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Developments in white-collar & capital markets regulatory enforcement

DECEMBER 13, 2017 7 MIN READ

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Regulators continue to try to "move the needle" in their pursuit of insider trading and other white-collar misconduct. Notably, the first court-imposed conviction for bribery under the *Corruption of Foreign Public Officials Act* (the CFPOA) was upheld by the Ontario Court of Appeal. While there were few notable securities enforcement cases, the Ontario Securities Commission (the OSC) appears to be capitalizing on the fact that courts support the use of circumstantial evidence to prove insider trading and tipping offences.

Developments in white-collar and anti-corruption enforcement

Enforcement authorities had a mixed record in prosecuting white-collar crime in 2017:

- ***R v. Karigar***: The Ontario Court of Appeal upheld Canada's first court-imposed conviction under the CFPOA. The accused was found guilty at trial of conspiring with other persons to pay bribes to foreign officials and later sentenced to three years' imprisonment. The court held that even though the illegal conduct occurred overseas, the offence could be prosecuted in Canada by virtue of the fact that the accused was a Canadian acting for a Canadian company in relation to work to be performed in Canada, and that the illegal conduct would benefit the Canadian company (the CFPOA has been amended since the offence occurred to provide that any CFPOA offence committed outside of Canada by a Canadian is deemed to have been committed in Canada). The court also clarified that an agreement to pay a bribe to a foreign public official is sufficient to constitute a conspiracy offence, even if no bribe is ultimately paid or even offered to the official.
- **SNC-Lavalin**: Three individuals – including two former SNC-Lavalin executives – were acquitted of corruption charges under the CFPOA in relation to a bridge construction project in Bangladesh. The Ontario Superior Court excluded wiretap evidence, which was central to the prosecution's case, on the basis that the wiretap application was based on speculation and lacked direct factual evidence demonstrating reasonable and probable grounds that an offence had been or was being committed. After the court excluded the wiretap evidence, the Crown elected not to call any witnesses at trial. Although wiretap evidence remains a useful prosecutorial tool, this acquittal highlights the careful scrutiny that courts will give to wiretap evidence because it represents a significant intrusion into

an individual's privacy. Corruption charges remain against other former SNC-Lavalin executives in relation to other projects.

In addition, the CFPOA has been amended to eliminate the exclusion of facilitation payments under the bribery offence. Facilitation payments, sometimes known as "grease payments," are made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of that official's duties or functions, and therefore does not require the exercise of discretion (*e.g.*,, the processing of official documents such as visas and work permits, the provision of public services such as power and water).

Finally, the Government of Canada launched consultations to consider introducing deferred prosecution agreements (DPAs) into Canada. DPAs are voluntary agreements negotiated between an accused and the prosecutor that allow the accused to avoid being convicted in exchange for complying with the terms of the DPA, which usually requires full co-operation with law enforcement. The government has stated that it is considering DPAs as an additional tool for prosecutors to use in holding offenders to account and to defer corporate misconduct. In its discussion guide for the DPA consultations, the government acknowledged that DPAs possess the potential advantages of encouraging self-disclosure of misconduct (thereby enhancing detection and enforcement) and improving corporate culture and compliance.

DPAs are available in the United States and in the United Kingdom. They have been used effectively in a number of high-profile cases to resolve investigations into alleged corporate misconduct, including bribery and tax evasion offences. Other jurisdictions are following suit: France introduced a DPA-like mechanism for anti-corruption investigations in 2016, and Australia completed consultations on a draft law for DPAs in May 2017.

Developments in capital markets regulatory enforcement

In 2017, several cases and settlements by securities regulators and courts had significant implications for capital markets enforcement:

- **Sino-Forest**: The OSC, after one of the longest proceedings in its history, ruled that Sino-Forest's former CEO and others had breached Ontario securities law as a result of having "engaged in deceitful or dishonest conduct" regarding the company's assets and revenues.
- **Amyot**: Five individuals and two companies pleaded guilty in Québec in an Autorité des marchés financiers (the AMF) proceeding alleging that the respondents took part in a "pump and dump" scheme to influence the price of five securities listed on U.S. over-the-counter markets. The respondents were fined a total of $18.2 million, with one respondent also ordered to serve a three-month intermittent prison sentence.
- **Home Capital**: The OSC entered into a settlement with Home Capital Group and three of its former executives. The respondents were required to pay $12.5 million in penalties for failing to disclose information related to fraudulent activity uncovered in Home Capital's residential mortgage business. Of the ordered penalties, $11 million is to be used as part of Home Capital's $29.5-million settlement in a related class action (which has received court approval).
- **Sentry Investments**: The OSC, as part of a settlement agreement, ordered Sentry Investments to pay a $1.5-million administrative penalty for payments and gifts that were improperly made to a dealing representative. The settlement is the first time that an OSC proceeding has addressed prohibited payments and gifts by an investment fund manager.

The settlement also addressed allegations of lack of internal controls, which created an environment in which these violations took place.

- **Da Silva**: An individual who had been convicted of illegally trading in securities, contrary to the Ontario *Securities Act*, pleaded guilty to *Criminal Code* charges for disobeying a court order and being unlawfully at large. After the Ontario Superior Court rejected the appeal of his *Securities Act* offences, the individual failed to surrender himself and left the country. Upon returning, he surrendered himself into custody to serve his sentence for his *Securities Act* violations and to address new *Criminal Code* allegations from the OSC's Joint Serious Offences Team.

OSC Staff continue to pursue insider trading and tipping

The Ontario Divisional Court in *Finkelstein v. Ontario (Securities Commission)* affirmed an OSC panel's finding of insider trading and tipping (and upheld sanctions) with respect to four of five appellants, reiterating the deference that courts give to securities commission decisions. At the same time, a further downstream tippee successfully appealed the findings against him in *Finkelstein*. This successful appeal for one of the five appellants underscores the continued evidentiary challenges that regulators face in pursuing those further down the "tipping chain."

Prior to *Finkelstein*, OSC Staff had been unsuccessful in several high-profile insider trading and tipping cases, in large part due to the evidentiary difficulties in proving these offences. The misconduct is generally secret, and OSC Staff lack more powerful investigation tools such as wiretaps. The decision in *Finkelstein* affirmed the OSC panel's reliance on circumstantial evidence to make a finding of insider trading and tipping, echoing the Divisional Court's prior decision in *Fiorillo*.

OSC Staff appear to be capitalizing on their success in *Finkelstein*. In *Hutchinson*, OSC Staff issued allegations of insider trading and tipping against four individuals, including a former legal assistant at a major Bay Street law firm. OSC Staff allege that the legal assistant provided a stock trader with confidential information about a series of take-over offers, which was then passed on to a wider insider trading ring spanning Panama, Bermuda, and the British Virgin Islands.

Whistleblowing developments

In 2017, the Alberta Securities Commission (the ASC) announced (in its most recent Strategic Plan) its plans to implement a whistleblower program in order to encourage reporting of securities law misconduct, although the ASC is not considering financial payouts for whistleblowers. More recently, the ASC has released a formal "credit for co-operation" policy.

The OSC and the AMF both established their own whistleblower programs last year. However, only the OSC's program provides financial rewards for reporting securities wrongdoing. Despite being in place for over a year, the regulators have not announced any cases brought forward as a result of their whistleblower programs (and in the OSC's case, no whistleblower payouts have been announced).