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Citation: Daley (Re), 2020 ONSEC 25

Date: 2020-10-07

File No. 2019-39

**IN THE MATTER OF  
SEAN DALEY AND KEVIN WILKERSON**

## **REASONS AND DECISION ON A MOTION**

**(Rule 27 of the Commission's *Rules of Procedure and Forms*, (2019) 42 OSCB 9714)**

**Hearing:** August 27, 2020

**Decision:** October 7, 2020

**Panel:** Lawrence P. Haber Commissioner and Chair of the Panel

**Appearances:** Christopher Horkins For Sean Daley

For Sean Daley

Hanchu Chen For Staff of the Commission

## For Staff of the Commission

No one appearing on behalf of Kevin Wilkerson

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## REASONS AND DECISION ON A MOTION

### I. OVERVIEW

- [1] Daley seeks a broad order for further disclosure in this matter in relation to documents and other information obtained or generated as a result of an ongoing investigation into him and others, as well as for certain specific disclosures related to materials previously disclosed to him in this proceeding.
- [2] Daley also seeks an order under s.17 of the *Securities Act*<sup>1</sup> (the **Act**) authorizing him to share the disclosure that he has received with co-respondent Wilkerson, for the purpose of preparing Daley's defence. To date, Wilkerson has refused to participate in this proceeding.
- [3] For the reasons set out below, I deny Daley's disclosure request.

### II. BACKGROUND

- [4] On November 9, 2018, Staff of the Ontario Securities Commission (**Staff** of the **Commission**) commenced a formal investigation into Daley, Wilkerson and others based on concerns that they were breaching the registration, distribution and fraud provisions of Ontario securities law through their operation of crypto-asset ventures known as Lyra and OTO Vouchers.
- [5] On August 6, 2019, Staff commenced a proceeding relating to the formal investigation that began on November 9, 2018 and obtained a temporary cease trade order against the respondents in that matter (the **Temporary Order Proceeding**). Daley and Wilkerson, as well as other parties, are respondents in the Temporary Order Proceeding. The temporary cease trade order has been extended a number of times and was in effect at the time of this disclosure motion.
- [6] On August 29, 2019, Wilkerson emailed Staff regarding the Temporary Order Proceeding stating that Staff did not have his consent to serve him, summon him, invite him to participate in any proceedings, or send him legal documents with the expectation of a response.
- [7] On November 18, 2019, Staff commenced this proceeding, by issuing a Statement of Allegations against respondents Daley and Wilkerson, alleging that Daley and Wilkerson obstructed Staff's investigation contrary to the public interest (the **Obstruction Proceeding**). Staff began providing disclosure to Daley in the Obstruction Proceeding later that month, with further disclosures having subsequently been made to him.
- [8] According to Staff, the investigation into the Temporary Order Proceeding remains open and ongoing. No Statement of Allegations has been issued regarding the conduct alleged in the Temporary Order Proceeding.
- [9] Wilkerson has not participated in the Obstruction Proceeding or the Temporary Order Proceeding to date.

### III. ISSUES

- [10] This motion presents the following issues:

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<sup>1</sup> RSO 1990, c S.5

- a. Is Daley entitled to the disclosure he is seeking from Staff in the Obstruction Proceeding as it relates to:
  - 1. a broad request requiring Staff to disclose all relevant, non-privileged documents and other information obtained or generated as a result of the ongoing investigation into Daley and others in relation to the Temporary Order Proceeding?
  - 2. specific disclosure requests?
- b. Is it in the public interest to order that Daley may share certain disclosure made to him in this proceeding with Wilkerson for the purpose of preparing Daley's defence pursuant to s.17 of the Act?

