Hutchinson did not implicate Sidders. As far as she knew, Sidders was not involved in the scheme. Staff must therefore rely on circumstantial evidence to prove that Sidders was in a special relationship with the relevant issuers.

[149] Staff submits that Cornish and Sidders were good friends during the Material Time, that they discussed securities almost daily, and that Sidders had approximately 25 years' experience in the securities industry.[55] As I concluded with respect to Caruso, I do not view these facts as implicating Sidders. They are equally consistent with Sidders not having participated in the scheme.

[150] There is no evidence that Sidders knew the extent of the relationship between Cornish and Hutchinson (including whether Cornish and Hutchinson were still in touch with each other during the Material Time), or that he knew what Hutchinson did for a living.

[55] In support of this submission, Staff purports to rely in part on the Cornish Examination, although as explained above, Staff is precluded from doing so as against Sidders. I have not taken the Cornish Examination into account with respect to any allegations against Sidders. However, as noted earlier, other evidence in the record establishes Sidders's years of experience in the industry.

[151] As was the case for Caruso, Staff's allegations against Sidders will depend on the characteristics of any trades that he carried out, and any communications between Cornish and Sidders. I consider the appropriate circumstantial evidence below, in the context of each of the three transactions where Sidders is alleged to have engaged in illegal insider trading.

### 9. Patterns

[152] Staff submits that an overall view of this case, taking into account all of the transactions, supports the allegations that Cornish engaged in tipping and that Cornish, Sidders and Caruso engaged in insider trading. Staff cites the improbability that the respondents repeatedly traded in the transactions, all of which were directly connected to Hutchinson and Davies, by coincidence.

[153] As the Commission did in *Azeff*, I reject the submission that I should view the transactions through the lens of similar fact evidence.[56] There are sufficient dissimilarities between the transactions (*e.g.*, none of Cornish, Caruso or Sidders is alleged to have traded in the same subset of transactions as any other respondent, and the timing of Caruso's and Sidders's impugned trading is inconsistent), that to do so would result in a prejudicial effect that outweighs the probative value of that evidence.

[154] I conclude that I must adjudicate each transaction separately and consider each respondent's conduct independently.

### 10. Transfers of funds

[155] Staff cites evidence of various transfers of funds between Cornish, Caruso and Sidders, and/or entities allegedly controlled by them.

[156] Most of the subject transfers occurred well before the Material Time. The two largest of those were payments of $277,700 and $247,000, both from Caruso to Sidders, although Caruso testified that he believed he was returning those funds to Cornish but wired the funds as Cornish instructed him to. Other transfers were from Verdmont to Cornish's roommate, or from Cornish's roommate to a corporate account owned by Cornish. Staff notes that none of the payments received by Cornish's roommate or Cornish's corporate account exceeded the $10,000 reporting threshold prescribed by the Financial Transactions and Reports Analysis Centre of Canada (**FINTRAC**). However, I note that some transfers went to Cornish's employer, Brant Securities, in amounts that did exceed the FINTRAC reporting threshold. During Staff's investigation, Brant's President and Chief Financial Officer advised Staff that he understood that the payments were to cover Cornish's trading losses in his inventory account.

[157] There was no evidence of any connection between these pre-Material Time payments and the allegations in this proceeding, other than to establish pre-existing relationships among the respondents. Staff appeared to be trying to create an air of suspicion around the flow of funds, by speculating that the two large transfers noted above were to enable Cornish to trade, and by noting that many transfers were in amounts less than the FINTRAC reporting threshold. However, Staff did not clearly articulate what conclusions I ought to draw from these payments. I draw none.

[56] *Azeff* at paras 8-10

[158] Staff did cite two small transfers that occurred during the Material Time. I refer to them below in paragraph [401], in my analysis of the transaction involving Tim Hortons.

[159] I will now review each of the eight transactions in turn.

## C. Quadra

### 1. The transaction: KGHM acquires Quadra

[160] The first of the transactions is the acquisition by KGHM Polska Miedz SA (**KGHM**) of all of the outstanding shares of Quadra FNX Mining Ltd. (**Quadra**).

[161] Staff alleges that Cornish, Caruso and Sidders traded in shares of Quadra while in possession of MNPI that Hutchinson communicated to Cornish and that Cornish then communicated to Caruso and Sidders. Quadra was a reporting issuer in Ontario, with its shares trading on the TSX.

[162] Davies was retained by KGHM and opened its file on October 14, 2011. The file was given a code name.

[163] At 9:00am on December 6, 2011, KGHM publicly announced that it had agreed to acquire all of the outstanding shares of Quadra for $15 per share, which was a 41% premium to Quadra's share price at the time.

### 2. Hutchinson's knowledge about the transaction and communication of information to Cornish

[164] At the relevant time, Hutchinson worked for a Davies lawyer who helped draft the agreement between KGHM and Quadra. According to records from Davies, Hutchinson was added to the file on October 19, and she accessed relevant documents on numerous days between October 19 and 31.

[165] There is no evidence as to the date on which Hutchinson became aware that Quadra was the target. Hutchinson was unable to specify what documents she reviewed and when. However, she testified that she passed on "information about this deal" to Cornish,[57] including the names of the parties.[58]

[166] The Davies records show her accessing DM (the Davies document management system) in October but do not show when she reviewed other information, including emails. Despite these facts, I reject Caruso's and Sidders's submission that it would be impermissible speculation for me to draw inferences about her knowledge. I have accepted her evidence about her access to confidential information generally, about her general practice, about how she followed that practice with respect to the Quadra transaction, and about how she conveyed at least the parties' names to Cornish. It is logical and reasonable to infer that she knew the names of the parties, as well as the timing of the transaction as the announcement date approached. I draw that inference.

[167] Hutchinson testified that she received $2,000-$3,000 from Cornish for the information she conveyed, and that she understood that the funds came from Caruso.

[57] Hearing Transcript, Hutchinson (Re), February 21, 2019 at 22 lines 14-16
[58] Hearing Transcript, Hutchinson (Re), February 21, 2019 at 49 lines 11-13

### 3. Publicly available information

[168] There is no evidence that the essential elements of the Quadra transaction had been generally disclosed prior to December 5, 2011, the day before the public announcement of the transaction. In light of that, and in light of the increase in the closing price on December 6, I find that the material facts, and in particular the price at which the transaction was to proceed, had not been generally disclosed.

[169] However, the respondents submit that there was publicly available information that would support purchases of Quadra shares by someone who did not possess MNPI. The publicly available information included the following:

a. on September 9, 2010, KGHM's CEO announced that KGHM was in early discussions with a target listed company, with a view to acquiring a second copper deposit in Canada;

b. on September 14, 2011, Quadra issued a news release advising that it had completed a joint venture to develop a project in Chile;

c. on October 14, 2011, Quadra announced that it had had its strongest quarter since 2009, with its copper production having increased 9% over the previous quarter;

d. on October 17, 2011, Scotia Capital's *DailyEdge* equity research report highlighted Quadra as a "top pick" among base metal producers and proposed a $28 one-year target price (which contrasted with Quadra's then-current trading price of approximately $10); and

e. on November 14, 2011, TD Securities's *Action Notes*, which reported favourably on a visit to one of Quadra's mines (described as one of Quadra's most important assets), and which continued to recommend the purchase of Quadra shares.

### 4. Price trends during the relevant time

[170] The closing price of Quadra shares varied between $13.00 and $15.00 throughout June 2011 and the first half of July 2011. In the latter half of July, the price increased to $16.00 per share before dropping to $13.00 in mid-August.

[171] The closing price then ranged from $9.00 to $13.00 until the announcement on December 6, 2011. On that day, the shares closed at $15.88. The closing price remained above $15.00 throughout the rest of December.

### 5. Cornish

[172] According to trading records from Brant, Cornish began to buy shares of Quadra on November 2, 2011, less than three weeks after Davies opened its file. Cornish bought and sold Quadra shares between November 2, 2011, and December 6, 2011, and ultimately made a profit of approximately $114,000.

[173] As I concluded above in paragraph [168], none of the essential elements of the Quadra transaction was generally disclosed before the transaction was announced.

[174] Staff must therefore prove that at the time of Cornish's trades, he had knowledge of material facts about Quadra, and that he was in a special

relationship with Quadra. As I explained above in paragraph [130], I find that Cornish was in a special relationship with Quadra beginning at the time that he was in possession of MNPI. It remains to be determined when that occurred.

[175] As noted above, Hutchinson testified that she told Cornish the names of the parties. Contrary to Staff's submission, Hutchinson did not testify that she conveyed the transaction price and the announcement date; in fact, on cross-examination she agreed that she did not recall having given Cornish information other than the names of the parties.[59] Hutchinson does not remember when she spoke to Cornish about the transaction.

[176] I accept Hutchinson's uncontradicted evidence that at some time prior to the announcement of the transaction on December 6, 2011, she told Cornish the names of the parties. I find that this was a material fact with respect to Quadra, in that it would reasonably be expected to have a significant effect on the market price or value of Quadra shares. This conclusion is reinforced by the fact that the closing price of the shares increased by 41% on the day of the announcement.

[177] Based on Hutchinson's evidence alone, however, I cannot reach a conclusion as to when she communicated that fact to Cornish. If I am to find that Cornish knew that information when he purchased Quadra shares, I must reach that conclusion based on circumstantial evidence.

[178] Staff relies in part on telephone records that show frequent contact between Hutchinson and Cornish in the weeks leading up to the December 6 announcement. For the reasons discussed above, I do not find these records persuasive. My difficulty in reaching Staff's proposed conclusion (that the phone records suggest communication of MNPI) is compounded by Hutchinson's evidence, which I accept, that she and Cornish often saw each other in person, and that when she communicated deal-related information to him, she did so in their face-to-face meetings. As a result, I have no basis to conclude that the frequency of contact between them leading up to the impugned trades was uncharacteristically high and that it therefore indicates the communication of MNPI.

[179] The timing of Cornish's trading is inconclusive. He began buying shares on November 2, 2011. The following day, Sidders sent Cornish two emails, the first with a link to a *Bloomberg Business Week* article regarding KGHM. Sidders directed Cornish to the bottom of the article where there was a "direct indication" that KGHM would buy a Canadian company. The second, which followed a few minutes later, indicated in the subject line "here it is clearer", and described public statements made by KGHM's CEO on October 11 and 20, confirming that KGHM intended to make a bid for a Canadian mining company. That same day (November 3), Cornish forwarded this information to an email address (the owner of which was not identified at the hearing), musing as to which company might be the target, and listing four candidates, including Quadra.

[180] The fact that in his November 3 email Cornish wondered about the identity of KGHM's target is inconsistent with him having learned that information from Hutchinson before that time, unless he already knew the identity of the target but deliberately wrote the email that way in order to create the misleading

[59] Hearing Transcript, Hutchinson (Re), February 21, 2019 at 49 lines 14-17

impression that he did not know. That is a possibility, but it is a speculative leap I am not prepared to make.

[181] Further, Cornish traded in Quadra shares on sixteen days between November 3 and December 6. On fifteen of those sixteen days (including on December 1 and 5), Cornish both bought and sold Quadra shares. On some of those days (including on December 1 and 5), he sold more than he bought. On some of the days where he both bought and sold, he made a net profit; on other days he suffered a net loss. The only day during that period on which Cornish bought but did not sell shares was December 2. This pattern of trading does not suggest that he possessed MNPI well before the public announcement, nor is it necessarily inconsistent with his having had MNPI on a particular day.

