

NO INSIDER TRADING WITHOUT CLEAR EVIDENCE

Posted on December 19, 2019

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The Ontario Securities Commission (the “**OSC**”) released its decision in a proceeding involving a former legal assistant (the “**Assistant**”) providing material non-public information (“**MNPI**”) to others.

OSC Staff reached a settlement with the Assistant with respect to the allegations against her. The proceeding continued against her contact, Cameron Cornish (“**Cornish**”), and his two friends Patrick Caruso (“**Caruso**”) and David Sidders (“**Sidders**”).

The OSC found that Cornish contravened the Ontario *Securities Act* [\[1\]](#) (the “**Act**”) by engaging in insider trading in respect of two takeover transactions. The OSC dismissed the remaining allegations against Cornish and all of the allegations against Caruso and Sidders. The sanctions hearing is pending.

The Settlement

OSC Staff settled all claims against the Assistant in April 2018. [\[2\]](#) In that settlement, the Assistant acknowledged that she contravened the Act by providing MNPI about certain transactions over a four and a half year period while employed at a full-service law firm in Toronto.

The settlement agreement included a two-year trading ban against the Assistant, amongst other sanctions. The OSC’s reasons approving the settlement agreement referred to several mitigating factors, including:

- the Assistant’s acknowledgement of liability;
- evidence of remorse;
- loss of employment;
- lack of financial resources;
- the Assistant’s receipt of a relatively small sum relative to profits made by other respondents;
- no prior breaches of securities law;
- the assertion that the Assistant had been manipulated by an experienced trader, Cornish; and
- cooperation with OSC Staff in its investigation of the remaining respondents.

The OSC Merits Decision – Preliminary Matters

Cornish did not appear at the hearing, Caruso testified and Sidders had representation at the hearing. [\[3\]](#)

On October 23, 2019, the OSC released its Reasons and Decisions in regards to the respondents who did not enter into a settlement with the OSC. The decision dealt with certain preliminary matters.

The decision dealt with certain preliminary matters. First, the OSC concluded that Cornish had been given proper notice of the proceeding and that the hearing on the merits could proceed in his absence.^[4]

Second, the OSC held that OSC Staff could not rely on Cornish's compelled examination during investigation in support of OSC Staff's case against Caruso and Sidders.^[5]

Third, the OSC decided that Caruso and Sidders could seek to rely on Cornish's compelled testimony in their favour, subject to the OSC's ability to determine the weight to be given to such testimony.^[6] This is particularly notable because of the prior preliminary finding. The OSC did not permit OSC Staff to rely on the same transcript that the other respondents were permitted to rely upon.

The Legal Tests

To prove allegations of insider trading, OSC Staff was required to prove:

1. the respondent purchased or sold securities of the issuer;
2. at the time of the purchase or sale, the respondent had knowledge of a "material fact" about the issuer;
3. the "material fact" had not been generally disclosed; and
4. at the time of purchase or sale, the respondent was in a "special relationship" with the issuer.^[7]

To prove allegations of tipping, which were only made against Cornish, OSC Staff had to prove all of the following:

1. Cornish informed Caruso and/or Sidders of a "material fact" with respect to the issuer;
2. at the time Cornish informed Caruso and/or Sidders, the "material fact" had not been generally disclosed; and
3. Cornish was in a "special relationship" with the issuer.^[8]

The Findings Against Cornish

OSC Staff relied primarily on the Assistant's testimony in the merits hearing. She disclosed that she had an arrangement with Cornish to provide MNPI about the transactions in which the law firm was involved.

