



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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Citation: B (Re), 2020 ONSEC 21

Date: 2020-08-18

File No.: 2020-23

IN THE MATTER OF B

REASONS FOR DECISION (Section 17 of the *Securities Act*, RSO 1990, c S.5)

Hearing: July 30, 2020

Decision: August 18, 2020

Panel: Timothy Moseley Vice-Chair of the Commission

Appearances: Robert Stellick For the applicant B

Rikin Morzaria For Staff of the Commission

REASONS FOR DECISION

I. OVERVIEW

- [1] Staff of the Ontario Securities Commission is conducting an investigation, assisted by an order of the Commission made under s. 11 of the *Securities Act*¹ (the **Act**). Such orders (**Investigation Orders**) empower individuals named in the order to issue a summons, pursuant to s. 13 of the Act, to compel an individual to provide oral testimony under oath and to provide documentary evidence.
- [2] One such s. 13 summons has been directed to B, the applicant in this proceeding. B wishes to cooperate with Staff and wishes to testify in response to the summons. However, B is concerned that doing so would violate B's employment contract, which states that all matters relating to B's employment are confidential, and which does not explicitly provide a relevant exception.
- [3] B seeks direction from the Commission that testifying in response to the summons will not breach the employment contract. If the Commission cannot give that direction, then B intends to ask the Superior Court of Justice for that same assurance.
- [4] In order to apply to court, though, B would have to disclose to the court the existence of the investigation and the fact that B received a s. 13 summons. Section 16 of the Act prohibits B from doing so unless the Commission makes an order under s. 17 of the Act authorizing disclosure. B therefore seeks such an order.
- [5] Staff contends that B is required to answer the s. 13 summons, that B's employment contract is no impediment, and that the Commission should not contribute to a delay of B's examination by making the order that B requests.
- [6] Following a videoconference hearing of B's application, held in the absence of the public, I issued a confidential order authorizing B to disclose, on a confidential basis, such information as is necessary to commence a court application. The order provided that reasons for my decision were to follow. These are my reasons.
- [7] I conclude that the Commission does not have the authority to give B the requested direction. B must seek that assurance from the court. It is in the public interest to facilitate B's application by granting a s. 17 order.

II. CONFIDENTIALITY

- [8] As noted above, the hearing of this application was held in the absence of the public.
- [9] The departure in this case from the usual practice of holding public hearings is authorized by s. 9(1)(b) of the *Statutory Powers Procedure Act*² and Rule 22 of the Commission's *Rules of Procedure and Forms* (**Rules**)³. Those provisions

¹ RSO 1990, c S.5

² RSO 1990, c S.22

³ (2019), 42 OSCB 9714

contemplate a balancing of the desirability that Commission proceedings be open to the public, against other factors.

- [10] In this case, the other factor is s. 16 of the Act, which achieves the important purpose of protecting the confidentiality of Investigation Orders and of information obtained pursuant to those orders.
- [11] To the extent that the balance favours confidentiality, the Commission may hold a hearing in the absence of the public, and documents submitted may be withheld from the public.
- [12] Hearing this application in public would have compromised the investigation, would have instantly defeated the confidentiality interest protected in B's employment contract, and would have rendered moot the issue at the heart of this application.
- [13] The need for confidentiality therefore outweighed the need for transparency. For that reason, I ordered that this application be heard in the absence of the public, and that all materials in relation to the hearing be kept confidential, pursuant to Rule 22 of the Rules and s. 2(2) of the *Tribunal Adjudicative Records Act, 2019*.⁴
- [14] Releasing these reasons publicly, without identifying information, achieves as much transparency as is possible without compromising the confidentiality interest described above.

III. ANALYSIS

- [15] I turn now to the two main issues on this application. Can the Commission give B the requested assurance? If not, is it in the public interest to grant the necessary order to allow B to seek that assurance in court?

A. Can the Commission grant the requested order pursuant to the Act directing that B may answer questions in an examination with Staff without violating B's employment agreement?