[182] To summarize, neither the pattern of communication nor the timing of Cornish's trading clearly shows when Cornish came into possession of MNPI regarding this transaction. However, Hutchinson did testify that at some time before December 6, she told Cornish the identities of the parties involved. On that basis, I find that Cornish's December 5 trades of Quadra shares were effected while he knew from Hutchinson that Quadra was a party to the planned transaction, and while he was in a special relationship with Quadra. It therefore follows that those trades were in violation of s. 76(1) of the Act. I make that finding in full recognition of the fact that on December 5, Cornish sold more Quadra shares than he bought. In my view, it is more likely than not that Cornish knew the MNPI before December 5, but I have no clear basis to choose one specific date over another.

[183] As for Staff's allegation that Cornish tipped Caruso and Sidders regarding this transaction, there is no direct evidence that he did so. Any such conclusion would have to be based on circumstantial evidence. I return to this question following my analysis of whether Caruso and Sidders traded while in possession of MNPI.

### 6. Caruso

[184] On November 24, 2011, approximately two weeks before the public announcement, Caruso started buying Quadra shares in an account in his name at TD Waterhouse. By December 6, the date of the announcement, he had purchased 3800 shares. On December 6, he sold 3800 shares for a profit of approximately $23,600.

[185] Staff must prove that at the time of Caruso's trades, he had knowledge of material facts about Quadra, and that he was in a special relationship with Quadra.

[186] Staff alleges, and Caruso denies, that Cornish tipped Caruso regarding Quadra. There is no direct evidence that he did. Staff relies on:

a. Hutchinson's hearsay evidence that Cornish told her he would pass along information to Caruso;

b. Hutchinson's evidence that she received $2,000-$3,000 from Cornish for the information, and that she understood that the funds came from Caruso; and

c. circumstantial evidence regarding Caruso's trading.

[187] For the reasons set out beginning at paragraph [134] above, I give no weight to Hutchinson's evidence about Caruso's involvement. I will review the circumstantial evidence to determine whether Caruso was in possession of MNPI at the time of the trades, and whether Caruso was in a special relationship at the time. In this case, given the alleged tipping chain, one follows naturally from the other.

[188] Circumstantial evidence can be sufficient to establish improper insider trading, even in the absence of any direct evidence that such trading took place.[60] The circumstantial evidence on which Staff relies includes the fact that Caruso and Cornish communicated frequently by telephone between October and December 2011, and that in the evening of November 23, the day before Caruso started buying, there were several calls between them. Staff's submission in this regard fails to put these facts in context, however. The evidence also indicates that:

a. during September 2011, well before Davies opened its file, Caruso and Cornish called each other approximately 50 times;

b. between October 3 and 13, still before Davies had opened its file, Caruso and Cornish called each other approximately 12 times;

c. between October 19 and November 22 (*i.e.*, in the five weeks before the calls to which Staff refers), Caruso and Cornish called each other approximately 50 times, *i.e.*, with the same frequency as during September; and

d. in each month from January to April 2012, after the Quadra announcement, and before the next subject transaction (the relevant time period for which began in September 2012), Caruso and Cornish called each other approximately 20 to 30 times.

[189] Staff has not demonstrated that the calls on which it relies were uncharacteristic of the normal pattern between Cornish and Caruso. Indeed, as Stuart agreed on cross-examination, Cornish and Caruso communicated with each other extremely frequently during periods unconnected with any of the transactions. I therefore attach no weight to the November 23 calls, or to any others in close proximity to the Quadra announcement.

[190] As a separate point, Staff submits that Caruso is not a credible witness because he denied ever discussing Quadra or any of the other subject issuers with Cornish. Staff says that Caruso's denial flies in the face of Caruso's own testimony that he often spoke to Cornish about the capital markets generally and about specific issuers. As Caruso's counsel pointed out, however, Caruso did not rule out having communicated with Cornish about Quadra. Rather, Caruso's counsel asked him in examination-in-chief: "Do you have any recollection of discussing Quadra with Mr. Cornish at all during this period of time?". Caruso replied, "No." His testimony was therefore that he did not recall. Staff did not follow up on this point to clarify whether Caruso was ruling out the possibility. Caruso's answer is unsurprising, given that more than seven years elapsed between when he traded and when he testified.

[60] *Suman* at paras 305-309

[191] Regarding the size of the trades, Caruso testified that the trades were not significant in the context of his portfolio. Staff makes two submissions in response.

[192] First, Staff submits that despite this evidence, overall Caruso's trading was significant relative to his portfolio. The submission was unsupported by any clear evidence or analysis as to the size of Caruso's portfolio. I cannot accept it.

[193] Second, and arguably inconsistently with the first submission, Staff suggests that Caruso deliberately kept some trades to smaller amounts so as not to attract suspicion. Staff's submission that Caruso made smaller trades in less highly traded issuers and larger trades in issuers with greater volume was unsupported by evidence or analysis to that effect. I cannot accept it.

[194] In any event, while it may be true that some trades were small, in order to accede to Staff's submission that this was deliberate in order to avoid detection, I would have to engage in impermissible conjecture. The suggested inference is no more likely than an innocent explanation; accordingly, it is not an inference I am prepared to draw. This is particularly so in the absence of evidence that the trades were unusual for Caruso. Further, and as a general matter, this submission leads to a presumption of guilt for all respondents – small trades are suspicious because they are engineered to avoid detection, and large trades are suspicious because they suggest risk-taking that would occur only if the trader were in possession of MNPI. The latter proposition is well-established,[61] and I find it to be more persuasive. Accordingly, without any corroborating evidence, I do not accept Staff's position on this point with respect to Caruso's trades.

[195] Staff also notes that Caruso had never traded in Quadra before and that he first traded in Quadra only after Davies was retained. Caruso testified that he has no specific memory as to why he traded Quadra when he did. Caruso notes that he has a long and active history of trading in securities and he submits that the trades were consistent with his overall trading strategy. In particular, he testified that he:

a. looks at a company's public filings, value, cash flow and trading price;

b. relies on a 13- and a 26-week weighted moving average;

c. trades options, for which he bases his trading decisions on yield;

d. makes both short- and long-term trades; and

e. considers selling if a security increases in price by 10%.

[196] With respect to Quadra specifically, Caruso notes that the closing price declined in the weeks leading up to his first purchases. Quadra shares closed at $12.19 on October 27, declined to $10.95 by November 10, and declined further to $9.41 on November 23, the day before Caruso acquired shares for between $9.43 and $9.48. Caruso testified that it was consistent with his usual trading practice to purchase shares following a decline in price.

[197] Caruso purchased a further 2500 shares on November 29, at $10.12. He then sold 5500 shares the following day (six days before the December 6 announcement), at $10.80 to $10.88. He submits that these trades were

[61] *Azeff* at para 45

consistent with his practice of selling after an approximately 10% increase in price, and that they were inconsistent with his having been in possession of MNPI.

[198] Staff submits that Caruso developed these explanations after the fact, based on publicly available information. Staff suggests that I should follow the approach in *Suman*, in which the Commission rejected the respondents' assertion that their trading decisions had been innocent and had been based on a set of five specified criteria. The Commission held that the criteria had likely been developed after the fact.

[199] There are significant distinctions between *Suman* and the case against Caruso. In *Suman*, unlike in the present case, the Commission found that:

a. the trades were "highly uncharacteristic" and "risky", and were a "fundamental shift in the nature of [the respondents'] trading";

b. the respondents had never applied the five criteria before; and

c. the five criteria were merely rules of thumb, and did not justify the respondents' price target.[62]

[200] Staff did not lead evidence to show that Caruso had engaged in other trading that was inconsistent with his professed strategy. Staff has not persuaded me that it is more likely than not that Caruso developed his explanations after the fact. Further, in considering that Caruso had never traded in Quadra before, I attach much less significance to that factor than I would if he were not the long-time active trader that he was. (This same logic applies to all of the transactions in this case.)

[201] Finally, Staff cites Caruso's admission that he knew regulators surveyed the market for suspicious trading during the Material Time. Staff submits that this supports the conclusion that Caruso operated in a manner to avoid detection. I do not accept the submission. Given Caruso's experience in the industry, his admission is unsurprising; in fact, the opposite would be more surprising. His awareness is no more consistent with an attempt to avoid detection than it is inconsistent with that conclusion.

[202] By way of additional response, Caruso submits that there is no evidence that any material consideration flowed from him to Cornish. I agree, in that there is no documentary evidence to that effect and given that I do not rely on Hutchinson's hearsay evidence implicating Caruso (including her testimony that Cornish told her that the cash payments Cornish gave her came from Caruso). Having said that, I do not take the absence of evidence of consideration as being conclusive of the fact that there were no payments; rather, it is neutral to Staff's case.

[203] Caruso makes an additional submission that highlights a challenge for Staff in proving, based on circumstantial evidence, insider trading cases involving successive tippees. The challenge arises from the distinction between a prohibited communication of actual MNPI, and a mere recommendation or encouragement without communication of any MNPI. This distinction is reflected in the amendment, in 2016, of s. 76 of the Act, which now prohibits, in s. 76(3.1), a person with knowledge of MNPI from recommending or encouraging

[62] *Suman* at paras 179, 207

the purchase or sale of securities of the relevant issuer. While the person making the recommendation or doing the encouraging is caught by s. 76(3.1), the recipient of the recommendation or encouragement does not, without more, contravene the section by trading in securities of the issuer. This is so because the existence of a "special relationship" for a successive tippee depends on the communication of a material fact.

[204] As the Court of Appeal of Alberta noted in *Walton v Alberta (Securities Commission)*, "even if a certain trading pattern might be consistent with 'tipping', it might equally be consistent with merely having been 'encouraged'… [G]iven the serious consequences of a finding of culpability, clear and cogent evidence should be expected before any particular inference is drawn."[63]

[205] Caruso therefore submits that even if I believe that Cornish communicated with Caruso about Quadra in a way that prompted Caruso to buy Quadra shares, I have no basis to conclude that Cornish communicated MNPI, as opposed to merely recommending or encouraging Caruso's purchase of Quadra shares, if Cornish did even that.

[206] The circumstances of this case increase the challenge Staff faces. Given the lengthy friendship between Cornish and Caruso, and given their profession, it is entirely plausible that Caruso would trade based on a recommendation from Cornish that did not include MNPI. Such an outcome would be less plausible following a communication between two acquaintances, neither of whom had any connection to the securities industry.

[207] I conclude my review of the circumstantial evidence by recalling that I must consider the weight of all the evidence. Once I do so, I must decline Staff's invitation to infer that Caruso possessed MNPI when he traded. In my view, there are too many weaknesses in the evidence for me to find that it is clear, convincing and cogent. Those weaknesses are as follows:

a. an absence of evidence of uncharacteristic (*i.e.*, especially significant or risky) trading;

b. the existence of publicly available information that would support investment in Quadra shares;

c. a credible explanation for the trading, as being consistent with objective standards and Caruso's established practice;

d. an absence of direct evidence of Caruso's involvement in the scheme (other than Hutchinson's hearsay evidence, which I have declined to rely on to implicate Caruso);

e. insufficient evidence to establish when Hutchinson conveyed MNPI to Cornish;

f. an absence of evidence of uncharacteristic or suspiciously timely communication between Cornish and Caruso;

g. no basis to conclude that any impugned communication included MNPI, as opposed to a mere recommendation or encouragement;

[63] 2014 ABCA 273 (***Walton***) at para 29

h. transactions that were inconsistent with the possession of MNPI (unless they were done deliberately to give that appearance, a speculative leap I am not prepared to make);

i. an absence of evidence that Caruso attempted to conceal his trading (given that all his trading in Quadra was in his TD Waterhouse account in his name); and

j. no reliable evidence of compensation flowing from Caruso to Cornish or Hutchinson.