#### **IV. LAW AND ANALYSIS**

##### **A. Is Daley entitled to the disclosure that he is seeking from Staff?**

- [11] Rule 27(1) of the *Ontario Securities Commission Rules of Procedure and Forms*<sup>2</sup> (the **Rules**) requires Staff to provide to every other party "copies of all non-privileged documents in Staff's possession that are relevant to an allegation."
- [12] Staff must initially assess which non-privileged documents it considers to be relevant to an allegation. In exercising that judgment, Staff must:
  - a. include not only documents on which Staff intends to rely, but also documents that might reasonably assist a respondent in making full answer and defence to Staff's allegations, including by helping the respondent make tactical decisions;
  - b. assess the relevance of documents in the context of the specific allegations being made by Staff;
  - c. reasonably anticipate defences or issues that a respondent might properly raise, in order to inform Staff's assessment of relevance;
  - d. include both inculpatory and exculpatory documents; and
  - e. err on the side of inclusion.<sup>3</sup>
- [13] Staff do not need to produce what is clearly irrelevant, and they bear the initial obligation to separate the "wheat from the chaff" before making disclosure.<sup>4</sup>
- [14] Following Staff's initial disclosure, the burden lies with the respondent making the disclosure request to articulate a basis for requesting further disclosure. The respondent needs to establish a sufficient connection between those documents or information that they state are missing and their ability to make full answer and defence to Staff's allegations.<sup>5</sup>

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<sup>2</sup> (2019) 42 OSCB 9714

<sup>3</sup> *BDO Canada LLP (Re)*, 2019 ONSEC 21, (2019) 42 OSCB 5239 (**BDO**) at para 14; *Kitmitto (Re)*, 2020 ONSEC 15 (**Kitmitto**) at para 20

<sup>4</sup> *R v Stinchcombe*, [1991] 3 SCR 326 at para 20

<sup>5</sup> BDO at paras 16-17; Kitmitto at para 23

**1. Broad disclosure request for all relevant, non-privileged documents or other information obtained or generated as a result of the ongoing investigation into Daley and others in relation to the Temporary Order Proceeding**

- [15] Daley requests an order compelling Staff to disclose all relevant material collected or generated through their investigation in the Temporary Order Proceeding. Daley submits that the information and documents relevant to the conduct of Staff's investigation and the fruits of their investigation will be relevant to the question of whether that investigation has actually been obstructed by Daley's conduct and whether his conduct is contrary to the public interest.
- [16] Daley further submits that the conduct of Staff's investigation in the Temporary Order Proceeding is centrally relevant and critical to his ability to make full answer and defence. He submits that he is entitled to explore in his defense whether reasonable investigation and assessment have been prevented in the way that is alleged in the Statement of Allegations by his conduct.
- [17] Staff submit that their disclosure obligations pursuant to Rule 27 of the *Rules* are limited to the four corners of the Statement of Allegations in this matter, which relate to Daley and Wilkerson acting contrary to the public interest in obstructing Staff's investigation, and does not extend to the Temporary Order Proceeding to the extent those documents are irrelevant to the Statement of Allegations in this proceeding.
- [18] Staff states that it is the actions and conduct of Daley and Wilkerson that are at the heart of these proceedings and that to the extent that the investigation relates to that conduct, such as whether Staff were able to speak with certain witnesses, is what is relevant. Staff state for this reason, their disclosure of materials relevant to the allegations in the Obstruction Proceeding is complete.
- [19] The conduct alleged in the Statement of Allegations in the Obstruction Proceeding relates to, but is separate from, the matters which are the subject of the investigation in the Temporary Order Proceeding. What might be relevant in those proceedings are not, by virtue of relatedness, necessarily relevant in these proceedings.
- [20] Staff's disclosure obligation does not extend to documents relevant to the investigation in the Temporary Order Proceeding outside of what is relevant to the Statement of Allegations in this proceeding. Staff's disclosure obligation is limited to the "four corners" of the Statement of Allegations in this matter. In my view, it is the alleged conduct of Daley and Wilkerson in obstructing Staff's investigations that is at the heart of these proceedings and their alleged conduct is what is relevant in the Obstruction Proceeding.
- [21] I find that Daley has failed to meet the burden in establishing that there is a sufficient connection between those documents or other information that he states are missing and his ability to make full answer and defence to Staff's allegations in this proceeding. I am not persuaded that Staff's investigation in the Temporary Order Proceeding or the fruits of that investigation, outside of what has already been disclosed by Staff as relevant, are relevant to the issue of whether Daley and Wilkerson obstructed Staff's investigation, as alleged in this

proceeding. Daley's ability to make full answer and defence is confined to the parameters of the Obstruction Proceeding only.

