



Ontario  
Securities  
Commission

Commission des  
valeurs mobilières  
de l'Ontario

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

**- and -**

**IN THE MATTER OF SEXTANT CAPITAL  
MANAGEMENT INC., SEXTANT CAPITAL GP INC.,  
SEXTANT STRATEGIC OPPORTUNITIES HEDGE FUND L.P.,  
OTTO SPORK, ROBERT LEVACK AND NATALIE SPORK**

**REASONS AND DECISION  
(Subsections 126(1) and (7) of the Act)**

<b>Hearing:</b>	December 19, 2008	
<b>Decision:</b>	December 23, 2008	
<b>Panel:</b>	Wendell S. Wigle James E. A. Turner	-Commissioner and Chair of the Panel -Vice-Chair
<b>Counsel:</b>	Susan Kushneryk Matthew Britton	-For the Ontario Securities Commission
	Joseph Groia Kevin Richard	-For Otto Spork and Sextant Capital Management A Islandi EHF

## REASONS AND DECISION

### I. Background and History of the Commission Proceeding

[1] On December 8, 2008, a Statement of Allegations and Notice of Hearing were issued (the “Commission Proceeding”) with respect to Sextant Capital Management Inc. (“SCMI”), Sextant Capital GP Inc., Sextant Strategic Opportunities Hedge Fund L.P. (the “Sextant Fund”), Otto Spork (“O. Spork”), Robert Levack and Natalie Spork (collectively, the “Respondents”).

[2] On that same day, the Ontario Securities Commission (the “Commission”) issued:

- a) a temporary cease trade order (the “TCTO”) pursuant to subsections 127(1) and (5) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”); and
- b) directions pursuant to paragraph (a) of subsection 126(1) of the Act: 1) to the Royal Bank of Canada with respect to funds, securities and property of SCMI, Sextant Capital GP Inc. and the Sextant Fund; and 2) to Newedge Canada Inc. with respect to funds, securities and property of the Sextant Fund (the “Freeze Directions”).

[3] On December 15, 2008, the Ontario Superior Court of Justice extended the two Freeze Directions dated December 8, 2008 until the final resolution of this matter by the Commission or further order of the Court.

[4] On December 16, 2008, the Commission extended the TCTO until March 17, 2009 to permit Staff of the Commission (“Staff”) to continue their investigation and to permit the Respondents to respond to the Statement of Allegations.

[5] There is a civil class action brought by the Squirrel Trust No. 1 against various parties (the “Civil Proceeding”), including the Sextant Strategic Hybrid<sup>2</sup> Hedge Resource Fund Offshore Ltd. and Sextant Strategic Global Water Fund Offshore Ltd. (together, the “Offshore Sextant Funds”) and Sextant Capital Management A Islandi EHF (“Sextant EHF”). On December 17, 2008, Justice Mesbur of the Ontario Superior Court refused a motion by the Squirrel Trust No. 1 for a Mareva injunction against the various parties, but did grant an adjournment until January 7 and 8, 2009 on a number of conditions. The Commission is not a party to the civil class action and did not participate in the proceedings, although Staff was present during some of the time.

[6] On December 17, 2008, a few hours after Justice Mesbur issued her endorsement, the Commission issued another direction in the Commission Proceeding (which is a separate and distinct regulatory proceeding from the Civil Proceeding) to Newedge Canada Inc. pursuant to paragraph (a) of subsection 126(1) of the Act (the “December 17 Direction”). This direction provides that Newedge Canada Inc. retain any funds, securities or property that they may have on deposit, under their control or for safekeeping in the name of the Offshore Sextant Funds.

[7] On December 18, 2008, a motion was brought by O. Spork and Sextant EHF (collectively, the “Moving Parties”) for an order revoking or varying the December 17 Direction (the “Motion”). Pursuant to subsection 126(7) of the Act, a person or company directly affected by a direction may apply to the Commission for clarification or to have the direction varied or revoked. Accordingly, any person or company, even if they are not a respondent may apply for such an order, such as Sextant EHF.

[8] The Commission heard the Motion on December 19, 2008. Oral and written submissions were provided by the Moving Parties and Staff. We have considered all the submissions and material before us and these are the Reasons to our Decision to dismiss the Motion.

## **II. Analysis**

### **a) The Relevance of Justice Mesbur’s Decision to the Commission Proceeding**

[9] The Moving Parties take the position that the December 17 Direction should be revoked on the basis that Justice Mesbur did not see it appropriate to grant the Mareva injunction affecting the funds and assets of the Offshore Sextant Funds and Sextant EHF. Counsel for the Moving Parties cautioned that the Commission could not and should not be seen to impose a direction that would effectively contradict the decision of Justice Mesbur.