[208] Staff's allegations against Caruso regarding Quadra are dismissed. It follows that Staff's allegation against Cornish that he tipped Caruso regarding Quadra is dismissed.

### 7. Sidders

[209] Sidders's Verdmont account began to accumulate Quadra shares on November 8, 2011, four weeks before the public announcement. Sidders acknowledges that the transactions occurred in his personal Verdmont account, but he notes that there is no evidence as to who placed the orders and when they were placed. That is true, but in the absence of any indication that it was anyone other than Sidders, I draw the reasonable and logical inference that he, as the account owner, gave the instructions and placed the orders at some time close to the time of the trade. It was open to Sidders to adduce evidence to the contrary. He chose not to.

[210] On November 8, Sidders purchased 15,000 shares, but sold them the same day at a loss of approximately $0.23 per share. He then continued to purchase shares until December 2, although he sold 3000 shares on November 30. By December 2, he had accumulated approximately $500,000 worth of Quadra shares.

[211] Staff must prove that at the time of Sidders's trades, he had knowledge of material facts about Quadra, and that he was in a special relationship with Quadra.

[212] Staff alleges that Cornish tipped Sidders regarding Quadra. There is no direct evidence that he did. Further, and in contrast to the case against Caruso, Hutchinson did not implicate Sidders at any time. As noted above, she had no reason to believe that Sidders was involved in the scheme, and she was surprised to learn of Staff's allegations against Sidders.

[213] Any conclusion that Sidders was in possession of material facts about Quadra, or that he was in a special relationship with Quadra, will require an inference drawn based on communications between him and Cornish, and the nature of his trading.

[214] Staff points to telephone contact between Cornish and Sidders between October 14 and December 6, 2011. However, Staff does not submit that this contact was uncharacteristic of the usual pattern of communication between them. Cornish and Sidders communicated frequently in the months leading up to October 2011, and as Stuart agreed on cross-examination, the pattern of telephone contact between Cornish and Sidders did not change after Sidders sold his shares following the December 6 announcement. Accordingly, I place no weight on this evidence.

[215] As for Sidders's trades, Staff submits that these were risky for him given the value at stake when compared to his net worth. Based on the only relevant evidence adduced, Sidders's net worth was no higher than $350,000 in June 2011. It is possible that Sidders understated his net worth, but there is no evidence to that effect, and it is logical to infer that the information he provided is accurate. The documents are sufficient for me to draw an adverse inference from Sidders's choice not to dispute their contents.

[216] I therefore accept Staff's submission that Sidders's significant concentration in one issuer relative to his net worth suggests (but does not establish) that Sidders was in possession of MNPI. However, net worth is not the only relevant basis of measurement. I am unable to determine whether Sidders's Quadra trades represented a significant percentage of his overall portfolio,[64] or whether they were uncharacteristic for him, because the trading records entered into evidence were incomplete. They show the trades in Sidders's Sub-B account, but not in what are presumably one or more other sub-accounts. Staff was not able to advise how many other sub-accounts or principal accounts Sidders held at Verdmont.

[217] The significance of the incomplete trading records is further highlighted by the fact that while Staff adduced the Canaccord account document to establish Sidders's net worth, I received no evidence or analysis about any trading Sidders may have conducted in that account. Moreover, in the Canaccord account document, Sidders states that he is employed as an "Independent Trader" at an asset management firm in Bermuda. I received no evidence or analysis about Sidders's trading at that firm.

[218] Further, the records from Verdmont were redacted to show only certain trades. Stuart testified that Staff received the records in redacted form from staff at the British Columbia Securities Commission, but he was unable to explain why the redactions were made or who made them. It is tempting to conclude that the records were redacted to show only trades in Quadra, but that would require speculation on my part. Further, even if that is correct, it leaves me unable to get a sense of how the trades that are visible fit into Sidders's overall portfolio and trading patterns.

[219] For the same reasons, I must reject Staff's submission that its allegations against Sidders are supported by the fact that there is no evidence that Sidders had previously traded in Quadra. The limited evidence adduced is insufficient for me to make that finding.

[220] With respect to trading records generally, Staff submits, and I agree, that there is no obligation on Staff to conduct a world-wide search to ensure that it has collected all of an individual's account and trading records. However, the fact remains that the records produced here are obviously incomplete. In my view, they fall short of what would be necessary for me to draw inferences about the impugned trading, and they fall short of supporting the drawing of an adverse inference as a result of Sidders's decision not to testify about his trading. He ought not to be put to that burden on the basis of these records, and in the absence of a specific allegation, of which he had notice, alleging that these were his first trades in Quadra.

[64] *Azeff* at para 45

[221] Staff also maintains that by trading in an off-shore account, Sidders sought to conceal his trading. I do not accept this submission. Sidders traded Quadra shares in an account in his name, that he appeared to have had since 2005, well before the scheme is alleged to have begun.

[222] As Caruso did, Sidders points to the publicly available information regarding Quadra (see paragraph [169] above). In addition, Sidders refers to, among other things, the following correspondence between him and Cornish:

a. On October 17, Cornish sent Sidders the Scotia Capital report referred to in paragraph [169] above. The report named Quadra as a top pick and set a one-year target price well in excess of the then-current trading price. It is noteworthy that Cornish sent this to Sidders two days before Hutchinson was added to the Quadra file at Davies.

b. On November 3, Sidders sent Cornish the two e-mails, referred to in paragraph [179] above, that described the public statements made by KGHM's CEO confirming that KGHM intended to make a bid for a Canadian mining company.

c. On November 14, Cornish sent Sidders the TD Securities *Action Notes* referred to in paragraph [169] above.

[223] Further, Sidders submits that his sales of shares on November 8 and December 2 are inconsistent with his having had MNPI. I do not find the November 8 sale persuasive, given that it came at the beginning of his accumulation of Quadra shares. The December 2 sale does suggest that he was not in possession of MNPI.

[224] Finally, Sidders submits that Staff's entire case against him is unsustainable because Staff makes no allegations that he engaged in improper trading in five of the eight subject transactions, and Staff has offered no theory as to why Cornish would tip Sidders on only three of the transactions. I do not accept the full force of that submission, although I do consider the lack of congruity to be a relevant factor. Having said that, I do not give it significant weight.

[225] Taking all of the circumstantial evidence into account, I am not prepared to infer that Sidders traded while in possession of MNPI regarding Quadra. The evidence against Sidders in respect of Quadra is not clear, convincing and cogent, due to the following weaknesses:

a. the incompleteness of the trading records, which precludes an assessment of how Sidders's Quadra purchases compare to his overall portfolio or to his usual trading patterns;

b. the existence of publicly available information that would support investment in Quadra shares;

c. communication between Cornish and Sidders that included publicly available information regarding Quadra;

d. Hutchinson's surprise that Sidders is alleged to have participated in the scheme;

e. an absence of evidence of uncharacteristic or suspiciously timely communication between Cornish and Sidders;

f. no basis to conclude that any impugned communication included MNPI, as opposed to a mere recommendation or encouragement; and

g. no attempt by Sidders to conceal his trading.

[226] Staff's allegations against Sidders relating to Quadra are dismissed. It follows that Staff's allegation against Cornish that he tipped Sidders regarding Quadra is dismissed.

## D. Barrick/Newmont

### 1. The contemplated transaction: Barrick confidentially expresses interest in acquiring Newmont

[227] The second of the potential transactions is the proposed acquisition by Barrick Gold Corporation (**Barrick**) of all of the outstanding shares of Newmont Mining Corporation (**Newmont**).

[228] Staff alleges that Caruso and Sidders traded in securities of Newmont and Barrick while in possession of MNPI about both issuers. Staff alleges that Hutchinson communicated that MNPI to Cornish, who then relayed it to Caruso and Sidders. Both Barrick and Newmont were reporting issuers in Ontario, with their shares trading on the TSX.

[229] On September 21, 2012 Davies opened a file for this transaction, with Barrick as its client. The file was given a code name.

[230] On February 18, 2013, Barrick confidentially communicated to Newmont that Barrick was interested in acquiring Newmont. On March 15, 2013, Newmont confidentially declined Barrick's expression of interest.

### 2. Hutchinson's knowledge about the transaction and communication of information to Cornish

[231] Hutchinson was added to the file on January 11, 2013. She testified that there were many lawyers working on the transaction, and that she was able to see the emails of everyone involved. There is no evidence as to when Hutchinson became aware of any particular information relating to the proposed deal.

[232] Staff adduced records from Davies showing time spent on the file by lawyers and others, and documents created by Davies. Each of these documents is headed "Documents created on or before February 19, 2013". Staff offered no explanation as to the reason for that date limitation (being one day after the expression of interest) and why there is no evidence of any activity after February 19.

[233] In her testimony, Hutchinson initially stated that when she first began working for a particular Davies lawyer, she saw that lawyer's many binders relating to the transaction. However, on cross-examination, she conceded that she had not started to work for the lawyer until 2014, after the relevant time for this transaction. Records from Davies showing who billed time to the file up to February 18, 2013, do not show that lawyer's name.

[234] Hutchinson testified that she told Cornish the names of the parties involved, and that Davies was representing Barrick. However, when asked whether she remembered telling Cornish any other specific information, she said:

> Not specifically. I just remember because it was an on-and-off deal, and it was more a merger of equals, so I think I must have told him the price because I didn't think they did it because the premium was so low at that point because it was – it was all over the street.[65]

[235] On cross-examination, Hutchinson elaborated, agreeing that there were "many rumours around at the time about the transaction".[66]

[236] Hutchinson received no money for this transaction. She testified that she did not believe that Cornish or Caruso traded.

#### 3. Publicly available information

[237] There was no evidence led regarding analyst reports or similar discussions of these issuers or a potential transaction. However, Hutchinson's testimony that "it was all over the street" is noteworthy.

#### 4. Price trends during the relevant time

[238] Shares of Newmont closed at prices ranging between $44.10 and $45.28 between February 4 and 14, 2013. The closing price dropped steadily to $40.56 over the next three trading days, opening at $40.69 on the day of Caruso's first trade in Newmont securities, three days after Barrick communicated its interest to Newmont.

[239] From February 1 to 19, 2013, shares of Barrick closed at prices ranging between $31.72 and $32.84. The closing price dropped to below $31.00 on February 20 and 21, but then recovered during the following week. During March, the closing price ranged from $29.22 to $30.61.

#### 5. Cornish

[240] Staff does not allege that Cornish traded in securities of Barrick or Newmont while in possession of MNPI. As for Staff's allegation that Cornish tipped Caruso and Sidders, there is no direct evidence that he did so. I will address that allegation in my analysis below regarding Caruso's and Sidders's trading.

#### 6. Caruso

[241] On February 21, 2013, three days after Barrick delivered its expression of interest to Newmont, Caruso bought 50 Barrick put options and 50 Newmont call options. That same day, he bought 15,000 shares of Newmont, for a total cost of approximately $610,000. Over the ensuing three weeks, Caruso completed the following transactions:

a. on February 25, he sold 3,000 shares of Newmont and 25 of the Barrick put options;

b. on February 27, he bought 3,000 shares of Newmont and sold 25 of the Newmont call options;

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[65] Hearing Transcript, Hutchinson (Re), February 21, 2019 at 24 lines 7-11
[66] Hearing Transcript, Hutchinson (Re), February 21, 2019 at 51 lines 13-15

c. on February 28, he bought 25 Barrick put options and then later sold 50 Barrick put options; and

d. on March 18, he sold the 15,000 Newmont shares.

