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Ontario Securities Commission narrows private party standing for public interest applications in contested transactions: The *Corus Entertainment* decision

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In its March 7, 2016 decision in *In the Matter of the Catalyst Capital Group Inc. and In the Matter of Corus Entertainment Inc.*, the Ontario Securities Commission (OSC) determined not to grant standing to The Catalyst Capital Group Inc. (Catalyst) to bring an application before the OSC under its public interest jurisdiction. Catalyst was seeking to oppose the proposed acquisition of Shaw Media Inc. (Shaw Media) by Corus Entertainment Inc. (Corus) and had sought relief under section 127 of the *Securities Act* (Ontario) (OSA) for an order requiring Corus to amend or supplement its management information circular in connection with the Corus special meeting of shareholders to be held on March 9, 2016 (and to thereby effectively force Corus to delay its special meeting) in connection with alleged disclosure deficiencies by Corus in connection with the proposed transaction.

The decision is the first time that the OSC has formally denied standing to a party in connection with a section 127 application. It represents a significant narrowing of the scope of private party standing under section 127 of the OSA and a pullback from the line of decisions commencing with *Re MI Developments Inc.* regarding the ability of a private party to obtain a hearing with respect to the exercise by the OSC of its public interest jurisdiction.

The reasons for the decision were released by the OSC on April 26, 2016.

Background

Background to the proposed transaction

On January 13, 2016, Corus and Shaw Communications Inc. (Shaw) announced that they had entered into a share purchase agreement, pursuant to which Corus agreed to acquire all of the outstanding shares of Shaw Media for $2.65 billion, to be paid through a combination of cash and the issuance of Class B non-voting participating shares of Corus to Shaw. Each of Corus and Shaw is controlled by the Shaw Family Living Trust, which beneficially owns, controls or directs 2,885,530 Class A participating shares of Corus, representing approximately 84.2% of the issued and outstanding shares of such class, and 17,562,400 Class A participating shares of Shaw, representing approximately 78% of the issued and outstanding shares of such class.

As a result of the control of each of Corus and Shaw by the Shaw Family Living Trust, Corus and Shaw are affiliates and related parties of each other for purposes of applicable Canadian securities laws, making the proposed acquisition a related party transaction for purposes of

Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* (MI 61-101). As a result of the application of MI 61-101, the proposed transaction was subject to "minority approval" of Corus shareholders (as defined in MI 61-101) and Corus was required to obtain an independent, formal valuation in respect of the transaction.

The announcement of the proposed transaction followed an extensive review process involving a special committee of independent directors, a formal valuation under MI 61-101 from Barclays Capital Canada and receipt of fairness opinions from each of Barclays and RBC Capital Markets. On January 29, 2016, Corus filed a notice of meeting announcing that a special meeting of shareholders was to be held on March 9, 2016, with the proxy deadline for registered shareholders set as March 7, 2016, at 10 a.m. On February 11, 2016, Corus released and filed its management information circular in respect of the special meeting of shareholders.

Catalyst's opposition to the proposed transaction

Catalyst is the second-largest hedge fund in Canada and acquired a position in the Corus Class B non-voting shares after the transaction was announced.

Beginning on February 22, 2016, Catalyst launched a public campaign against the proposed transaction. The campaign included numerous press releases, electronic investor presentations, a website, an investor conference call, a proxy solicitation campaign and a series of meetings with Corus's largest shareholders. Catalyst also made written complaints to OSC Staff regarding various aspects of Corus's disclosure in connection with the proposed transaction, which did not ultimately result in any subsequent action by OSC Staff.

At 7 a.m. on March 3, 2016, Catalyst announced that it intended to make an application to the OSC seeking a hearing "into the inadequacy of Corus's disclosures, and to seek appropriate remedies" and Catalyst filed its application early in the morning on Friday, March 4, 2016, one business day prior to the proxy deadline for registered shareholders.

The OSC hearings

The parties convened for an initial hearing before a panel of three OSC commissioners on the afternoon of Friday, March 4, 2016. At the hearing, Corus, Catalyst, Shaw and OSC Staff debated whether the OSC should appropriately hold a combined hearing on whether Catalyst had standing to bring a public interest application and on the merits of the Catalyst application, or whether to bifurcate the hearings and first hold a preliminary hearing on whether Catalyst had standing to bring the application alone. The OSC panel ultimately determined to hold separate hearings on Monday, March 7, 2016, regarding Catalyst's standing and, if it determined to grant standing to Catalyst, to immediately hold a second hearing on the merits of Catalyst's disclosure complaints.

