

Litigation - Canada

The Conrad Black saga continues: OSC affirms reciprocal order power

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July 08 2014

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Introduction

In yet another instalment of the long-running saga involving former media mogul Conrad Black, the Ontario Securities Commission (OSC) recently denied Black's motion to stay the OSC Staff's proceeding against him involving allegations of securities fraud alleged to have been committed by Black as former chief executive officer of media company Hollinger Inc. Following his criminal and administrative convictions in the United States, the OSC Staff issued an amended statement of allegations in 2013, seeking a reciprocal order against Black in Ontario based on the findings and convictions in the US proceedings. By way of motion, Black argued that the OSC proceeding was unnecessary and constituted an abuse of process.⁽¹⁾ However, the OSC disagreed, stating that reciprocal orders are effective tools to facilitate inter-jurisdictional enforcement and increase judicial efficiency, and that granting a stay in this case would defeat the public expectation that the OSC will finally address the allegations against Black in Ontario that have been outstanding for more than nine years.

Procedural history

The initial OSC proceeding against Black and other former Hollinger Inc associates commenced on March 18 2005 in respect to their alleged conduct as former directors and officers of Hollinger Inc. On February 2 2006⁽²⁾ Black provided an undertaking to the OSC that restricted his participation in Ontario's capital markets, pending the OSC's final decision in the matter.

Following the initial OSC proceeding, a parallel criminal proceeding involving similar allegations was commenced against Black in the United States on November 17 2005. Following numerous appeals and motions, Black was convicted of fraud and obstruction of justice, and was sentenced to 42 months of incarceration on June 24 2011.

Concurrent with the criminal proceeding, on November 14 2004 the US Securities and Exchange Commission instituted a separate civil proceeding against Black. On September 24 2008 Black was found liable for securities fraud and other violations of the US Securities Exchange Act of 1934,⁽³⁾ and was permanently banned from serving as a director and officer of a reporting issuer in the United States.

As a result of the US proceedings, the timing of the hearing in relation to the initial OSC proceeding was significantly extended, as the initial OSC proceeding was adjourned indefinitely pending resolution of the US proceedings. On July 12 2013, following the conclusion of the US proceedings, the OSC Staff issued an amended statement of allegations against Black, relying on Section 127(10) of the Ontario Securities Act,⁽⁴⁾ seeking a reciprocal order in Ontario based on the findings and convictions against Black in the United States.

Power to issue reciprocal orders

The OSC reviewed Black's request to stay the OSC proceeding against him in light of the statutory language and purpose of Section 127(10) of the Ontario Securities Act, which permits the OSC Staff to bring the OSC proceeding against Black by way of a reciprocal order.

Section 127(10) of the act deals with inter-jurisdictional enforcement and states:

"(10) Without limiting the generality of subsections (1) and (5) [dealing with public interest orders], an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exist:

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Norm Emblem



1. The person or company has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives.
2. The person or company has been convicted in any jurisdiction of an offence under a law respecting the buying or selling of securities or derivatives.
3. The person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities or derivatives.
4. The person or company is subject to an order made by a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on the person or company.
5. The person or company has agreed with a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, to be made subject to sanctions, conditions, restrictions or requirements." (Emphasis added.)

According to the OSC ruling, Section 127(10):

"plays an important role in facilitating the cross-jurisdictional enforcement of judgments for breaches of securities law and provides the Commission with a mechanism to issue protective and preventative orders to ensure that conduct which took place in other jurisdictions will not be repeated in Ontario's capital markets."⁽⁵⁾

In arriving at this conclusion, the OSC relied on the Supreme Court of Canada decision in *McLean v British Columbia (Securities Commission)*,⁽⁶⁾ where the court held that the power to issue a reciprocal order:

"achieves the legislative goal of facilitating interprovincial [and international] cooperation by providing a triggering 'event' other than the underlying misconduct. The corollary to this point must be the ability to actually rely on that triggering event — that is, the other jurisdiction's settlement agreement (or conviction or judicial finding or order, as the case may be) — in commencing a secondary proceeding." (Emphasis in original.)

As a result, the OSC ruling concluded that the section "provides a process whereby the Commission may make a final order against Black based on findings made in the United States",⁽⁷⁾ which in turn "saves time and resources and avoids the need for an inefficient and parallel duplicative proceeding in Ontario".⁽⁸⁾

Black's request for stay of proceedings

In the motion before the OSC, Black sought an order staying the OSC proceeding against him on the condition that the undertaking given by him would remain in effect. In light of the undertaking, Black argued that the OSC proceeding was "entirely unnecessary so as to be unfair and vexatious, and constitute[d] an abuse of process".⁽⁹⁾

The OSC rejected this argument, noting that Black had failed to establish that the OSC proceeding was oppressive, vexatious and an abuse of process and, by failing to do so, had not satisfied the test for the granting of a stay. In *R v Regan*⁽¹⁰⁾ the Supreme Court of Canada articulated the following criteria for when a stay is appropriate:

"(1) The prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;