[242] Staff provided no analysis as to the profit that Caruso made, or the loss he suffered, on these trades.

[243] Staff must prove that at the time of Caruso's trades, he had knowledge of material facts about Barrick and Newmont, and that he was in a special relationship with those issuers.

[244] Staff alleges, and Caruso denies, that Cornish tipped Caruso. There is no direct evidence that he did. Staff relies on:

a. Hutchinson's hearsay evidence that Cornish told her he would pass along information to Caruso; and

b. circumstantial evidence regarding Caruso's trading.

[245] As I explained above with respect to Quadra, I give no weight to Hutchinson's evidence about Caruso's involvement. I turn to a review of the circumstantial evidence.

[246] Staff relies on phone contact between Hutchinson and Cornish, and between Cornish and Caruso, from January 11 to March 15, 2013. However, Staff did not provide any analysis of this phone contact to suggest that it was uncharacteristically frequent.

[247] While Staff notes that Caruso called Cornish on the morning of Caruso's first trades (February 21, 2013), I cannot conclude that the call was suspicious. First, it was from Caruso to Cornish rather than the other way around; that fact does not exclude the possibility that Cornish was tipping Caruso, but neither does it suggest that he was. Second, as discussed above, the two communicated so frequently that it is not noteworthy that they communicated that morning.

[248] Once again, Staff contends that Caruso should not be believed, because he implausibly denies having discussed Barrick with Cornish. In fact, his answer to that question was "Not to my recollection." If Staff wanted to rely on a categorical denial, Staff needed to follow up in some way, for example by asking Caruso on cross-examination whether Caruso was ruling out the possibility.

[249] Staff submits that Caruso's decision to buy Newmont call options and Barrick put options is consistent with his having known that Barrick intended to acquire Newmont. This is so, according to Staff, because following announcement of the transaction, the share price of Newmont (the target) would rise, and the share price of Barrick (the acquiror) would drop. While I accept that generally, one would expect the price of a prospective target's shares to rise on news (or rumour) that the target is in play, I do not accept, without analysis in support, that the price of an acquiror's shares would reliably be expected to decline in such circumstances.

[250] In any event, Caruso denies that he possessed any MNPI, and he submits that there were good reasons for his trades:

a. on February 14, 2013, one week before his first trades, an article in the financial press referred to Barrick taking a US$4.2 billion write-down relating to disappointing results at one of its mines;

b. Barrick's share price hit a high of $33.38 on February 14, but closed at $30.81 on February 20, the day before Caruso's first trades; and

c. on February 21, Newmont issued press releases that could reasonably be seen to have contained positive news.

[251] Caruso testified that he had watched Barrick and Newmont for some time, and that his trades were consistent with his usual trading strategy. His evidence was neither contradicted nor seriously challenged on cross-examination. I have no reason to disbelieve it. Further, Caruso's trades were not unidirectional with respect to either issuer. In other words, there is no pattern to his trading that suggests convincingly that he possessed MNPI.

[252] As I explained with respect to the Quadra transaction, I do not find it persuasive that there is no evidence that Caruso had previously traded in securities of Barrick or Newmont.

[253] Once again, I do not find that the evidence is clear, convincing and cogent. In weighing all the evidence, I note the following weaknesses:

a. Hutchinson's apparent confusion about for whom she worked in connection with this transaction, and when and how she first learned of information regarding the transaction;

b. the absence of any evidence as to when Hutchinson learned that Newmont was the other party to the transaction;

c. Hutchinson's inability to recall whether she told Cornish anything other than the names of the parties;

d. Hutchinson's testimony that "it was all over the street", which suggests that any information that Cornish might have passed along to Caruso and/or Sidders would already be reflected in the prices of the securities, and therefore would not be MNPI;

e. an absence of evidence of uncharacteristic (*i.e.*, especially significant or risky) trading;

f. a credible explanation for the trading, as being consistent with objective standards and Caruso's established practice;

g. no evidence or explanation as to any activities after February 18, 2013, involving Hutchinson or anyone else at Davies, leaving an unanswered question as to what MNPI would have guided Caruso's trading after his initial trades;

h. an absence of direct evidence of Caruso's involvement in the scheme (other than Hutchinson's hearsay evidence, which I have declined to rely on to implicate Caruso);

i. an absence of evidence of uncharacteristic or suspiciously timely communication between Cornish and Caruso;

j. no basis to conclude that any impugned communication included MNPI, as opposed to a mere recommendation or encouragement;

k. transactions that were inconsistent with the possession of MNPI (unless they were done deliberately to have that effect, a speculative leap I am not prepared to make); and

l. no reliable evidence of compensation flowing from Caruso to Cornish or Hutchinson.

[254] I therefore find that Staff has not established that Caruso was in possession of MNPI at the time of his trades in securities of Barrick or Newmont. Staff's allegations against Caruso regarding this transaction are dismissed.

[255] It follows that Staff's allegation against Cornish that he tipped Caruso regarding Barrick or Newmont is dismissed.

### 7. Sidders

#### *(a) Did Sidders conduct any trades at all in shares of Newmont (*i.e.*, did Staff establish that Sidders controlled the Rhinoceros Capital account)?*

[256] In the Statement of Allegations, Staff alleges that Sidders carried out his trading in two accounts at Verdmont – one account in Sidders's own name (through which Sidders traded in Quadra shares), and one account in the name of "his Panama-incorporated company". That company is not identified in the Statement of Allegations.

[257] At the hearing, Staff adduced evidence with respect to an account at Verdmont in the name of Rhinoceros Capital S.A. (**Rhinoceros Capital**). The Rhinoceros Capital account purchased 7000 shares of Newmont between February 20 and 22, 2013, and sold 2500 shares of Newmont on March 7, 2013, at a loss. There is no evidence as to when, if ever, Rhinoceros Capital sold the remaining 4500 shares.

[258] Staff submits that Sidders was the owner of the Rhinoceros Capital account and that he directed the trading in that account while in possession of MNPI obtained from Cornish. Sidders submits that Staff has failed to prove these allegations.

[259] Staff relies on account documentation for the Rhinoceros Capital account, which shows that Rhinoceros Capital was incorporated on February 1, 2013, and that the beneficial owner of the account was Fairpoint Capital Foundation. At the time of the impugned trades, Sidders's address was 9 Fairpoint Gardens, Pembroke, Bermuda.

[260] Staff also relies on an affidavit that Sidders swore in February 2015 (two years after the impugned trading), in a United States Securities and Exchange Commission (**SEC**) proceeding, in which Sidders sought to have the SEC release the assets of "Rhinoceros Inc.". In closing submissions, Staff suggested that Rhinoceros Inc. and Rhinoceros Capital S.A. are the same corporation, in that the suffixes "Inc." and "S.A." are equivalent, depending on whether the relevant jurisdiction operates under common law or civil law. While there may be some truth to that in substance, I am not prepared to accept, without more, that in

Panama, "Inc." and "S.A." are mere translations of each other with respect to the same company. Further, Staff's suggestion does not explain why the word "Capital" is present in Rhinoceros Capital S.A. but not in Rhinoceros Inc.

[261] In addition, Staff relies on communications and trading in connection with the Aurora Oil & Gas Limited (**Aurora**) transaction, which I discuss beginning at paragraph [288] below. For the purposes of the Barrick/Newmont transaction, and particularly Staff's allegation that Sidders directed trading in the Rhinoceros Capital account, I consider the Aurora-related communications and trades here. The evidence establishes that approximately one hour before Rhinoceros Capital purchased 5,000 shares of Aurora, Cornish forwarded Sidders emails from two brokerage firms. The emails included analyses of a number of companies, including Aurora, and classified Aurora's stock as "buy" and "outperform".

[262] Finally, Staff relies on an undated Verdmont Due Diligence Form. The first page of that document refers to Sidders, and under the heading "Advisor's Comments", it says: "related to his individual account (that has been closed), Fairpoint Capital Foundation".

[263] Sidders objected to this form being made part of the record, due to the circumstances surrounding its introduction:

a. prior to the hearing, the parties assembled a joint hearing brief;

b. by using document ID numbers, Caruso and Sidders identified some documents, disclosed to them by Staff early in the proceeding, that Caruso and Sidders wished to be included in the joint hearing brief;

c. Sidders's counsel identified two sequential ID numbers that were not actual documents; rather they were two pages from a multi-page document that included the Verdmont form as well;

d. Sidders's counsel did not explicitly state that it was only the two pages that should be included;

e. Staff inserted the full multi-page document into the hearing brief without verifying Sidders's counsel's intention;

f. the hearing brief was marked as an exhibit on consent, without Sidders's counsel adverting to the fact that the full document had been included; and

g. it was not until oral closing submissions that the misunderstanding came to light.

[264] The parties agree, and I accept, that the misunderstanding arose through pure inadvertence. I sought submissions from the parties and decided to re-open the evidentiary portion of the hearing to allow Stuart, Staff's investigator witness, to testify about the Verdmont form. Sidders's counsel had the opportunity to cross-examine Stuart.

[265] I overruled Sidders's objection and admitted the Verdmont form. In my view, while Staff ought to have been more diligent in confirming with Sidders's counsel the instructions to insert two pages, Sidders's counsel ought to have been more diligent in reviewing the exhibit entered on consent. Any prejudice that might be occasioned to Sidders was, in my view, overcome by his ability to cross-examine Stuart and to lead evidence in response, if necessary.

[266] Sidders submits in the alternative that I should place no weight on the form, since it is neither dated nor signed. Stuart agreed on cross-examination that he did not know who completed the form or when, and that he did not know who put together the package of documents containing the form. These are good reasons to treat the form with caution, but in my view, it is appropriate to consider the form in light of the other evidence on this issue.

[267] While I reject (for the reasons set out above) Staff's suggestion that Rhinoceros Inc. and Rhinoceros Capital are the same corporation, the common use of "Rhinoceros" suggests a connection between the two entities. If that were the only evidence, I would find it insufficient to conclude that Sidders was behind Rhinoceros Capital and that he directed trading in that account.

[268] However, I consider that evidence along with: (i) the fact that "Fairpoint" is part of Sidders's address and part of the name of the beneficial owner of the Rhinoceros Capital account; (ii) the fact that the Verdmont due diligence form describes Fairpoint Capital Foundation as "his [Sidders's] personal account"; and (iii) the timing of the communications and trading relating to the Aurora transaction. Taking all of that evidence together, I find that Staff has made out a *prima facie* case that Sidders owned and directed the trading in the Rhinoceros Capital account. In other words, that evidence is sufficient for me to draw an adverse inference against Sidders as a result of his failure to testify to the contrary. I draw that adverse inference, and I find that Sidders owned and directed the trading in the Rhinoceros Capital account from its inception.

[269] I do so despite Sidders's submissions that:

a. Fairpoint Capital Foundation is identified as the beneficial owner of the Rhinoceros Capital account, but not as an authorized signatory; and

b. there is no evidence of who controlled Fairpoint Capital Foundation, or of who placed the orders to trade.

[270] In my view, these submissions are speculative, and the inference I have drawn above is the most likely one. If there were some truth to Sidders's submissions to the contrary, it was open to him to testify to that effect. He did not.

### *(b) Did Sidders acquire the Newmont shares while he was in possession of MNPI?*

[271] Staff must prove that at the time of the Rhinoceros Capital trades, Sidders had knowledge of MNPI regarding Newmont. Staff alleges that Cornish tipped Sidders. There is no direct evidence that he did. Again, any conclusion that Sidders possessed MNPI depends on circumstantial evidence regarding communications between Cornish and Sidders, and regarding Sidders's trading.