[10] Staff takes the position that Justice Mesbur’s decision was made in connection with an unrelated Civil Proceeding and that the Commission is neither a party nor an intervenor in that litigation. The plaintiffs in the Civil Proceeding sought a Mareva injunction against the assets of the Sextant Offshore Funds in the context of a civil class action. In contrast, Staff seeks the December 17 Direction for a different purpose.

[11] We agree that the Commission Proceeding is separate and distinct from the Civil Proceeding. The December 17 Direction was issued in the context of the Commission’s mandate, which is established under section 1.1 of the Act to provide protection to investors from unfair, improper or fraudulent practices; and to foster fair and efficient capital markets and confidence in the capital markets. These are public interest concerns that are not necessarily engaged in the context of private civil litigation. Although the civil litigation involves the interests of investors, the Commission’s public interest mandate is much broader. As submitted by Staff, there are multiple contraventions of the Act involving self-dealing of a mutual fund in Ontario and the potential inaccuracy of the valuation of the Sextant Fund alleged under sections 111 and 127 of the Act.

[12] In *Ontario Securities Commission v. New Life Capital Corp.*, [2008] O.J. No. 4775 at para. 15, the Court stated that there is “a significant distinction between a Mareva injunction and a Direction of an appointed body in respect of the public securities markets”, which includes a direction made pursuant to subsection 126(1) of the Act. The Commission must take into consideration the due administration of Ontario securities law and the regulation of Ontario’s capital markets.

[13] Accordingly, in our view, the issuance of the December 17 Direction does not contradict or override the decision of Justice Mesbur because it was made in the context of a separate and distinct regulatory proceeding under the Act, and not in the context of private civil litigation.

**b) The Materials in Support of the December 17 Direction**

[14] Counsel for the Moving Parties also questioned whether the Chair of the Commission (the “Chair”), who signed the December 17 Direction, had knowledge of Justice Mesbur’s decision. In addition, it was submitted that the Moving Parties were entitled to the information the Chair relied on in coming to his decision to issue the December 17 Direction.

[15] With respect to the argument that the Moving Parties did not have access to the information relied on by the Chair, Staff explained that within two days of the December 17 Direction, the Moving Parties were provided with this material.

[16] In any event, when an *ex parte* direction is made, an appearance must be held within 7 days of the issuance of the direction before the Ontario Superior Court, pursuant to subsection 126(5) of the Act. In fact, Staff submitted that they are appearing before the Ontario Superior Court on December 24, 2008 to argue for the continuation of the December 17 Direction. At this time, the materials in support of the initial direction would be reviewed by the Superior Court of Justice.

**c) The Issuance of the December 17 Direction was Justified**

[17] Once the Commission issues a direction under subsection 126(1), the Commission only has the power to clarify, vary or revoke the direction pursuant to subsection 126(7) of the Act. Only the Superior Court is granted the power pursuant to subsection 126(5) of the Act to continue the direction against any affected individuals.

[18] In the case before us, we were not provided with sufficient information from the Moving Parties to vary or revoke the December 17 Direction prior to the appearance before the Superior Court on Wednesday, December 24, 2008.

[19] According to Staff’s motion record before us, the Chair had reasonable grounds upon which to issue the December 17 Direction freezing the assets, funds and property of the Offshore Sextant Funds. We are not satisfied that there are sufficient grounds or evidence before us to interfere with that decision. In this case, the public interest favours preserving the assets for the benefit of investors particularly when the matter will be considered by the Court next Wednesday.

[20] Staff also emphasized its concerns that more than \$90 million is unaccounted for and a combined total of only about \$7.6 million is in the custodial accounts of the Sextant Fund and the Sextant Offshore Funds. A large sum of the funds cannot be accounted for and it is appropriate and in the public interest to preserve and freeze the funds that can be traced and are available, and this is why such directions are necessary. This also prevents situations where there is a risk that funds can be transferred offshore and dissipated.

[21] We are not comfortable in relying only on the conditions imposed by Justice Mesbur to ensure the preservation of the assets particularly when we do not know what redemptions have already been requested. We do not believe that the fact that the Court refused the injunction should limit or restrict Staff and the Chair from taking action they consider to be in the public interest in a separate regulatory proceeding.

**III. Order**

[22] For the reasons provided above, it is hereby ordered that the Motion is dismissed.

Dated on this 23<sup>rd</sup> day of December, 2008.

*“Wendell S. Wigle”*

*“James E. A. Turner”*

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Wendell S. Wigle, Q.C.

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James E. A. Turner