On March 7, 2016, following the initial phase of the bifurcated hearing, the OSC panel ruled that Catalyst would not be granted standing to pursue the application, and the second hearing on the merits was accordingly cancelled.

The OSC's public interest jurisdiction under section 127 and prior decisions

Section 127 of the OSA grants the OSC broad jurisdiction to intervene in the capital markets in order to protect the public interest. The OSC also has the discretion to exercise that

jurisdiction at the request of private parties.

The exercise of the OSC's public interest jurisdiction is typically the result of the initiative of OSC Staff. The leading case regarding the standing of private parties to bring an application pursuant to section 127 prior to *Corus Entertainment* was the 2009 decision in *MI Developments Inc.*, pursuant to which the OSC concluded that parties other than OSC Staff cannot bring section 127 applications as a matter of right, but that the OSC has the discretionary power to permit such applications.

The OSC determined that the applicants in *MI Developments* were entitled to bring an application for the following reasons:

1. the applications related to both past and future conduct regulated by Ontario securities law
2. the applications were not, at their core, enforcement in nature
3. the relief sought was future looking
4. the OSC has the authority to grant an appropriate remedy
5. the applicants were directly affected by the conduct (past and future)
6. the OSC concluded it was in the public interest to hear the applications

This approach was subsequently applied in both *VenGrowth* and *Central GoldTrust*. In all three proceedings, a single hearing regarding standing and merits occurred and the applications were ultimately determined on the merits, i.e., the complainants were successful in obtaining standing given the arguably low bar set in the *MI Developments* decision.

The *Corus Entertainment* decision

Bifurcating the hearing

The hearings that led to the *Corus Entertainment* decision represent [to our knowledge] the first time that the OSC has determined to hold a bifurcated hearing on the standing of a complainant separately from the hearing on the merits of a section 127 application. The panel signaled in its decision that whether future applications will be combined (as in *MI Developments*, *VenGrowth* and *Central GoldTrust*) or bifurcated (as in *Corus Entertainment*) will depend on the evidence and submissions at hand, including the "public interest factors involved." In *Corus Entertainment*, the OSC found that there were sufficient public interest considerations arising from the evidence and submissions on the issue of standing to make a sequential process preferable to a combined hearing.

The denial of standing

The OSC ultimately exercised its discretion to deny Catalyst standing to bring the section 127 application. In assessing standing, the OSC had reference in particular to the *Western Wind Energy Corp*. decision, where the OSC, in assessing the application of its public interest jurisdiction under section 104 of the OSA (where an "interested person" has a right to make an application, in contrast to section 127), stated "... the Commission can decline to hold a hearing on the merits in respect of an application brought under section 104 for any appropriate reason, including because the application is *prima facie* without merit, because no useful purpose would be served by the hearing or because holding such a hearing is not in the public interest." The panel also reinforced the principle that "the ability of a private party to bring an application under section 127 is intended to be an extraordinary circumstance," and that accordingly private party complainants were subject to an onus of

demonstrating that a hearing would be in the public interest.

The OSC cited a number of factors in reaching its conclusion, including the following:

- the Catalyst application raised no novel issues
- Corus had sought to comply with the procedural protections of MI 61-101, including the review of the transaction by a Special Committee composed of independent directors, the preparation of a fairness opinion, the securing of an independent valuation and obtaining minority approval
- the specific financial disclosure deficiencies alleged by Catalyst had been the subject of a "very active public debate" in light of the proxy and public relations battle that had occurred between them
- the disclosure deficiencies had been the subject of complaints and a subsequent dialogue with OSC Staff, who had not chosen to pursue further remedies or action
- the financial disclosure had been reviewed and assessed by numerous third parties (financial analysts and proxy advisory firms) who had made their own assessments of the financial disclosures at issue
- the application was received late relative to the transaction, given that the special meeting of Corus shareholders was scheduled to take place less than a week prior to the application having been brought
- there was no *prima facie* case of inadequate or materially misleading disclosure. "In fact, as described above, there was detailed information and analysis available to investors included in the Management Circular, the Dissident Proxy Circular, analyst, proxy advisory firm and other reports to enable shareholders to make informed investment decisions. We accept Corus's submission that this case is really a 'debate about the meaning and significance of disclosed financial ratios and data, which is drawn from the Management Circular and sliced and diced by Catalyst' (Transcript of March 7, 2016, page 27, lines 4-9)"

In light of the foregoing, the OSC determined that in these circumstances it was not persuaded that the relief requested by Catalyst would better serve the minority shareholders than proceeding to the scheduled vote.