[272] On February 19, 2013, the day before the Rhinoceros Capital account began to acquire Newmont shares, there were 20 text messages from Sidders to Cornish.[67] Staff provided no analysis as to whether this was uncharacteristic. I give that evidence no weight.

[67] In written submissions, Staff stated that there were 34 text messages exchanged between Cornish and Sidders that day. Staff cited only Sidders's phone records in support. My analysis of those records shows 20 text messages from Sidders to Cornish and no information about incoming text messages to Sidders.

[273] Staff cites the fact that the cost of the Newmont shares that Sidders acquired was approximately $285,000. As was the case with Quadra, this fact by itself tends to indicate that Sidders possessed MNPI, given that his net worth approximately nine months earlier appears to have been $50,000. However, I am unable to reach that conclusion in the face of Hutchinson's evidence that "it was all over the street".

[274] Staff also relied on the absence of evidence that Sidders had previously traded in Newmont shares. While the Rhinoceros Capital records are not redacted in the same way that Sidders's personal account records were, the incompleteness of the records precludes the suggested conclusion. In addition, and as was the case with the Quadra transaction, there is an insufficient basis for me to draw an adverse inference on this point.

[275] In conclusion, I am not prepared to infer that Sidders traded in shares of Newmont while in possession of MNPI. The evidence against him is not clear, convincing and cogent, due to:

a. Hutchinson's apparent confusion about for whom she worked in connection with this transaction, and when and how she first learned of information regarding the transaction;

b. the absence of any evidence as to when Hutchinson learned that Newmont was the other party to the transaction;

c. Hutchinson's inability to recall whether she told Cornish anything other than the names of the parties – her assertion that she "must have" told him the price of the contemplated transaction was not convincing;

d. Hutchinson's testimony that "it was all over the street", which suggests that any information that Cornish might have passed along to Caruso and/or Sidders would already be reflected in the prices of the securities, and therefore would not be MNPI;

e. no evidence or explanation as to any activities after February 18, 2013, involving Hutchinson or anyone else at Davies, leaving an unanswered question as to what MNPI would have guided Caruso's trading after his initial trades;

f. the fact that the only evidence of a sale by Rhinoceros Capital of Newmont shares resulted in a loss;

g. an absence of evidence of uncharacteristic or suspiciously timely communication between Cornish and Sidders;

h. no reliable evidence of compensation flowing from Sidders to Cornish or Hutchinson;

i. no basis to conclude that any impugned communication included MNPI, as opposed to a mere recommendation or encouragement;

j. the incompleteness of Sidders's trading records, which precludes an assessment of how his purchases compare to his overall portfolio or to his usual trading patterns; and

k. Hutchinson's surprise that Sidders is alleged to have participated in the scheme.

[276] Staff's allegations against Sidders with respect to Newmont are dismissed. It follows that Staff's allegation against Cornish that he tipped Sidders regarding Newmont is dismissed.

## E. Rainy River

### 1. The transaction: New Gold acquires Rainy River

[277] The third of the transactions is the acquisition by New Gold Inc. (**New Gold**) of all of the outstanding shares of Rainy River Resources Ltd. (**Rainy River**).

[278] Staff alleges that Cornish traded in shares of Rainy River while in possession of MNPI that Hutchinson communicated to him. Rainy River was a reporting issuer in Ontario. Its shares traded on the TSX.

[279] All of the dates discussed below fall within the year 2013.

[280] Davies opened a file for this transaction, with Rainy River as its client, on May 14. Davies appears to have had a limited role, and another law firm was Rainy River's primary counsel.

[281] On May 31, New Gold acquired Rainy River.

### 2. Hutchinson's knowledge about the transaction and communication of information to Cornish

[282] Hutchinson accessed documents relating to this transaction on May 23. She remembered this deal but did not remember anything specific about it. She did not work on the transaction very much, and while she could not remember for certain that she told Cornish that Davies acted for Rainy River, she said she was "sure [she] must have."[68]

[283] Hutchinson does not remember receiving any money for this transaction.

### 3. Cornish

[284] On May 30, Cornish purchased and sold 27,000 Rainy River shares in Brant's institutional account for a loss of $1,173.

[285] Staff relies on the fact that Hutchinson and Cornish had phone contact between May 23 and May 31. Staff did not provide any analysis to demonstrate that this contact was uncharacteristic or particularly timely.

[286] I find that Staff has not established that Cornish was in possession of MNPI at the time of his trades in shares of Rainy River. I reach this conclusion because:

a. there is no evidence about what Hutchinson knew about this transaction and when she knew it;

b. Hutchinson has no recollection of telling Cornish even that Davies acted for Rainy River;

c. there is no evidence that Cornish's trades were uncharacteristic, especially significant, or particularly risky;

[68] Hearing Transcript, Hutchinson (Re), February 21, 2019 at 25 lines 8-12

d. Cornish's sales of the shares the same day he purchased them, and the loss he experienced on the sales, do not suggest that he was in possession of MNPI at the time;

e. there is no evidence of uncharacteristic or particularly timely communication between Hutchinson and Cornish; and

f. Cornish did not attempt to conceal his trading.

[287] Staff's allegations against Cornish regarding Rainy River are dismissed.

## F. Aurora

### 1. The transaction: Baytex acquires Aurora

[288] The fourth transaction is the acquisition by Baytex Energy Corp. (**Baytex**) of all of the outstanding shares of Aurora Oil & Gas Limited (**Aurora**).

[289] Staff alleges that Caruso and Sidders traded in securities of Aurora while in possession of MNPI. Staff alleges that Hutchinson communicated that MNPI to Cornish, who then relayed it to Caruso and Sidders. Aurora was a reporting issuer in Ontario with its shares trading on the TSX.

[290] Davies opened a file for this transaction, with Aurora as its client, on November 18, 2013.

[291] On February 6, 2014, after the market close, Baytex announced that it would acquire all of Aurora's outstanding shares.

### 2. Hutchinson's knowledge about the transaction and communication of information to Cornish

[292] Caruso points out that in Hutchinson's settlement agreement, she made no admissions regarding this transaction. I give that fact no weight. A settlement agreement is a product of negotiation, and there may be many reasons the parties to the agreement choose to include or exclude certain matters.

[293] Records from Davies indicate that Hutchinson accessed a document on this file on November 18, 2013, the day that Davies was retained. The Davies records do not disclose any other access by Hutchinson to documents.

[294] During her investigation interviews, Hutchinson told Staff that she did not remember this transaction. At the hearing, she testified that she recalled the names of the parties but had no other recollection regarding the transaction. She had no memory of advising Cornish of any information regarding the deal. She does not recall receiving any money.

### 3. Publicly available information

[295] There is no evidence that information regarding the Aurora transaction had been generally disclosed prior to the public announcement.

[296] On January 2, 2014, Aurora issued a press release that forecast an almost 50% increase in total 2014 production. On January 9, 2014, an industry publication contained an article entitled "Are Beach Energy and Aurora Oil and Gas set to soar?".

[297] On January 22, 2014, two brokerage firms issued positive commentary regarding Aurora, with target prices more than 50% greater than its trading price at the time.

### 4. Price trends during the relevant time

[298] In the first half of January 2014, Aurora shares closed at prices ranging from $2.73 to $2.97 per share. The price experienced a relatively steady decline through that period.

[299] From mid-January 2014 to February 6, 2014, the closing price ranged from $2.62 to $2.80 per share, and was at the lower end of that range for the week leading up to the February 6 announcement.

[300] On February 7, 2014, after the announcement, the shares closed at $4.06.

### 5. Cornish

[301] Staff does not allege that Cornish traded in securities of Aurora while in possession of MNPI. As for Staff's allegation that Cornish tipped Caruso and Sidders, there is no direct evidence that he did so. I will address that allegation in my analysis below regarding Caruso's and Sidders's trading.

### 6. Caruso

[302] On January 27, 2014, Caruso purchased 10,000 shares of Aurora in his TD Waterhouse account, for a total cost of approximately $26,800. On February 7, 2014, he sold those shares for a profit of approximately $13,800.

[303] Staff must provide that at the time of Caruso's trades, he had knowledge of material facts about Aurora, and that he was in a special relationship with Aurora.

[304] Staff alleges, and Caruso denies, that Cornish tipped Caruso about the transaction. As with the other transactions, there is no direct evidence that he did, and I disregard Hutchinson's hearsay evidence as to Caruso's involvement.

[305] As part of the circumstantial evidence on which Staff relies, Staff submits that between November 18, 2013, and February 7, 2014, there was frequent phone contact between Hutchinson and Cornish. Staff did not provide any analysis to demonstrate that this contact was uncharacteristic or particularly timely. I attach no weight to the evidence of communication between them.

[306] Staff submits that Caruso implausibly denied discussing Aurora with Cornish. Caruso's answer regarding this transaction was closer to a denial than was the case with most of the other transactions, but again it was qualified: "Not to my knowledge, no." Even if I were to take that answer as a denial, I am not persuaded that Caruso's general answer about discussing specific securities with Cornish means that Caruso was saying that he discussed with Cornish every security he traded. I cannot accede to Staff's submission that Caruso gave inconsistent evidence in this regard.

[307] Caruso testified that his purchase of Aurora shares followed a steady decline of the share price and that the purchase was consistent with his trading strategy. Staff did not cross-examine Caruso on this point, and identified no specific reason for me to disbelieve Caruso's testimony. I accept it.

[308] I find that the evidence against Caruso is not clear, convincing or cogent, for the following reasons in particular:

a. Hutchinson having advised Staff in her investigation interview that she did not remember the transaction;

b. Hutchinson's evidence at the hearing that she did not remember telling Cornish anything about the transaction, and that she did not remember receiving any money for the transaction;

c. an absence of evidence of uncharacteristic (*i.e.*, especially significant or risky) trading by Caruso;

d. a credible explanation for the trading, as being consistent with objective standards and Caruso's established practice;

e. an absence of direct evidence of Caruso's involvement in the scheme (other than Hutchinson's hearsay evidence, which I have declined to rely on to implicate Caruso);

f. an absence of evidence of uncharacteristic or suspiciously timely communication between Cornish and Caruso;

g. no basis to conclude that any impugned communication included MNPI, as opposed to a mere recommendation or encouragement;

h. an absence of evidence that Caruso attempted to conceal his trading; and

i. no evidence of compensation flowing from Caruso to Cornish or Hutchinson.

[309] I therefore find that Staff has not established that Caruso was in possession of MNPI at the time of his Aurora trades. Staff's allegations against Caruso regarding Aurora are dismissed.

[310] It follows that Staff's allegation against Cornish that he tipped Caruso regarding Aurora is dismissed.

### 7. Sidders

[311] The Rhinoceros Capital account at Verdmont purchased a total of 10,000 shares of Aurora on January 22 and January 27, 2014. On February 7, 2014, after Baytex announced the acquisition of Aurora, the Rhinoceros Capital account sold the Aurora shares for a profit of approximately $12,700.

[312] As I explained above with respect to the Barrick/Newmont transaction, I find that Sidders owned and controlled the Rhinoceros Capital account at the relevant time and that he directed the trading in that account.

[313] Staff must prove that at the time of Sidders's trades in the Rhinoceros Capital account, he had knowledge of material facts about Aurora, and that he was in a special relationship with Aurora.

[314] Staff alleges that Cornish tipped Sidders about the transaction. There is no direct evidence that he did. Staff relies on circumstantial evidence.