**(a) *Documents evidencing Staff's analysis, commentary, opinions or discussions***

- [22] Staff states, in addition to its general objection to further disclosure on the basis of non-relevance to these proceedings, that many of the items in Daley's disclosure request, including his request for "all internal communications at the OSC relating to the investigation in the Temporary Order Proceeding save for privileged communications involving the lawyers prosecuting the case", address a category of documents that Commission case law consistently confirms as irrelevant: Staff's internally generated documents evidencing Staff's analysis, commentary, opinions or discussions.
- [23] As the Commission recently held, internal analysis, commentary, opinions or discussions, even by a non-fact expert witness, and even if squarely on the issue to be determined by the Commission, would have no probative value before the Commission.<sup>6</sup> However, as discussed in both *BDO* and *Kitmitto*, the determinative factor is not whether a document is internally generated, but rather whether it contains analysis, commentary, opinions or discussions.<sup>7</sup>
- [24] Daley distinguishes this matter from *BDO* and *Kitmitto*, which he states are, like most cases before the Commission, cases that deal with a respondent's conduct and the impact that conduct has on the capital markets. This case, he submits, deals with an investigation and the impact that the respondents' alleged conduct has had on the investigation, as opposed to the capital markets. He submits that the investigation itself is not only relevant, but highly relevant to the allegations against him in this matter.
- [25] I do not find that this case is distinct from *BDO* and *Kitmitto*. The mere fact that in this case the subject matter is an investigation and the conduct of an investigation does not by itself change the analysis as to whether such internal analysis, commentary, opinions or discussions would have any probative value before the Commission. Daley is not entitled to Staff's analysis, commentary, opinions or discussions.

**2. Specific disclosure requests**

- [26] My decision regarding Daley's broad disclosure request and my decision regarding disclosure of documents evidencing Staff's analysis, commentaries, opinions and discussions largely dispenses with Daley's request for further disclosure in this matter. In addition to the broad disclosure request, Daley is also seeking specific disclosure that he states is missing based on the disclosure that he has already received in this matter.
- [27] I will discuss each of these specific areas.

**(a) *Launchpad review***

- [28] Staff's disclosure includes references to a review Staff requested from Launchpad, the specialized branch of the Commission with expertise in the regulation of crypto-currency and other digital innovations. Daley submits that

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<sup>6</sup> *Kitmitto* at para 32

<sup>7</sup> *Kitmitto* at para 33; *BDO* at para 22

only one document was initially provided to him related to the Launchpad review, and subsequent to this disclosure motion, more information has been provided. However, he states that the following specific disclosure is still outstanding:

- a. the questions asked of Launchpad;
  - b. the scope of the review requested from Launchpad;
  - c. any feedback, finding and responses provided by Launchpad to Staff;
  - d. copies of notes prepared by Staff or Launchpad related to the review;
  - e. any copies of correspondence related to the review; and
  - f. whether there was any relationship between a former lawyer on this matter and an individual who was on the Launchpad FinTech Advisory Board with the same last name.
- [29] Daley submits that these materials are relevant and necessary because “[p]resumably, Launchpad’s guidance was sought and relied upon by Staff in their determination that Lyra and OTO vouchers qualify as ‘securities’ within the regulatory jurisdiction of the OSC.”<sup>8</sup>
- [30] In addition, Daley requests information with respect to the relationship, if any, between an individual who was previously a member of Launchpad’s FinTech Advisory Committee, Ms. Britton, and the Enforcement Staff lawyer, Mr. Britton, who, until his recent retirement, had primary responsibility for the prosecution of this case. He submits that this information will be relevant and necessary for his defence as a possible relationship may disclose potential grounds for an allegation of bias in Staff’s investigation.
- [31] Staff submits that Daley is not entitled to these materials as they are irrelevant, and Daley fails to adequately explain how the information sought could be relevant in preparing a defence. Staff characterizes Daley’s description of Staff’s discussion with Launchpad as an “inaccurate reflection” of Staff’s discussion with Launchpad and stated that the discussion focused on the feasibility of one of the respondents in the Temporary Order Proceeding, Ascension, and potential interview topics with Daley.
- [32] Staff submits that the request for copies of correspondence between Staff and Launchpad would clearly encompass internal Staff analysis, commentary, opinions or discussions that previous Commission case law has confirmed is irrelevant.
- [33] Lastly, Staff submits that it is not aware of any relationship between Mr. Britton and Ms. Britton, nor would any relationship be of significance because Ms. Britton is irrelevant to these proceedings as she is not mentioned in disclosure and was not a participant in the discussion with Launchpad.
- [34] I find that Daley’s requested information in (a) – (e) in paragraph [28] falls under Staff’s analysis, commentary, opinions or discussion that Daley is not entitled to, for the reasons as discussed above. Specifically, the issue of whether Lyra and OTO vouchers qualify as securities, which may be relevant to the Obstruction Proceeding, is a question of law to be determined by the panel in the merits hearing of the Obstruction Proceeding. For the reasons set out in *BDO* and

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<sup>8</sup> Exhibit 1, Affidavit of Sean Daley dated July 31, 2020

*Kitmitto*, they relate to analysis, commentary, opinions or discussions, and are thus not relevant for disclosure purposes.

