OSC short-selling prosecution dismissed

November 11, 2024

The Ontario Capital Markets Tribunal (the CMT) dismissed the Ontario Securities Commission (OSC) prosecution in *Re Cormark Securities Inc*. The CMT held that the OSC "failed to prove any of its allegations", that the transactions in issue were not an illegal distribution, and that the respondents' conduct did not engage the CMT's public interest jurisdiction. The CMT's decision contains helpful guidance for market participants on a number of issues. BLG represented Cormark in this matter.

What you need to know

- A "distribution" under the Ontario *Securities Act* is the first sale of those securities into the market. Whether a transaction is a "distribution" does not depend on the parties' subjective intent.
- Pledging restricted securities as collateral for a share loan and selling the borrowed shares on the secondary market is not a "distribution". There is no general prohibition on using restricted shares as collateral in a share lending transaction.
- Whether an issuer is an investment bank's "client" under OSC Rule 31-505 is contextual, including whether the investment bank conducted registrable activities for the issuer, whether the investment bank received a benefit, whether the relationship was formally documented, and whether the parties considered the issuer to be a client.

Background: The transactions and the OSC prosecution

The proceeding focused on transactions executed on or around March 17, 2017, the day on which Canopy Growth Corporation (Canopy) was added to the S&P TSX Composite Index. The transactions were structured to allow Canopy to raise capital. The transactions were:

- Canopy sold 2.5 million common shares to Saline Investments Ltd. (Saline, a Cormark client) in a private placement, subject to a four-month hold period (the Restricted Shares);
- Saline borrowed 2.5 million freely-trading Canopy common shares (the Free-Trading Shares);

- Saline provided the Restricted Shares to Goldman Holdings as collateral for the loan of the Free-Trading Shares; and
- Saline sold short 2.5 million Canopy common shares on the Toronto Stock Exchange through a series of sales on the open market and in the exchange's market-on-close facility, using the Free-Trading Shares to settle the short sales.

The OSC commenced public interest proceedings and sought sanctions against the respondents based on a number of allegations that were the subject of a hearing. Each of the allegations were dismissed as set out in the CMT's decision.

The transactions were not an illegal distribution

The CMT rejected the OSC's allegation that the sales of the Free-Trading Shares on the secondary market were an indirect offering of securities to the public without a prospectus, because they fell within the "extended" definition of a distribution under section 1(1) of the *Securities Act*. The definition of "distribution" pursuant to section 1(1) of the *Securities Act* includes two components:

- The first component is a list of six types of trades, including but not limited to, "a trade in securities that have not been previously issued" (section 1(1)(a)).
- The second component of section 1(1), which is often referred to as the "extended" definition, includes "any transaction or series of transactions involving a purchase and sale or a repurchase and resale in the course of or incidental to a distribution".

The CMT found that the "extended" definition did not apply because it did not accept the OSC's premise that the transactions effectively converted the Restricted Shares issued under the private placement into the Free-Trading shares borrowed under the securities loan agreement.

The CMT noted that the OSC's premise was "ill conceived" because it was inconsistent with the facts and contrary to the working of the closed system of Ontario's securities laws. The CMT ultimately determined that the Restricted Shares remained within the closed system during the hold period and that the Free-Trading Shares used to settle the short sales were distinct sets of securities. Consequently, the CMT did not consider it appropriate to extend the definition of distribution to include transactions involving different shares and therefore there was no illegal distribution.

Canopy was not Cormark's client

The CMT found that Canopy was not a client of Cormark or Kennedy for the purposes of OSC Rule 31-505 *Conditions of Registration*. The CMT provided a list of indicia of a client relationship, including: (i) conducting registrable activities, (ii) receipt of a benefit, (iii) formal documentation, and (iv) the parties' beliefs.

Applying these factors, the CMT found that Canopy did not rely on Cormark or Kennedy. Moreover, the CMT noted that to the extent Cormark and Kennedy were carrying on registrable activities in relation to the transactions, they were doing so on behalf of Cormark's client, Saline. The CMT also determined that any benefits Cormark and Kennedy received from Canopy were indirect, hypothetical or insignificant.

The CMT held that the lack of an agreement between Cormark, Kennedy and Canopy was not determinative of the existence of a client relationship, but that it was consistent with Cormark's and Kennedy's understanding that Canopy was not their client. The CMT was also not persuaded that Canopy believed it was Cormark's client nor that Cormark believed Canopy was its client. In making these determinations, the CMT emphasized that Canopy was a sophisticated party with an experienced board, management, and counsel and that it was therefore not analogous to a vulnerable individual investor.

No basis for a public interest order

The CMT also found there was no basis to make an order under its public interest jurisdiction in section 127(1) of the *Securities Act*. The CMT rejected the OSC's allegations that Cormark and Kennedy lied to Canopy. Specifically, the CMT held that: (i) Cormark and Kennedy did not mislead Canopy about the ordinary course nature of the transactions; (ii) Cormark and Kennedy did not lie about short selling; (iii) Cormark and Kennedy did not conceal Saline's risk-reward ratio; and (iv) Cormark and Kennedy did not fail to disclose the risk to Canopy's net proceeds from the Transactions.

The CMT further found that: (i) the respondents did not undermine investor protection provided by resale restrictions on securities; (ii) the respondents did not avoid disclosure and they had no control over Canopy's disclosure; (iii) Saline's short sales did not threaten capital markets efficiency or the public's confidence in them; and (iv) Cormark, Kennedy and Bistricer did not fail to meet the high standard of fitness and business conduct expected of market participants and registrants.

Conclusion

The CMT found that the OSC failed to establish any of its allegations against any of the respondents and dismissed the proceeding in its entirety. The CMT emphasized that the Commission had "not proven any of its numerous allegations" against the respondents and that these allegations were an "overreach". The CMT further noted that the "unfortunate consequence" of the proceedings is that the respondents incurred significant financial and reputational costs, which they cannot recover.

The BLG team representing Cormark in this matter included: David Di Paolo, Graham Splawski, Heather Pessione, Rebecca Flynn, Natalia Paunic, Rachel Toope and Alicia Krausewitz (Disputes), and Philippe Tardif and Laura Levine (Securities).

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