[315] As Staff points out, there appears to have been telephone contact between Cornish and Sidders on January 20, 2014, two days before Rhinoceros Capital's first purchase of Aurora shares. That call was seven seconds long. My review of

Cornish's phone records suggests that there were also three calls between Cornish and Sidders on December 26, 2013, one on January 3, 2014, and one on each of February 18 and 24, 2014. Taking into account the length of the January 20 call and the distribution of the other calls in December and February, I do not find the evidence sufficiently compelling to draw any conclusions about the content (if any) of the January 20 call.

[316] Sidders notes that at 10:30am on January 22, Cornish sent him two emails attaching the analyst coverage referred to in paragraph [297] above. Sidders asserts that this email preceded the Rhinoceros Capital trade that day, although I was not directed to any evidence in support of that assertion. Nonetheless, it is at least as likely that the assertion is correct than it is incorrect. Sidders also notes that the emails preceded the seven-second call between Cornish and Sidders referred to above.

[317] I am not prepared to find that the evidence against Sidders is clear, convincing and cogent, for the following reasons in particular:

a. Hutchinson advised Staff in her investigation interview that she did not remember the transaction;

b. Hutchinson's evidence at the hearing that she did not remember telling Cornish anything about the transaction, and that she did not remember receiving any money for the transaction;

c. the existence of positive public commentary about Aurora shares;

d. Cornish's emails of January 22, which included positive analyst coverage regarding Aurora, and which appear to have preceded Sidders's first trade;

e. an absence of evidence of uncharacteristic (*i.e.*, especially significant or risky) trading by Sidders;

f. an absence of evidence of uncharacteristic or suspiciously timely communication between Cornish and Sidders;

g. no basis to conclude that any impugned communication included MNPI, as opposed to a mere recommendation or encouragement;

h. no evidence of compensation flowing from Sidders to Cornish or Hutchinson; and

i. Hutchinson's surprise that Sidders is alleged to have participated in the scheme.

[318] Staff's allegations against Sidders with respect to Aurora are dismissed. It follows that Staff's allegation against Cornish that he tipped Sidders regarding Aurora is dismissed.

## G. Osisko

### 1. The transaction: Agnico and Yamana acquire Osisko

[319] The fifth transaction is the acquisition of Osisko Mining Corporation (**Osisko**) by Agnico Eagle Mines Limited (**Agnico**) and Yamana Gold Inc. (**Yamana**).

[320] Staff alleges that Caruso traded in shares of Osisko while in possession of MNPI that Hutchinson communicated to Cornish and that Cornish then communicated

to Caruso. Osisko was a reporting issuer in Ontario, with its shares trading on the TSX.

[321] All of the relevant dates discussed below fall within the year 2014.

[322] On January 13, Goldcorp Inc. made a $2.6 billion unsolicited take-over bid for Osisko. Following that, Agnico began to explore a potential bid for Osisko.

[323] Agnico retained Davies with respect to the potential bid. The evidence was unclear as to precisely when Davies opened its file, although it appears that it was in mid-January, and nothing turns on the particular date.

[324] Through the rest of January, and through February, Agnico had discussions with its advisers and with Osisko about a potential transaction. In March and April, Agnico and Newmont (one of the issuers in the Barrick/Newmont transaction referred to above) discussed a possible alternative transaction involving Osisko.

[325] On April 2, Osisko issued a press release in which it announced that Osisko and Yamana had entered into an agreement pursuant to which Yamana would acquire a 50% interest in Osisko's mining and exploration assets.

[326] Ultimately, on April 14, Agnico and Yamana confidentially submitted a joint proposal to acquire Osisko. Agnico's and Yamana's acquisition of Osisko was announced publicly on April 16.

### 2. Hutchinson's knowledge about the transaction and communication of information to Cornish

[327] Hutchinson testified that she remembered this transaction, and that it kept changing, including as to the number of parties involved. She stated that she was not working for a lawyer involved in the deal, but that she had access to the emails of a lawyer who was involved.

[328] Records from Davies establish that on January 15, 16 and 20, Hutchinson sent and received emails with attachments regarding this transaction, including an overview of Goldcorp Inc.'s offer and a document referred to as a confidentiality agreement regarding Osisko. According to information obtained from Agnico by Staff, Agnico entered into a confidentiality agreement with Osisko on January 17.

[329] Stuart testified about a letter sent to Staff from Agnico's General Counsel during Staff's investigation, in response to Staff's request for information regarding, among other things, individuals who may have had knowledge, prior to the April 16 announcement, of Agnico's interest in pursuing an acquisition of Osisko. The letter lists Hutchinson among more than 100 individuals, and states that based on information received from Davies, Hutchinson would first have been aware on April 14.

[330] Caruso's counsel objected to admission of the letter from Agnico, on the ground that it was hearsay evidence. Indeed, it is at least double hearsay with respect to the time that Hutchinson became aware of the transaction, in that it is Stuart testifying about a letter from Agnico that purports to advise what Davies told Agnico about Hutchinson's knowledge. There is further reason to be cautious about the assertion, in that the Agnico letter explicitly states certain assumptions that were made about when individuals became aware. Stuart was, of course, not in a position to shed light on whether those assumptions were valid with respect to Hutchinson.

[331] Even without the Agnico letter's statement about Hutchinson's knowledge, but based on the undisputed sequence of events in the Agnico transaction, I conclude that Hutchinson was aware of Agnico's interest in Osisko by no later than April 14.

[332] Hutchinson testified that she remembers telling Cornish about the transaction, including that Davies represented Agnico, the change in structure of the deal, and the date (when she became aware of it). She stated that Cornish gave her approximately $2,000-$3,000 for information regarding this transaction. Hutchinson understood from Cornish that this money came from Caruso.

#### 3. Publicly available information

[333] There is no evidence that information regarding this transaction was generally disclosed before the public announcement on April 16.

#### 4. Price trends during the relevant time

[334] Shares of Osisko closed at $7.35 on April 2 (the day of the Osisko/Yamana partnership announcement, and two weeks before the final announcement), and closed at prices ranging from $7.22 to $7.63 over the next eleven days, hitting that peak on April 14. On April 15, the day before the announcement, the closing price dropped from $7.63 to $7.43. On April 16, after the announcement, the closing price jumped to $7.94.

#### 5. Cornish

[335] Staff does not allege that Cornish traded in securities of any issuers connected with this transaction, while he was in possession of MNPI. As for Staff's allegation that Cornish tipped Caruso, there is no direct evidence that he did so. I will address that allegation in my analysis below regarding Caruso's trading.

#### 6. Caruso

[336] On April 1, Caruso bought 11,000 shares of Osisko in his personal TD Waterhouse account. He sold the shares the next day, for an average profit of $0.23 per share.

[337] On April 15, Caruso bought 30,000 shares of Osisko in his personal TD Waterhouse account, and 50,000 shares of Osisko in an account he held at Barrington Investments Ltd. in the name of his corporation, Q Capital Investments Ltd. (**Q Capital**). The purchases were for $7.49 to $7.50 per share, prices below the closing price on each of the five previous trading days.

[338] The following day, after the announcement of this transaction, Caruso sold his shares in both accounts, for a total profit of approximately $27,200.

[339] Staff must prove that at the time of Caruso's trades, he had knowledge of material facts about Osisko, and that he was in a special relationship with Osisko.

[340] Staff alleges, and Caruso denies, that Cornish tipped Caruso regarding Osisko. As with the other transactions, there is no direct evidence that he did, and I disregard Hutchinson's hearsay evidence as to Caruso's involvement.

[341] As part of the circumstantial evidence on which Staff relies, Staff cites the fact that Hutchinson called Cornish twice on April 14, 2014, and once on April 15, 2014. Staff also notes that Cornish and Caruso exchanged text messages later in

the morning of April 15, 2014, the day of Caruso's trades. Staff says that the timing of these communications is suspicious.

[342] That selective submission highlights the problem I discussed at paragraphs [104] to [117] above. My own review of Hutchinson's phone records reveals that she called Cornish twice on each of April 10 and 11, six times on April 2, once on each of March 27 and April 1, three times on March 26, and frequently in the preceding weeks. Cornish's phone records show that he and Caruso exchanged text messages very frequently on many of the days leading up to April 15 – my review suggests they did so 30 times on April 12, sixteen times on April 13, and nine times on April 14. To further illustrate the point by selecting dates in early March, well before any impugned trading, Cornish and Caruso exchanged text messages eight times on March 2, ten times on March 5, and seven times on March 6.

[343] Again, Staff has not demonstrated that the communications on which it relies were uncharacteristic. I attach no weight to them.

[344] As with other transactions, Staff submits that Caruso implausibly denied discussing Osisko with Cornish. Once again, Caruso did not rule out the possibility. When asked, Caruso replied: "Not to my recollection."

[345] Staff also relies on the fact that Caruso did some of his trading through the Q Capital account, where Staff says his interest was veiled. The suggested implication, that Caruso did so in order to conceal his trading, is undermined by the fact that Caruso traded at the same time in the TD Waterhouse account in his name.

[346] I also have difficulty with Staff's contention that Caruso split his trading across multiple accounts so as to avoid drawing attention to the amount of trading. A pattern to that effect might be persuasive, but in this case there is no such pattern. In two of the subject transactions, Caruso did all of his trading in his TD Waterhouse accounts. Further, in fairness to Caruso, if Staff wanted to ask me to draw this conclusion, it was incumbent on Staff to ask Caruso in cross-examination why he was trading in multiple accounts simultaneously.[69] There are plausible innocent explanations for doing so, and without that question having been explored with Caruso, I cannot find that it is more likely than not that Caruso did so for nefarious purposes.

[347] I also find that the April 1 and 2 trades are inconsistent with Caruso having had MNPI. They are not inconsistent with his having acquired MNPI between April 3 and 15, but there is no evidence of that happening. Caruso testified that he bought Osisko shares on April 15 because Goldcorp had increased its bid, he thought another bid may be forthcoming, and the gold industry was very active at the time. Staff did not offer a basis to reject Caruso's explanation. I accept his evidence.

[69] *Walton* at para 143

[348] I do not find that the evidence in support of Staff's allegations against Caruso with respect to Osisko is clear, convincing and cogent. I note the following weaknesses:

a. an absence of evidence of uncharacteristic (*i.e.*, especially significant or risky) trading;

b. a credible explanation for the trading, as being consistent with objective standards and Caruso's established practice;

c. an absence of direct evidence of Caruso's involvement in the scheme (other than Hutchinson's hearsay evidence, which I have declined to rely on to implicate Caruso);

d. an absence of evidence of uncharacteristic or suspiciously timely communication between Cornish and Caruso;

e. no basis to conclude that any impugned communication included MNPI, as opposed to a mere recommendation or encouragement;

f. evidence that is inconsistent with an attempt by Caruso to conceal his trading; and

g. no reliable evidence of compensation flowing from Caruso to Cornish or Hutchinson.

[349] I therefore find that Staff has not established that Caruso was in possession of MNPI at the time of his Osisko trades. Staff's allegations against Caruso regarding Osisko are dismissed.

[350] It follows that Staff's allegation against Cornish that he tipped Caruso regarding Osisko is dismissed.

## H. Allergan

### 1. The transaction: Valeant proposes to merge with Allergan

[351] The sixth transaction was the proposed merger of Valeant Pharmaceuticals International, Inc. (**Valeant**) with Allergan, Inc. (**Allergan**).

[352] Staff alleges that Caruso traded in shares of Allergan while in possession of MNPI that Hutchinson communicated to Cornish and that Cornish then communicated to Caruso.

[353] All of the dates discussed below fall within the year 2014.

[354] Davies acted for a US investment firm that was a shareholder of Allergan. The US firm was assisting Valeant with the transaction.