The OSC reviewed each of the eight transactions that were the subject of the proceedings separately. Cornish was held to be in breach of the securities law for insider trading in connection with two of the transactions.^[9] In the first transaction, the OSC held that Cornish knew of the planned transaction on the date that he traded certain securities while being in a "special relationship" with the subject issuer.^[10] In regards to the second

transaction, the OSC inferred, based on evidence, that the Assistant told Cornish about the transaction and drew an adverse inference against Cornish on that point given his failure to testify.^[11] The OSC also found that Cornish had knowledge of MNPI about the subject issuer, he was in a “special relationship” with that issuer and he traded securities in violation of securities law.^[12]

The OSC found that Cornish was not responsible for insider trading in the remaining transactions and did not engage in tipping.^[13]

The Findings Against Caruso and Sidders

OSC Staff’s case against Caruso and Sidders was based on circumstantial evidence.^[14] The OSC concluded that such evidence did not rise to the “necessary level of clear, convincing and cogent evidence” that makes it more likely than not that they traded in securities of any of the subject issuers while they were in possession of MNPI.^[15] The allegations against them were dismissed.^[16]

An example of OSC Staff’s failure to reach the necessary level of evidence was with respect to Caruso’s trading patterns. Caruso gave evidence about his trading strategy. He argued that the trades were consistent with his strategy. OSC Staff did not lead any evidence to show that Caruso’s other trades were inconsistent with his strategy.^[17]

Another example was OSC Staff’s allegation that Caruso’s trades were bad because overall they were large relative to his portfolio and were also bad because Caruso kept certain trades small to avoid suspicion. The OSC held that these positions were “arguably inconsistent”.^[18]

The allegations against Sidders suffered from similar frailties. For many of the allegations, there was an absence of evidence of uncharacteristic trading or suspiciously timely communication.^[19]

Conclusion

As observed by the OSC, it is often the case that certain elements of insider trading and tipping cases must be proven by circumstantial evidence because “the only persons who have direct knowledge of relevant communications are the wrongdoers themselves.”^[20]

The OSC noted that facts in this sort of case may be established by drawing inferences from circumstantial evidence.^[21] Accordingly, the OSC should assess each piece of evidence on its own, to determine whether the evidence deserved weight, whether it supported a finding of fact, and if so, whether that fact alone or together with other facts then supported a suggested inference.^[22] This could not be avoided by simply pointing to the “combined weight of the evidence”.^[23]

A predominant weakness in the evidence against both Caruso and Sidders was the absence of evidence about

their trading and communications between the parties. Some of the weaknesses may have resulted from turnover at the OSC. The senior investigator initially involved was no longer with OSC Staff.^[24] No matter the reason, there was insufficient evidence in this case about the respondents' general trading patterns to demonstrate that MNPI was used for some of the trades in question. This case serves as a reminder about the importance of putting forward a complete set of evidence when asking a decision-maker to draw factual inferences.

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[1] RSO 1990, c S 5.[ps2id id='1' target='']

[2] (2018) 41 OSCB 3500.[ps2id id='2' target='']

[3] *In the Matter of Donna Hutchinson, Cameron Edward Cornish, David Paul George Sidders and Patrick Jelf Caruso*, 2019 ONSEC 36 at para 2.[ps2id id='3' target='']

[4] *Ibid* at para 26.[ps2id id='4' target='']

[5] *Ibid* at para 43.[ps2id id='5' target='']

[6] *Ibid* at paras 53 and 54.[ps2id id='6' target='']

[7] *Ibid* at para 100.[ps2id id='7' target='']

[8] *Ibid* at para 103.[ps2id id='8' target='']

[9] *Ibid* at para 431.[ps2id id='9' target='']

[10] *Ibid* at para 182.[ps2id id='10' target='']

[11] *Ibid* at para 388.[ps2id id='11' target='']

[12] *Ibid* at para 393.[ps2id id='12' target='']

[13] *Ibid* at para 431.[ps2id id='13' target='']

[14] *Ibid* at para 4.[ps2id id='14' target='']

[15] *Ibid* at para 5.[ps2id id='15' target='']

[16] *Ibid* at para 430.[ps2id id='16' target='']

[17] *Ibid* at para 200.[ps2id id='17' target='']

[18] *Ibid* at para 193.[ps2id id='18' target='']

[19] See e.g. para 317(e), (f).[ps2id id='19' target='']

[20] *Ibid* at para 60.[ps2id id='20' target='']

[21] *Ibid* at para 61.[ps2id id='21' target='']

[22] *Ibid* at para 63.[ps2id id='22' target='']

[23] *Ibid* at para 63.[ps2id id='23' target='']

[24] *Ibid* at para 68.[ps2id id='24' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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