- [35] I agree with Staff's submission that even if a relationship existed between Mr. Britton and Ms. Britton, it would be irrelevant to the Obstruction Proceeding. Therefore, Daley is not entitled to his request in (f) at para [28].

**(b) Covert phone call**

- [36] Daley seeks more information regarding whether Staff's investigator directly requested, on a covert phone call with Daley, to purchase Lyra tokens from Daley. Daley submits that based on the witness summaries provided to him by Staff, the covert telephone discussion with Daley appears to be a key element of Staff's case, and materials collected or generated through this phone call will be relevant and necessary to prepare his defence.
- [37] Staff submits that the notes of the call have been disclosed to the extent that there are notes, and the other information that Daley is seeking is more appropriate for cross-examination of Staff's investigators during the merits hearing.
- [38] Daley submits that having to wait to receive what he considered to be relevant information about Staff's case undermines the purpose of Staff's robust pre-hearing disclosure obligations.
- [39] The characterization of whether Lyra and OTO Vouchers are an investment contract is what is relevant to the issue for the merits hearing of whether these are securities, not how it was sold. Although the covert call with Daley goes to the issue of Daley's conduct, (a) Daley was a participant on the call so he would be aware of the questions Staff asked of him; (b) Daley has already received the notes of the call as part of Staff's disclosure; and (c) whether Staff requested to purchase securities may be relevant to the Temporary Order Proceeding, but is not relevant to the Obstruction Proceeding. Therefore, Daley is not entitled to the information that he has requested related to the covert phone call.

**(c) Witness interviews**

- [40] Staff's disclosure to Daley included references to two interviews with an individual, *BC*. Daley submits that full disclosure regarding these interviews, including notes taken by all in attendance and correspondence internally, and between Staff and the individual regarding the interviews, has not been provided.
- [41] Daley submits that these materials are relevant and necessary for him to prepare his defence, and for Daley to determine whether it will be necessary for him to seek to compel *BC* as a witness in the merits hearing in the Obstruction Proceeding.
- [42] Based on the written cross-examination answers of one of Staff's investigators in this motion, Daley submits that there is a possibility that there are notes from other investigators that have not yet been disclosed.
- [43] Staff submits that all relevant, non-privileged documents have been disclosed and that Daley is not entitled to internal Staff correspondence related to the interviews.

- [44] I find that Daley's requested disclosure in this area falls under Staff's analysis, commentary, opinions or discussions, which Daley is not entitled to. Further, this request falls outside of the scope of information relevant to the allegations that have been made in this proceeding.

**(d) VHDX file**

- [45] Daley's final disclosure request relates to a "VHDX" file, which is like a virtual hard drive that Staff collected, and it appears to Daley that all of this data relates to the investigation in the Temporary Order Proceeding. Daley states that Staff have disclosed the actual raw data but have not included particulars of what happened in the extraction and review of the file.
- [46] Daley submits that given the importance placed on the review of this file and the work done on it in the witness summaries for the Obstruction Proceeding, it is important for him to understand the continuity of this evidence, how it was extracted, and what exactly was done to it after it was produced. He submits that he has received no notes or correspondence relating to this review, which Daley submits is relevant to the investigation.
- [47] Daley submits that he also requires this information to determine whether it will be necessary to seek to compel the attendance of Staff investigators that Staff has not indicated that they intend to call as a witness.
- [48] Staff submits that they have disclosed all relevant, non-privileged documents regarding the VHDX file, including a document leading to the file's acquisition and the analysis conducted on the file by a Senior Staff Forensic Specialist. They state that the information sought by Daley is irrelevant and Daley has not alleged any improprieties in the integrity of Staff's handling of the VHDX file. Further, they state that Daley is not entitled to Staff's notes or conclusions.
- [49] I find that Daley has failed to show how this information is relevant to the allegations in the Obstruction Proceeding, and Staff is therefore not required to provide this disclosure as requested.