[355] Davies opened its file on February 20. On April 22, Valeant announced that it proposed to acquire Allergan.

### 2. Allergan was not a reporting issuer

[356] In its current form, s. 76(1) of the Act, which prohibits illegal insider trading, refers to trading in any "issuer", which term is defined in s. 76(5) to include any reporting issuer, or any other issuer whose securities are publicly traded.

[357] However, in 2014, the relevant time with respect to this transaction, the insider tipping and trading provisions in s. 76 of the Act were limited to reporting

issuers. Allergan was not a reporting issuer. Therefore, Staff could not, and did not attempt to, establish that Caruso contravened s. 76(1) of the Act. Staff alleges instead that Caruso's conduct would have amounted to illegal insider trading had Allergan been a reporting issuer, and that his conduct was contrary to the public interest.

### 3. Hutchinson's knowledge about the transaction and communication of information to Cornish

[358] As was the case with the Aurora transaction, Caruso notes that in Hutchinson's settlement agreement, she made no admissions regarding the Allergan transaction. For the reasons set out above in paragraph [292], I give that fact no weight.

[359] Staff adduced no specific evidence as to Hutchinson's involvement with the Allergan deal or the timing of her involvement. Staff led no evidence that Hutchinson had access to any documents related to the deal, or to relevant emails at the critical time. In written submissions, Staff asserts that during this transaction, Hutchinson had access to a lawyer's emails "as this transaction overlapped with the Allergan [*sic*] Transaction."[70] I presume that the intended reference is to the Osisko transaction, given the proximity in time. However, there is no clear evidence to support Staff's submission, and while it would not be surprising if it were factually true, it would be impermissible speculation on my part to reach that conclusion.

[360] Hutchinson testified that she vaguely remembered the deal, although on cross-examination, Hutchinson agreed that she did not "really remember" the transaction.[71] Further, she had no specific recollection of speaking to Cornish about the transaction (but believes that she did) or that Davies was representing the US firm. She had no memory of being paid regarding this transaction.

[361] Staff did not ask her about this transaction during her investigation interviews, and she stated during the second of those interviews that she had no recollection of any transactions that had not been addressed by Staff.

### 4. Publicly available information

[362] There is no evidence that information regarding the Allergan transaction was in the public domain prior to the April 22 announcement.

### 5. Price trends during the relevant time

[363] In the week preceding Caruso's purchase of Allergan shares, the closing price on the NYSE climbed steadily from US$116.63 on April 10, to US$133.93 on April 17. On April 21, the day of Caruso's purchase, the shares closed at US$142.00. On April 22, the day that Caruso sold the shares, the closing price was US$163.65.

### 6. Cornish

[364] Staff does not allege that Cornish traded in securities of Allergan while in possession of MNPI. As for Staff's allegation that Cornish tipped Caruso, there is

[70] Closing Written Submissions of Staff dated May 3, 2019 at para 374
[71] Hearing Transcript, Hutchinson (Re), February 21, 2019 at 56 lines 18-20

no direct evidence that he did so. I will address that allegation in my analysis below regarding Caruso's trading.

### 7. Caruso

[365] On April 21, Caruso bought 2700 shares of Allergan in his TD Waterhouse accounts and 5800 shares of Allergan in his Q Capital account at Barrington Investments. These were significant purchases, totaling approximately US$1.2 million.

[366] On April 22, after the public announcement of Valeant's merger proposal, Caruso sold all of his Allergan shares for a total profit of approximately US$205,000.

[367] Staff alleges that at the time of Caruso's trades, he had knowledge of material facts about Allergan, and that he was in a special relationship with Allergan. Staff further alleges that Cornish tipped Caruso regarding Allergan. There is no direct evidence that he did. Staff relies on circumstantial evidence.

[368] Records obtained by Staff from Davies disclose that between April 19 and 21, a senior Davies partner was reviewing a draft offer letter and press release relating to this transaction. On April 20, and in the morning of April 21, Hutchinson and Cornish were in contact by telephone. Staff says that the timing of these communications was suspicious. However, again, Staff has not demonstrated that the communications were uncharacteristic. I attach no weight to them.

[369] Because Caruso effected approximately one third of his trades through his personal TD Waterhouse accounts, I also reject Staff's submission that Caruso attempted to conceal his trading.

[370] Finally, Caruso notes that on April 21, after he first entered his order for the Allergan shares, but before that order was filled, Caruso entered two "Change Former Orders", in an attempt to obtain a marginally lower price rather than an immediate fill. Caruso submits that this behaviour is inconsistent with him having known that a bid was about to be announced. I accept this submission. I cannot find, as Staff asks me to, that it is more likely than not that Caruso entered these Change Former Orders in a deliberate effort to conceal illegal trading.

[371] I do not find that the evidence in support of Staff's allegations against Caruso with respect to Allergan is clear, convincing and cogent. I note the following weaknesses:

a. critically, the absence of any clear evidence that Hutchinson had access to confidential documents or emails;

b. Hutchinson's evidence in her investigation examination that she did not remember this transaction;

c. Hutchinson's testimony at the hearing that she only vaguely remembers the deal, and has no memory of speaking to Cornish about it, or of being paid any money for it;

d. a credible explanation for the trading, given the steadily increasing price of the shares in the days leading up to Caruso's purchase;

e. Caruso's entering of the Change Former Orders;

f. an absence of evidence of uncharacteristic (*i.e.*, especially significant or risky) trading;

g. an absence of reliable evidence of Caruso's involvement in the scheme;

h. an absence of evidence of uncharacteristic or suspiciously timely communication between Cornish and Caruso;

i. no basis to conclude that any impugned communication included MNPI, as opposed to a mere recommendation or encouragement;

j. evidence that is inconsistent with an attempt by Caruso to conceal his trading; and

k. no reliable evidence of compensation flowing from Caruso to Cornish or Hutchinson.

[372] I therefore decline to find that Caruso engaged in conduct contrary to the public interest with respect to his trades in Allergan. Staff's allegations against Caruso regarding Allergan are dismissed.

[373] It follows that Staff's allegation against Cornish that he tipped Caruso regarding Allergan is dismissed.

## I. Tim Hortons

### 1. The transaction: Burger King acquires Tim Hortons

[374] The seventh transaction is the acquisition by Burger King Worldwide Inc. (**Burger King**) of all of the shares of Tim Hortons Inc. (**Tim Hortons**).

[375] Staff alleges that Cornish and Caruso traded in securities of Tim Hortons while in possession of MNPI that Hutchinson communicated to Cornish and that Cornish then communicated to Caruso. Tim Hortons was a reporting issuer in Ontario, with its shares trading on the TSX.

[376] All dates discussed below are in 2014.

[377] Davies acted for Burger King. Davies opened its file on February 24, using a code name.

[378] On August 24, Tim Hortons and Burger King confirmed publicly that they were in discussions regarding a potential strategic transaction. On August 26, Tim Hortons and Burger King entered into an agreement for Burger King to acquire the shares of Tim Hortons, for approximately $89.32 per share, being about a 30% premium over the trading price of Tim Hortons shares at that time.

### 2. Hutchinson's knowledge about the transaction and communication of information to Cornish

[379] Hutchinson testified that she was not working for a lawyer involved with the file but that she learned about this transaction from reading the emails of a lawyer who was involved.

[380] Hutchinson's evidence about the transaction was limited to the following:

a. she remembered the deal, but could not remember what emails or documents she accessed;

b. she knew Burger King was acquiring Tim Hortons;

c. the deal "kept going back and forth",[72] including with respect to its price;

d. she told Cornish about the transaction towards the beginning of the deal, including that Davies was representing Burger King;

e. she believed the beginning of the deal was in 2013 or 2014;

f. she updated Cornish "as to the status of the deal over however long the period of time was",[73] whenever something changed about the deal, but she could not remember specifically what she told Cornish or when she told him;

g. Cornish told her that he was trading in Tim Hortons shares, because he had traded Tim Hortons before and it would therefore not look as suspicious; and

h. Cornish paid her $7,000 in cash, which she understood came from him and Caruso.

[381] I accept that evidence, which was neither contradicted nor seriously challenged.

[382] However, Staff failed to lead evidence to establish that Hutchinson ever told Cornish that Tim Hortons was the target. I return to this point below.

### 3. Publicly available information

[383] There is no evidence that information regarding this transaction was in the public domain prior to the August 24 announcement. Increases in the trading price of Tim Hortons shares, as described below, suggest that there may have been some information, or at least speculation, in the market no later than August 6, eighteen days before the first announcement.

### 4. Price trends during the relevant time

[384] From February 24 (the day Davies opened its file) to March 12, the closing price of Tim Hortons shares climbed from $57.94 to $62.38. After March 12, the closing price dropped slightly and then ranged between those figures to and including August 5.

[385] On August 6, the shares closed at $64.52, up from $60.08 the previous day. The closing price hit $68.31 by August 13 and ranged between $66.90 and $68.16 until August 21. The closing price climbed to $68.78, $82.03 and $88.71 on August 22nd, 25th (the day after the announcement confirming discussions) and 26th (the day of the final announcement) respectively.

### 5. Cornish

[386] Between March 25 and August 26, Cornish bought shares of Tim Hortons in his Brant inventory account. He earned a profit of approximately $128,000.

[387] Staff alleges that Cornish traded in Tim Hortons shares while in possession of MNPI and while he was in a special relationship with Tim Hortons.

[388] Because Staff led no evidence that Hutchinson told Cornish that Tim Hortons was the target, any finding I make to that effect must be by inference. Based on Hutchinson's knowledge that Tim Hortons was the target, and based on her other

[72] Hearing Transcript, Hutchinson (Re), February 21, 2019 at 29 lines 15-16
[73] Hearing Transcript, Hutchinson (Re), February 21, 2019 at 30 lines 9-10

evidence about information she did convey to Cornish and the payment she received from Cornish, I conclude that it is reasonable and logical to infer that she told Cornish about Tim Hortons. I also consider it appropriate to draw an adverse inference against Cornish on this point, given that Staff has established a sufficient case for him to answer, and given his failure to testify.

[389] I further find that the information Hutchinson conveyed to him, including the names of the parties and the transaction price, was MNPI. This conclusion is supported by the rise in the closing price of Tim Hortons shares, as described above.

[390] It therefore follows, for the reasons set out beginning at paragraph [130] above, that Cornish was in a special relationship with Tim Hortons once Hutchinson conveyed that information to him.

[391] While I cannot be certain exactly when that occurred, I have accepted Hutchinson's evidence that it was near the beginning of the transaction. When I combine that evidence with the timing of Cornish's trading, I conclude that Cornish knew the identity of the parties, and some pricing information, no later than March 25. He was therefore in a special relationship with Tim Hortons by that time.

[392] I reach that conclusion without relying on what Staff describes as frequent phone contact between Hutchinson and Cornish from February 25 to September 11. Once again, Staff did not provide any analysis of this phone contact to suggest that it was uncharacteristically frequent or that there was a pattern indicating the communication of MNPI.

[393] Having found that Cornish had knowledge of MNPI about Tim Hortons, and that he was in a special relationship with Tim Hortons, no later than March 25, it follows, and I find, that Cornish's trades were in violation of s. 76(1) of the Act.

[394] With respect to Staff's allegation that Cornish tipped Caruso regarding this transaction, there is no direct evidence that he did so. Any such conclusion would have to be based on circumstantial evidence, and will flow logically from my conclusions as to whether Caruso traded while in possession of MNPI.