- [16] B's primary request is for an order pursuant to the Act directing that B may answer questions in an examination with Staff without violating the employment agreement. That request does not specify a section of the Act under which the Commission should make the requested order.
- [17] The Commission is a statutory tribunal with no inherent jurisdiction. It can order only what it is empowered to order.⁵ The Act contains no provision that provides the Commission with the kind of declaratory authority given to some courts by the *Courts of Justice Act*.⁶ Without such authority, the Commission cannot make binding declarations of right as between B and B's employer.
- [18] I reject B's submission that this tribunal's power to control its own process, granted by s. 25.0.1 of the *Statutory Powers Procedure Act*, provides a means for the Commission to give the requested assurance. That section empowers a tribunal to make orders relating to a "proceeding". At the hearing of this application, B's counsel rightly conceded that an Investigation Order does not commence a proceeding.

⁴ SO 2019, c 7, Sch 60

⁵ *Amato (Re)*, 2015 ONSEC 16 at para 18

⁶ RSO 1990, c C.43, s 97

- [19] I also reject B's submission that I can give the requested assurance because the Commission must be able to control the entire enforcement process. For example, asks B, shouldn't the Commission be able to resolve disputes about appropriate questions on an examination conducted pursuant to a s. 13 summons?
- [20] That option might have some appeal for its efficiency. However, it is not provided for in the Act, it might well raise other questions about the tribunal's independence, and I was given no court or Commission decision that suggests it is available. In fact, s. 13(1) of the Act explicitly provides a different mechanism for resolving disputes about the propriety of questions put to a summonsed individual: "the refusal of a person to... answer questions... makes the person... liable to be committed for contempt by the Superior Court of Justice...".
- [21] Staff's right to bring a contempt application may be viewed by some as being more forceful than is warranted in response to a person's refusal to answer certain questions. Even if that is true, it is not a sufficient basis for me to create a less forceful alternative.
- [22] For these reasons, I dismissed B's request for directions.

B. Is it in the public interest to authorize B to disclose to the Superior Court of Justice such information as is necessary to bring an application for directions?

- [23] I will now address B's alternative request for relief; namely, an order pursuant to s. 17 of the Act, authorizing B to disclose such information as is necessary to permit B to bring an application in the Superior Court of Justice for directions.
- [24] Staff opposes this request for three reasons:
- a. the order sought would unduly delay this and other investigations;
 - b. no employment contract would be relevant to a person's obligation to answer questions pursuant to a s. 13 summons; and
 - c. in any event, s. 154 of the Act provides that a person who discloses information to the Commission in good faith and in compliance with Ontario securities law does not thereby breach any contractual provision to which the person is subject.
- [25] I reject all of these, as I explain below.
- 1. The requested s. 17 order would not unduly delay this or other investigations**
- [26] While Staff submitted that my granting the requested s. 17 order would unduly delay this and other investigations, Staff did not sufficiently explain how that would happen.
- [27] Prior to the hearing of this application, Staff advised B's counsel that Staff intended to ask the Superior Court of Justice to find B in contempt if B continued to refuse to answer questions. It was evident at the time of the hearing of this application that Staff had not taken that step, but I heard no reason why Staff had not done so, or could not do so if it wished.
- [28] I can speculate that Staff may think it inappropriate to bring a contempt application while B's application for directions is pending. However, Staff did not

explicitly make that argument. Further, and understandably, neither Staff nor B's counsel could reliably predict how quickly either type of application would be resolved by a court.

[29] I see nothing that stands in the way of Staff proceeding as expeditiously as it thinks it should. Any argument that a contempt application ought to await B's application for directions necessarily presumes that B's concern is not frivolous. The issues B raises should be addressed by the court if the court sees fit to do so. It would not be in the public interest for me to prevent that inquiry.

[30] Staff also submits that authorizing disclosure here may delay other investigations, because others will want to follow B's path. I reject that submission. If the court resolves the interplay between the s. 13 summons and the employment contract, the question will have been answered, at least for those who are subject to similar confidentiality provisions.

2. Staff's submission that no employment contract would be relevant to a person's obligation to answer questions pursuant to a s. 13 summons

[31] Staff submits that it is not in the public interest to authorize disclosure pursuant to s. 17 of the Act, because the Act properly interpreted gives no basis to conclude that B's employment contract has any relevance to B's obligation to answer questions pursuant to the s. 13 summons.