**B. Is it in the public interest to order that Daley may share certain disclosure to Wilkerson for the purpose of preparing Daley's defence pursuant to s.17 of the Act?**

- [50] Section 16 of the Act prohibits the disclosure of the nature or content of an investigation order, or the name of any person examined or sought to be examined or the production of any document, amongst other things, by any person or company unless permitted by an order of the Commission under s.17.
- [51] Daley has requested an order that he be permitted to share the disclosure that he has received with co-respondent Wilkerson, pursuant to s. 17 of the Act, for the purpose of preparing Daley's defence.
- [52] Wilkerson is unrepresented and has refused to participate in the Obstruction Proceeding or the Temporary Order Proceeding. As a result, Staff have not provided any disclosure to Wilkerson. Rule 21(3) of the Rules and s.7(1) of the *Statutory Powers Procedure Act*<sup>9</sup> permit the Commission to proceed in the absence of any party that has been given reasonable notice in a proceeding.

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<sup>9</sup> RSO 1990, c S.22

- [53] Pursuant to s.17(1) of the Act, the Commission may make an order authorizing the disclosure of certain confidential information, provided that the Commission considers that it would be in the public interest to do so.
- [54] When considering whether disclosure is warranted under s.17(1), the Commission must consider the purpose for which the disclosure is sought and the specific circumstances of the case, as well as balance the continued requirement for confidentiality with the Commission's assessment of the public interest at stake.<sup>10</sup>
- [55] Daley believes that consulting with Wilkerson, including through discussing and sharing information and documents that he has received as part of Staff's disclosure, will be necessary to adequately prepare for his defence.
- [56] Daley submits that he should not be prejudiced in his defence by Wilkerson's decision not to participate and that if Wilkerson were a participating respondent, Daley would have the opportunity to consult and collaborate with him in preparing his defence on a common interest basis. He submits that Staff named Wilkerson as a respondent and they intended him to receive the disclosure materials.
- [57] Staff submits that Daley does not need Wilkerson's assistance to make full answer and defense and that Daley has not met the high burden necessary to obtain a disclosure order under subsection 17(1) of the Act. They submit that the central and only allegation against Daley relates to his own conduct and actions. They further submit that there is no principle of natural justice that requires a respondent to obtain the assistance of a co-respondent.
- [58] Staff is concerned that Wilkerson will not comply with the confidentiality requirements in sections 16 and 17 of the Act and submit that Wilkerson's past actions demonstrate that he holds the Commission and Ontario securities laws in low regard. In Staff's view, it would be reasonable to expect that Wilkerson would disregard the confidentiality requirements under the Act if he were provided with the disclosure. Specifically, Staff point to:
  - a. the allegations that it has made in the Statement of Allegations that Wilkerson is alleged to have sent a mass email discouraging cooperation with Staff's investigation and urging non-compliance with any summons issued by Staff; and
  - b. Wilkerson's correspondence to Staff stating that "any order from the OSC concerning [him], however worded, to be null, void and of no force or effect" and indicated that any future communications from the Commission will "go straight into [his] spam folder unread."
- [59] As the Commission has previously stated, confidentiality is central to preserving the integrity of investigations conducted by Staff of the Commission and the Act creates a regime in which the Commission controls the flow of information in connection with its investigations, which are presumptively confidential.<sup>11</sup> The disclosure to anyone, except counsel, an insurer or insurance broker, is

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<sup>10</sup> *Katanga Mining Limited (Re)*, 2019 ONSEC 4 (**Katanga**) at para 16

<sup>11</sup> Katanga at para 14

prohibited under s.16 of the Act, unless specifically authorized by the Commission pursuant to s.17 of the Act.

- [60] I agree with Staff's concerns that based on his previous conduct, Wilkerson is unlikely to comply with the confidentiality requirements of the Act if he were provided with the disclosure. Further, Daley does not need Wilkerson's assistance to be able to make full answer and defence to defend his own conduct.

**V. CONCLUSION**

- [61] For the reasons set out above, I deny Daley's disclosure motion request.

Dated at Toronto this 7<sup>th</sup> day of October, 2020.

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*"Lawrence P. Haber"*

Lawrence P. Haber