### 6. Caruso

[395] On February 25, 2014, Caruso purchased 380 Tim Hortons call option contracts with an expiry date of October 18, 2014, for approximately US$320,000. From February 25, 2014, to September 11, 2014, Caruso purchased and sold Tim Hortons shares and options in his Q Capital account and in two accounts in his name at TD Waterhouse.

[396] After the transaction was generally disclosed, Caruso earned a profit of approximately US$1.9 million in his Q Capital account and $128,000 in his TD Waterhouse accounts.

[397] Staff must prove that at the time of Caruso's trades, he had knowledge of material facts about Tim Hortons, and that he was in a special relationship with Tim Hortons. Staff alleges, and Caruso denies, that Cornish tipped Caruso regarding Tim Hortons. There is no direct evidence that he did, and as explained above I give no weight to Hutchinson's evidence about Caruso's involvement.

[398] Staff relies on circumstantial evidence, including communications between Hutchinson and Cornish, and between Cornish and Caruso. Staff notes that on February 24, 2014, the day before Caruso's first purchase of Tim Hortons securities, Hutchinson communicated four times by phone with Cornish. That evening, Cornish and Caruso exchanged five text messages. Staff further submits that between February 25, 2014, and September 11, 2014, Hutchinson and Cornish were in frequent phone contact.

[399] Staff provided no analysis to demonstrate that any of this contact was uncharacteristic in its frequency or timeliness.

[400] Once again, Staff asserts that Caruso implausibly denied discussing Tim Hortons with Cornish. Caruso's answer was: "No, not to my recollection." Staff did not follow up to clarify.

[401] Staff also cites two payments to Cornish's company from Riverview Capital Inc. (**Riverview**), a company that Caruso employed to make investments and to operate a used car business. Riverview issued bank drafts for $12,000 and $3,000 on May 7 and July 10, 2014, both payable to Cornish's company. However, there was nothing particularly noteworthy about the timing or amounts of these payments. Staff did not suggest what conclusion I should draw from them. I draw none.

[402] Caruso testified that:

a. he had always been interested in Tim Hortons, because customers were "always lined up",[74] and because he had once considered purchasing a franchise;

b. his attention was drawn to Tim Hortons at the relevant time because Canada Post had recently decided it was advantageous to sell some products through Tim Hortons, given the higher customer traffic in Tim Hortons stores;

c. he believed that the Tim Hortons options were incorrectly priced in the market (*i.e.*, they were less expensive than they ought to have been) and that he was seeking to make a profit on that error in the pricing.

[403] Caruso also notes that on March 13, less than three weeks after his first purchase, and after the price had climbed almost 8% in that time, he exercised 280 call options and immediately sold the resulting 28,000 shares. Had he waited to exercise the options and sell the shares until after the Tim Hortons transaction was announced, he would have realized a significantly greater profit. Caruso therefore submitted that his trading pattern in the Tim Hortons options was inconsistent with the trading of an individual in possession of MNPI.

[404] Similarly, on August 22, two days before Burger King and Tim Hortons announced that they were engaged in discussions, Caruso gave instructions to exercise 100 options. On August 25, the day before the transaction was announced, Caruso exercised a further 380 options, and sold the 48,000 shares resulting from the two exercises. Given that the closing price of Tim Hortons shares jumped from $74.70 on August 25 to $81.00 on August 26, Caruso

[74] Hearing Transcript, Hutchinson (Re), March 20, 2019 at 66 line 12

submits that he lost the opportunity for approximately $240,000 in profit, and that his trades were inconsistent with his having possessed MNPI.

[405] Caruso's evidence regarding his trading strategy was neither contradicted by any other evidence, nor undermined on cross-examination. It is of course possible that Caruso created the explanation after the fact, with the benefit of hindsight and publicly available information, but I would have no basis other than speculation to reach that conclusion. It was open to Staff to point out a flaw in Caruso's logic, but I heard none. Staff observed that Caruso's evidence on this point was uncorroborated, but Staff did not assist by identifying what kind of corroboration would be expected but was absent.

[406] The timing of Caruso's first trades, and the size of the trades and of the profit he realized, give cause to be suspicious that he possessed MNPI. However, I do not find that the evidence in support of Staff's allegations is sufficiently clear, convincing and cogent. I reach that conclusion because:

a. Caruso had a credible explanation for his trading, as being consistent with objective standards and his established practice;

b. Caruso engaged in trades that appear to be inconsistent with his having possessed MNPI, unless he engaged in those trades to create the appearance that he did not, a speculative conclusion I am not prepared to reach;

c. an absence of direct evidence of Caruso's involvement in the scheme (other than Hutchinson's hearsay evidence, which I have declined to rely on to implicate Caruso);

d. an absence of evidence of uncharacteristic or suspiciously timely communication between Cornish and Caruso;

e. no basis to conclude that any impugned communication included MNPI, as opposed to a mere recommendation or encouragement;

f. an absence of evidence that Caruso attempted to conceal his trading; and

g. no reliable evidence of compensation flowing from Caruso to Cornish or Hutchinson.

[407] I therefore find that Staff has not established that Caruso was in possession of MNPI at the time of his trades in securities of Tim Hortons. Staff's allegations against Caruso regarding the Tim Hortons transaction are dismissed.

[408] It follows that Staff's allegation against Cornish that he tipped Caruso regarding Tim Hortons is dismissed.

## J. Xtreme Drilling

### 1. The transaction: Schlumberger acquires XSR from Xtreme

[409] The final transaction involves the acquisition by Schlumberger Limited (**Schlumberger**) of the XSR Coiled Tubing Services Segment from Xtreme Drilling and Coil Services Corp. (**Xtreme**).

[410] Staff alleges that Caruso traded in shares of Xtreme while in possession of MNPI that Hutchinson communicated to Cornish and that Cornish then communicated

to Caruso. Xtreme was a reporting issuer in Ontario, with its shares trading on the TSX.

[411] Davies opened its file on May 6, 2015, with Schlumberger as its client.

[412] On April 27, 2016, Schlumberger publicly announced that it would acquire the business from Xtreme for approximately $205 million.

#### 2. Hutchinson's knowledge about the transaction and communication of information to Cornish

[413] Hutchinson testified that she remembered this transaction. She recalled that it began as a share transaction and ended up as an asset transaction, that the price fluctuated a lot, and that the price ultimately paid was significantly less than was initially contemplated. Hutchinson worked for lawyers who were involved with the deal.

[414] Hutchinson told Cornish information about the deal, including that Davies represented Schlumberger. She gave Cornish updates regarding the structure, price and timing of the deal as it progressed.

[415] Hutchinson did not receive any money for this transaction. She testified that she was told that "they" lost money on the transaction, although she specified neither the person who told her that (presumably Cornish, although she did not say) nor who "they" was (presumably Cornish and Caruso, although she did not say that).

#### 3. Publicly available information

[416] There is no evidence that information regarding this transaction was in the public domain prior to the announcement on April 27, 2016.

#### 4. Price trends during the relevant time

[417] In the seven months following Schlumberger's retainer of Davies, the closing price for Xtreme shares ranged from $1.50 to $2.91. From January 2016 to April 26, 2016, the day before the announcement, the closing price ranged from $1.39 to $1.83. There were no price trends during either period that are noteworthy for the purposes of this proceeding.

[418] On April 27, 2016, the day of the announcement, Xtreme shares closed at $2.62, a 43% increase over the previous day's close.

#### 5. Cornish

[419] Staff does not allege that Cornish engaged in illegal insider trading with respect to this transaction. As for Staff's allegation that he tipped Caruso, there is no direct evidence that he did so. I will address that allegation in my analysis below regarding Caruso's trading.

#### 6. Caruso

[420] Between October 5, 2015, and April 26, 2016, Caruso accumulated more than 140,000 shares of Xtreme in his personal account, his Q Capital account, and in an account held by Riverview at RBC Direct Investing Inc.

[421] After the public announcement of the transaction, Caruso sold his shares of Xtreme, realizing a profit of approximately $30,000.

[422] Staff must prove that at the time of Caruso's trades, he had knowledge of material facts about Xtreme, and that he was in a special relationship with Xtreme. Staff alleges, and Caruso denies, that Cornish tipped Caruso regarding Xtreme. As with the other transactions, there is no evidence that he did, and I disregard Hutchinson's hearsay evidence as to Caruso's involvement.

[423] There is little circumstantial evidence to support Staff's allegations against Caruso with respect to this transaction. Staff relies on what it describes as the "proximity" of telephone contact between Cornish and Caruso, and Caruso's trading, but again provided no analysis to show that the contact was suspiciously frequent or timely.

[424] When asked whether he discussed Xtreme with Cornish, Caruso testified: "Not to my recollection." Staff did not clarify. For the reasons discussed above with respect to other transactions, I cannot find that Caruso gave inconsistent evidence about discussing specific securities with Cornish.

[425] Staff also relies on the fact that some of Caruso's trading was through off-shore and corporate accounts. I give that submission no force, given that a substantial portion of Caruso's trading was through accounts in his name in Ontario.

[426] There was nothing about Caruso's trading in Xtreme that was risky or particularly timely. Caruso bought and sold shares of Xtreme throughout the relevant period, sometimes at a loss. Caruso explained that this trading was often in order to lower his average cost. Staff did not successfully challenge this explanation.

[427] The evidence in support of Staff's allegations against Caruso with respect to Xtreme is not clear, convincing and cogent, for the following reasons:

a. Caruso had a credible explanation for his trading, as being consistent with objective standards and his established practice;

b. an absence of evidence of uncharacteristic (*i.e.*, especially significant or risky) trading;

c. Caruso engaged in trades that appear to be inconsistent with his having possessed MNPI, unless he engaged in those trades to create the appearance that he did not, a speculative conclusion I am not prepared to reach;

d. an absence of direct evidence of Caruso's involvement in the scheme (other than Hutchinson's hearsay evidence, which I have declined to rely on to implicate Caruso);

e. an absence of evidence of uncharacteristic or suspiciously timely communication between Cornish and Caruso;

f. no basis to conclude that any impugned communication included MNPI, as opposed to a mere recommendation or encouragement;

g. an absence of evidence that Caruso attempted to conceal his trading; and

h. no reliable evidence of compensation flowing from Caruso to Cornish or Hutchinson.

[428] I therefore find that Staff has not established that Caruso was in possession of MNPI at the time of his Xtreme trades. Staff's allegations against Caruso regarding Xtreme are dismissed.

[429] It follows that Staff's allegation that Cornish tipped Caruso regarding Xtreme is dismissed.

## V. CONCLUSION

[430] Staff's allegations against Caruso and Sidders are dismissed with respect to all transactions.

[431] With respect to Cornish:

a. Staff's allegations that he contravened s. 76(2) of the Act by tipping Caruso and/or Sidders are dismissed with respect to all transactions;

b. Staff's allegations that he contravened s. 76(1) of the Act by engaging in illegal insider trading in shares of Rainy River are dismissed; and

c. I find that Cornish contravened s. 76(1) of the Act by engaging in illegal insider trading in shares of Quadra and Tim Hortons.

[432] Unless otherwise ordered by the Commission on written request of Staff or Cornish filed on or before November 1, 2019, a hearing with respect to a sanctions and costs order against Cornish shall be held in writing according to the following schedule:

a. on or before November 29, 2019, Staff shall file with the Registrar affidavit evidence as to costs, and written submissions as to sanctions and costs;

b. Cornish shall file responding materials, if any, on or before December 13, 2019; and

c. Staff shall file reply materials, if any, on or before January 10, 2020.

Dated at Toronto this 23rd day of October, 2019.

*"Timothy Moseley"*
Timothy Moseley