[32] I reject that submission. I have already explained, in paragraphs [16] to [22] above, my conclusion that the Commission is not empowered to resolve that question directly. It would be inappropriate to invoke the public interest test in s. 17 of the Act to resolve that same question indirectly.

3. Does s. 154 of the Act, which provides that a person who discloses information to the Commission in good faith and in compliance with Ontario securities law does not thereby breach any contractual provision to which the person is subject, apply?

[33] Both Staff and B suggested that B might be protected by s. 154 of the Act, which states that the "disclosure of information to the Commission... that is made in good faith by a person... in compliance with Ontario securities law" does not constitute a breach of any contractual provision to which that person is subject. Staff submits that s. 154 solves the problem, obviating the need for an order authorizing disclosure to the court.

[34] I disagree. I was not persuaded that a person who answers questions in response to a s. 13 summons is doing so in compliance with "Ontario securities law", a term that is defined in s. 1(1) of the Act. The definition provides, in relevant part, that Ontario securities law includes the Act itself and, in respect of a person, a "decision" to which the person is subject. I deal with each of those two elements in turn.

(a) The Act

[35] The Act does not, in any direct way, require that a person who receives a s. 13 summons answer questions in response to that summons.

- [36] The summonsed individual's obligation is indirect. The existence of the obligation is made explicit in the summons itself, and can be inferred from two portions of s. 13(1) of the Act:
- a. the words that empower a person appointed under an Investigation Order to "summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise"; and
 - b. words later in that subsection, which provide that "the refusal of a person to attend or to answer questions... makes the person liable to be committed for contempt".
- [37] Staff submits that compliance with a s. 13 summons is in substance compliance with s. 13(1) of the Act. Even if true, however, that submission obscures the binary question of whether a s. 13 summons can properly be described as being part of the Act.
- [38] B's obligation to answer questions does not arise directly under the Act. It arises as a result of a power exercised under the Act. The words "this Act" in the definition of "Ontario securities law" are clear. Effectively, Staff's submission would have me interpret those words to mean "this Act and any obligations that arise from the exercise of a power under this Act".
- [39] Such an interpretation would have many consequences. In the absence of clear legislative intent, I decline Staff's invitation to broaden the definition.

(b) A decision

- [40] Staff also submits that a s. 13 summons is part of Ontario securities law because it is a "decision" of the Commission.
- [41] Subsection 1(1) of the Act defines "decision" as follows:
- 'decision' means, in respect of a decision of the Commission or a Director, a direction, decision, order, ruling or other requirement made under a power or right conferred by this Act...
- [42] In written submissions, Staff contends that a s. 13 summons "falls within the definition of 'decision' if viewed as a Commission requirement made under a power or right conferred by this Act...".
- [43] There is some superficial appeal to Staff's submission, but I cannot accept it, for two reasons.
- [44] First, the ordinary meaning of the word "decision" connotes the weighing of factors, resulting in a choice among options. A summons does not naturally fit that definition. The linguistic contortion necessary to conclude that a summons is a decision would, in my view, require a clear expression of legislative intent. There is none here.
- [45] Second, while the words "requirement made under a power or right conferred by this Act" may seem to apply to a summons, those words cannot be viewed in isolation. They are qualified by the opening words of the definition, *i.e.*, "in respect of a decision of the Commission or a Director".
- [46] Can a s. 13 summons be said to be a decision "of the Commission"? Clearly not. The summons is not issued by the Commission. It is issued by a person who is

named in an Investigation Order and who is thereby appointed to investigate the matters described in that order. Persons appointed need not even be a member of Staff of the Commission. To think of a s. 13 summons issued by such a person as a "decision of the Commission" is to stretch the phrase well beyond its breaking point.

4. Conclusion

[47] B ought to have the opportunity to ask a court to resolve the interplay between the summons and the employment contract. There is no compelling reason to prevent B from doing that. For these reasons, I issued the confidential order under s. 17 of the Act permitting B to disclose the necessary information to the Ontario Superior Court of Justice, on a confidential basis.

Dated at Toronto this 18th day of August, 2020.

"Timothy Moseley"

Timothy Moseley