New insights from Kraft on the “necessary course of business” exception to tipping

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In Canadian capital markets, the act of “tipping”, being the selective sharing of material non-public information (MNPI) about an issuer, is generally prohibited to maintain market integrity; however, Canadian securities laws provide an important exception: disclosure of MNPI made in the “necessary course of business” (NCOB). Insiders of reporting issuers regularly rely on this exception, although the exact parameters of its application have been less clear.

This ambiguity was recently addressed in *Kraft (Re)* (*Kraft*), where the Ontario Capital Markets Tribunal (the Tribunal) for the first time explicitly considered the parameters of the NCOB exception under Section 76(2) of the *Securities Act* (Ontario) (the OSA).

Kraft provides long-awaited guidance for public companies and their insiders on the circumstances in which disclosure of MNPI may be made under this exception.

What you need to know

In *Kraft*, the Tribunal clarified the application of the NCOB exception:

- *Evidential Burden*: the person seeking to rely on the exception bears the burden of establishing that the selective disclosure was made in the NCOB;
- *Business Rationale Insufficiency*: the inclusion of the word “necessary” in the exception imports a level of importance beyond a mere business rationale or purpose. Disclosure must be essential or indispensable to business operations;
- *Objective Standard*: the “necessity” of the selective disclosure of MNPI must be evaluated objectively. Practically, this means individuals and companies must judge decisions to disclose in terms of objective necessity, not personal beliefs or intentions, even if held honestly and in good faith;
- *Narrow Interpretation*: the NCOB exception should be interpreted and applied reasonably narrowly, maintaining alignment with the overarching goal of upholding market integrity; and
- *No Bright Line Test:* NP 51-201 (as defined below) outlines the types of recipients with whom it may be appropriate to share MNPI in reliance on the NCOB exception; however, demonstrating that selective disclosure was made to such a recipient is not the end of the enquiry. Although *Kraft* outlines several

factors beyond the tippee's identity for determining NCOB applicability, it does not establish any bright line test.

The decision

WeedMD Inc., now Entourage Health Corp., is a cannabis production and distribution company listed on the TSX Venture Exchange. In 2017, WeedMD entered into a transaction with Perfect Pick Farms Ltd. (the Transaction) that included an option to purchase Perfect Pick's property.

In October 2017, MK, the then Chairman and Director of WeedMD, shared draft documents containing MNPI about the Transaction with MS, a long-time friend and business associate. The day before the transaction's public announcement, MS purchased 45,000 shares of WeedMD, and sold them shortly after for a substantial profit. This was not part of a formal consultancy, as MS was neither retained nor compensated. The OSC alleged that MK contravened the tipping prohibition.

Central to the legal issues was MK's claim that his disclosure to MS was made in the "necessary course of business." In rebuttal, MK claimed he sought MS's expertise as his trusted advisor in real estate and financial matters.

Understanding the necessary course of business exception

Section 76(2) of the OSA explicitly prohibits issuers or those in a special relationship with an issuer from disclosing material facts or changes about the issuer before general disclosure, except in the necessary course of business.

The OSA, however, does not define "NCOB," leaving its interpretation primarily to National Policy 51-201 *Disclosure Standards* (NP 51-201). Published first in 2002, NP 51-201 suggests that the NCOB exception is crucial for not unduly interfering with a company's ordinary business activities. It also outlines the types of recipients with whom it may be appropriate to share MNPI in reliance on the NCOB exception.

Kraft outlines several factors beyond the tippee's identity for determining NCOB applicability but does not establish any bright line test. The non-exhaustive list of factors include:

- the business of the issuer;
- the relationship between the tipper and the issuer;
- the relationship between the tipper and the tippee;
- the specific nature of the disclosed MNPI;
- the relevance of the MNPI to the relationship between the tippee and the issuer (that is, whether the nature of the relationship necessitates the disclosure of the impugned MNPI);
- the tipper's reasons for the selective disclosure; and
- the credibility of the tipper seeking to establish the NCOB exception.

Taking these factors into consideration, the Tribunal ultimately concluded that MK's disclosure was not made in the NCOB on the following grounds:

- *Personal Motive for Disclosure*: the disclosure was made because of MK's own personal desire to have MS provide a "second set of eyes;"
- *Lack of Internal Discussion*: the disclosure was made without any prior consultation with the WeedMD Board or management team;
- *Hasty Disclosure*: the disclosure took place hastily, without consideration of whether it was being made in the necessary course of WeedMD's business;
- *Lack of Expertise*: there was no indication that MS possessed specialized expertise that WeedMD did not already have access to; and
- *Absence of Confidentiality Measures*: MS was not instructed to maintain confidentiality of the information nor provided with guidelines regarding its potential use.

MK was held to have engaged in prohibited tipping by sending the draft documents to MS, and MS was found guilty of insider trading for purchasing the shares while in possession of MNPI.

Best practices moving forward

While its full impact remains to be seen, the *Kraft* decision offers new and valuable insights into strategies for avoiding pitfalls in disclosing MNPI. Best practices include:

- *Confidentiality Measures*: confidentiality agreements with recipients of MNPI should be used where appropriate, in addition to discussions emphasizing the sensitive nature of the information and the recipient's obligations;
- *Oversight*: *Kraft* underscores the importance of risk management strategies related to the handling and dissemination of MNPI. For instance, establishing a protocol requiring internal approval from relevant management (and the board, if appropriate) before any MNPI is selectively disclosed. The deliberation at the management or board level considering the advisability or necessity of such disclosure should be well-documented;
- *Regular Review*: to stay compliant and effectively manage risks, organizations must consistently review and update their compliance strategies for handling and disclosing MNPI. This regular assessment should account for changes in internal dynamics and legal standards, ensuring alignment with current applications of the NCOB exception; and
- *Legal Consultation*: legal advisors can assist in developing the compliance strategies and provide support in adapting dissemination practices with evolving legal standards.

In light of the severe repercussions that can follow breaches of insider tipping rules, it is crucial for organizations to adopt a proactive approach in upholding compliance.

Concluding remarks

While *Kraft* does not provide definitive guidance or any form of bright line test for being able to rely on the NCOB exception, it does serve as the first decision to directly consider and apply the NCOB exception to the tipping prohibition. In providing new

insights to supplement the guidance set forth in NP 51-201, the decision is helpful in better understanding the scope and applicability of this exception - underscoring the need for heightened vigilance to ensure issuers' and insiders' practices align with evolving legal interpretations.

This article was prepared with the assistance of Kaliopi Dimitrakoudis, articling student.

By

Laura Levine, Cameron A. MacDonald, Philippe Tardif

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

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T 604.687.5744
F 604.687.1415

Montréal
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Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749

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