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Working Together Works: Ontario Securities Commission Approves Reduced Sanction for Insider Tipper who Cooperated with Investigation

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The OSC recently approved a settlement agreement in which the respondent admitted to providing material non-public information to a third party.[1] The order in *Re Hutchinson*, which did not include an administrative penalty or disgorgement of profits, was held to be in the public interest given the respondent's cooperation and other mitigating factors.

Key Takeaways

- **Administrative penalties and disgorgement of profits are typical in cases of insider tipping or insider trading.** However, there are circumstances in which an order not containing these sanctions may be reasonable.
- **Determining whether a proposed sanction is in the public interest is dependent on the specific circumstances of the case.** These include factors surrounding the respondent's position, the breach at issue, and mitigating factors.
- **Cooperation with the OSC is viewed as a significant mitigating factor.** In light of Staff Notice 15-702 – *Revised Credit for Cooperation Program*, published in 2014, the OSC views cooperation in an investigation favourably, especially when cooperation results in evidence that would be difficult to obtain otherwise.

Summary and Background

The respondent Donna Hutchinson worked as a legal assistant in a large Toronto law firm, providing assistance with M&A transactions. She knowingly provided tips about material, non-public information for six transactions to a friend, Cameron Edward Cornish. Mr. Cornish passed this information on to another individual who traded on the basis of the tips. Mr. Cornish occasionally paid the respondent small amounts of money for the tips. The OSC commenced proceedings against the respondent, Mr. Cornish, and two others.

The respondent admitted to breaching subsection 76(2) of the *Securities Act*.[2] She cooperated with Staff, implicated the non-cooperative respondents, and agreed to testify as a witness in future proceedings. As a result, the parties entered into a settlement agreement, which provided for multiple orders against the

respondent, but did not require her to pay any administrative penalties or disgorgement of profits.

At the settlement approval hearing, the panel considered whether the agreement and subsequent order, including the absence of administrative penalties or disgorgement of profits, were in the public interest. The panel concluded that the order was in the public interest, and approved the agreement.

Cooperation and Mitigation

The panel reviewed the specific circumstances surrounding the case in considering whether the agreement was in the public interest. Factors mitigating against a higher sanction were of particular importance. The panel noted that the respondent (i) acknowledged her involvement and thereby prevented the need to expend resources to establish liability, (ii) lost her job as a result of the breach, (iii) received relatively minimal profits from the misconduct compared to the other respondents, (iv) had no prior offence record, (v) was not and had never been a registrant under the *Securities Act*, and (vi) was manipulated by Mr. Cornish, an experienced trader.

The most significant mitigating factor was the respondent's cooperation and willingness to testify against the other respondents. The willingness to testify is especially significant as it provides direct evidence that would otherwise be unavailable in an insider tipping or insider trading proceeding. The panel made specific reference to the 2014 Staff Notice 15-702 – *Revised Credit for Cooperation Program*, which provides that credit ought to be given for cooperation, including narrowing the scope of allegations, a proposed resolution of the matter, or a reduction of the recommended sanctions.

The panel noted that while sanctions for insider tipping or trading will generally include administrative penalties and disgorgement of profits, the proposed settlement agreement was reasonable in the specific circumstances of the case. It reasoned that the aims of the *Revised Credit for Cooperation Program* can only be reached if meaningful credit is given to respondents who cooperate and provide valuable information.

The Upshot

The *Re Hutchinson* decision is novel in its application of Staff Notice 15-702 and discussion of cooperation. The significance of the decision rests in the manner in which it explicitly broadens the scope of the OSC's possible application of this Staff Notice to allow for reduced penalties in certain circumstances.

The OSC decision in Re Hutchinson is available here.

If you have any questions concerning this case or securities litigation generally, please contact Lara Jackson, John M. Picone, or any other member of the Cassels Securities Litigation Group.

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[1] 2018 ONSEC 22.
[2] R.S.O. 1990, c. S. 5.

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