

OSC Commences Quasi-Criminal Proceeding for Breach of Administrative Order Prohibiting Accused from Serving as Director or Officer

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The Ontario Securities Commission recently announced that it would be charging an individual with a quasi-criminal offence for breaching an administrative order. While the OSC has traditionally been hesitant to proceed in this fashion, this recent decision may suggest an increasing inclination to do so.

Key Takeaways

- **The OSC can charge individuals with quasi-criminal offences under s. 122(1)(c) of the *Securities Act*.** These charges can be made against any individual that “contravenes Ontario securities law,” including those that breach administrative orders.
- **The OSC has not historically enforced breaches of administrative orders with quasi-criminal proceedings.** However, recent cases suggest that it is willing to do so.
- **Director and officer bans can apply to both private and public companies.** A common misconception is that securities regulators can only impose director and officer bans in respect of public companies. The securities regime provides that securities regulators can prohibit individuals from being a director or officer of any private or publicly listed company, including prohibiting such individuals from performing the duties of an officer or director without formally holding those positions.

Background

On January 14, 2020, the OSC announced that it would be commencing a quasi-criminal proceeding under s. 122(1)(c) of the *Securities Act* against an individual on the basis that he breached an administrative order.

The proceedings arose out of an approved 2015 settlement of a securities regulatory proceeding, in which the individual respondent admitted to perpetuating a fraud on investors who purchased certain securities. The accused had also admitted that he illegally traded and distributed the securities, made inaccurate and misleading statements, and operated contrary to the public interest.

Pursuant to the terms of the settlement agreement, the accused was banned from serving as a director or officer of any issuer for five years. However, he allegedly continued his role as officer of one company and maintained links to others.

Under s. 122(1)(c) of the *Securities Act*, individuals or corporations can be convicted of a quasi-criminal offence by the Ontario Court of Justice for any action that “contravenes Ontario securities law.” Individuals or companies convicted of these offences are liable for a fine that cannot exceed \$5 million dollars and/or imprisonment that cannot exceed 5 years less a day.

Significance and Implications

The OSC has historically refrained from exercising its quasi-criminal powers, with only five such cases reported since 2017.¹ It is especially rare for the OSC to use its s. 122(1)(c) powers to enforce breaches of administrative orders.

One of the more recent cases in which the OSC has used quasi-criminal proceedings to seek recourse against an individual for breaching an administrative order is the case of *R v. Weber*.² In that case, the accused had been issued a 15-year ban on trading securities as well as a 15-year ban on serving as a director or officer of an issuer. The Ontario Court of Justice found that the accused had breached the cease trade order and sentenced him to 90 days in prison, to be served intermittently.

In *Weber*, the Ontario Court of Justice acknowledged that it is only able to sentence a small number of white-collar offenders and that many of these offenders believe what they are doing is not criminal. These twin factors were used to justify the imposition of a significant and harsh punishment as a deterrent.³ It is possible that the OSC has taken the commentary in *Weber* to heart in

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deciding to pursue quasi-criminal proceedings in connection with the alleged breach of an administrative order in this case.

The Upshot

The OSC's decision to proceed against the accused in quasi-criminal proceedings raises the stakes for those who would ignore or attempt to avoid a director and officer ban imposed by the OSC. Given the expansive definitions of "director" and "officer" in the *Securities Act*, individuals who have been banned must not only refrain from formally holding those positions, but also from performing a similar function to a director and officer.⁴ The OSC's willingness to proceed to enforce such a ban through quasi-criminal proceedings confirms that the consequences of ignoring such a ban can be dire.

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¹ Ontario Securities Commission 2019 Annual Report at page 26.

² 2019 CarswellOnt 18822 [Weber].

³ Ibid at para 33.

⁴ Section 1 of the Securities Act defines "director" as "a director of a company or an individual performing a similar function or occupying a similar position for any person" and "officer" as , with respect to an issuer or registrant, as "(a) a chair , vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager, (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b)".

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