The OSC's reasons appear to place particular weight to the prior public debate that had occurred between the parties in the context of the contested transaction in assessing the merits of proceeding to a hearing on disclosure-related matters. In particular, the decision states that, although "inadequate disclosure is not cured by information disseminated by persons other than the issuer" it was appropriate for the OSC to consider the information available in the marketplace in considering whether to take action in the public interest. This is not a determination regarding whether an issuer is in full compliance with its disclosure responsibilities, but a confirmation that an OSC panel hearing a section 127 application "should not generally act as examiners late in the implementation of a corporate transaction where there is no convincing *prima facie* case of material inadequacies."

The panel briefly addressed the arguments that had been made regarding Catalyst's standing on the basis of its relatively small economic position and the timing of its acquisition of Corus Class B common shares (i.e., that it was not a long-term shareholder and had acquired its position after the announcement of the proposed transaction), as well as its status an "activist investor." The panel was careful to note that these factors did not influence their decision in this case, and that "[t]he significance of the size of shareholding or timing of

a share acquisition, if it bears any significance, will vary from case to case and cannot be stated as a general principle."

Timeliness of intervention

In assessing the timeliness of the Catalyst application, the OSC determined that granting standing to Catalyst would "interfere unduly with the justified expectations of participants in our marketplace, including minority shareholders, regarding the timetable for implementing corporate transactions. Such a late intervention could affect fairness, efficiency and confidence in our capital markets." Although the OSC confirmed that it would be prepared to intervene in situations where an offer is abusive, contravenes Ontario securities law or an animating principle underlying that law, or brings the integrity of the capital markets into disrepute, including involving disclosure or otherwise, it stated that "when an application is brought late in the process without new information or without critical issues being raised relating to the transaction in question, we will need more convincing evidence showing that the public interest is at stake than was offered by the Applicant."

Role of OSC Staff

The decision makes a number of observations of interest regarding the role of OSC Staff in a contested transaction process and the conduct of a section 127 application. In particular, the panel accepted the submission of OSC Staff that third parties should not expect staff to inform them as to their conclusions in relation to their review of a public company transaction or a complaint – which has important potential implications going forward for interested parties seeking to contest a transaction. The panel also specifically accepted OSC Staff's submission that they "[…] are not gatekeepers with respect to a party's decision whether or not to bring an application before the Commission" – the decision to bring an application, and the timing of the application, must be the private party's own decision. There is a tension between this element of the decision and the market's traditional understanding of the important role that OSC Staff plays generally with respect to the OSC's exercise of its public interest jurisdiction, as is indeed arguably reflected in other elements of the OSC's decision in *Corus Entertainment.*

Conclusion

In deciding to bifurcate the hearings on standing and merits, and then subsequently ruling against Catalyst on standing, the OSC has set important limits on the circumstances under which a private party can reasonably expect to gain potential access to the OSC's public interest powers under section 127 of the OSA. The issues raised by the decision in *Corus Entertainment* will therefore be important considerations going forward for parties evaluating the conduct and tactics of a contested transaction where they may wish to preserve the ability to seek a remedy from the OSC.

In particular, while the OSC has not shut the door on private party applicants making applications late in a transaction process seeking the exercise of the OSC's public interest jurisdiction (and in fact, acknowledges there may be cases, even late in the process, where doing so may be in the public interest), the *Corus Entertainment* decision presents a clear statement from the OSC that, in practice, will likely meaningfully limit the ability of a tactical litigant to wait until the last minute to launch an application to delay a shareholder meeting or completion of a transaction. As a result of the decision, it appears clear that complainants who "lie in the weeds" until the last possible moment will have a heavy onus charge to discharge in order to avoid having their applications dismissed. It can also be expected that future proceedings will place heavier weight on standing issues than has previously been the

case.

Ultimately, whether the OSC will grant standing to a private party applicant for a public interest hearing under section 127 of the OSA will turn on its assessment of the particular facts and circumstances at hand. In the wake of the *Corus Entertainment* decision, it appears likely that, in addition to the factors previously set forth in *MI Developments*, these will include the following:

- the timing of the application
- in the case of allegations of disclosure deficiencies, the information otherwise available in the marketplace and the public debate, if any, between the parties
- the position of OSC Staff on the allegations and their views on standing
- the impact of the decision on the issuer and its shareholders

Osler acted for Corus Entertainment in connection with its acquisition of Shaw Media and the proceeding before the OSC.