(2) No other remedy is reasonably capable of removing that prejudice; and

(3) A balancing of interests that would be served by the granting of the stay of proceedings against the interest that society has in having a final decision."⁽¹¹⁾

The Supreme Court in *Regan* also set a high threshold for determining whether there is an abuse of process by requiring that it be demonstrated that:

"(1) the proceedings are oppressive or vexatious; and

(2) violate the fundamental principles of justice underlying the community's sense of fair play and decency." (Emphasis added.)⁽¹²⁾

Applying the legal criteria above, the OSC found that a reciprocal order proceeding would be an "entirely proper discharge"⁽¹³⁾ by the OSC of its statutory mandate to protect investors and ensure the efficiency of Ontario's capital markets. From a policy perspective, the reciprocal order sought by the OSC Staff would be consistent with the:

"public expectation that the Commission will finally address and make a determination with respect to the allegations against Black in Ontario that have been outstanding for more than nine years (since the Initial OSC Proceeding was commenced) and the Commission's failure to make such a determination would bring its regulatory role into disrepute and would likely be viewed as a means by which Black would avoid any finding against him in Ontario."⁽¹⁴⁾

Scope of evidence

As an alternative submission, Black sought direction on the scope of evidence to be presented at the hearing of the OSC proceeding.

With respect to this alternative submission, the OSC ruling noted that, generally, there is a "low threshold"⁽¹⁵⁾ for determining whether it is in the public interest to reciprocate an order from another regulatory authority. However, despite the low threshold, the OSC has a duty to make its own determination of what is in the public interest in Ontario and whether Black's conduct would have constituted a breach of the act in Ontario such that his actions would be considered contrary to the public interest.⁽¹⁶⁾ If the reciprocal orders are based on decisions of courts and regulators outside Canada, principles of comity and reciprocity underlying the enforcement of foreign judgments should equally apply to securities regulators. The OSC ruling relied, in part, on *Re New Futures Trading International Corp.*,⁽¹⁷⁾ where the OSC stated:

"Comity requires that there not be barriers to recognizing and reciprocating the orders of other regulatory authorities when the findings of the foreign jurisdiction qualify under subsection 127 (10) of the Act as a judgment that invokes the public interest. For comity to be effective and the public interest to be protected, the threshold for reciprocity must be low. The onus will rest with the Respondents to show that there was no substantial connection between the Respondent and the originating jurisdiction, that the order of the foreign regulatory authority was procured by fraud or that there was a denial of natural justice in the foreign jurisdiction." (Emphasis in original.)⁽¹⁸⁾

Accordingly, the OSC reviewed the various proceedings in the United States to determine whether Black was subjected to a denial of natural justice or due process. The OSC ultimately concluded that Black was provided "with an exhaustive opportunity to repeatedly contest the criminal and administrative allegations against him",⁽¹⁹⁾ and that by "any measure, the U.S. Proceedings met Canadian standards of fairness and Canada's concept of natural justice".⁽²⁰⁾ In the result, it was determined that the convictions and orders arising from the US proceedings were a reliable basis for an enforcement proceeding in Ontario.

Comment

The OSC ruling is significant both from legal and policy grounds. From a legal perspective, the OSC ruling affirms the relatively low threshold that must be met in order to fall within the ambit of Section 127(10) of the act with respect to inter-jurisdictional enforcement of securities law violations. Similarly, the OSC ruling affirms that the threshold to be met when reciprocal orders are based on decisions of courts and regulators outside Canada is low. The OSC ruling confirms the use of Section 127(10) as an "entirely proper discharge" by the OSC of its statutory mandate. From a policy perspective, the decision stands as a clear message that the OSC's mandate of cross-jurisdictional enforcement of judgments for breaches of securities law will be taken seriously by the OSC, and that applicants wishing to challenge the enforcement of interprovincial and foreign judgments must demonstrate evidence of alleged deficiencies in or procedural failures of the foreign proceedings that would amount to denials of natural justice in Ontario.

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Endnotes

(1) *In the Matter of Conrad M Black, John A Boulton and Peter Y Atkinson* (June 13 2014), OSC Decision, online: OSC.

(2) As amended on March 30 2007.

(3) Securities Exchange Act of 1934, 15 USC §§ 78a-77kk.

(4) RSO 1990 c S.5, as amended.

(5) *Supra* note 1 at para 7.

(6) [2013] 3 SCR 895.

(7) *Supra* note 1 at para 8.

(8) *Ibid* at para 9.

(9) *Ibid* at para 10.

(10) [2002] 1 SCR 297.

(11) *Ibid* at paras 54 and 57.

(12) *Ibid* at para 50 citing *R v Scott*, [1990] 3 SCR 979 at p 1007.

(13) *Supra* note 1 at para 14.

(14) *Ibid* at para 17.

(15) *Ibid* at para 26.

(16) *Ibid*.

(17) 36 OSCB 5713.

(18) *Ibid* at para 27.

(19) *Ibid* at para 32.

(20) *Ibid* at para 33.

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