

Legal update

***Fiorillo v Ontario Securities Commission*: deference wins the day on insider trading appeal**

November 2016 Securities litigation

The Divisional Court recently upheld an Ontario Securities Commission (Commission) decision sanctioning a number of individuals for insider trading and tipping, and acting contrary to the public interest.¹

This is the latest in a series of unsuccessful appeals from Commission decisions, suggesting that the courts' significant deference to decisions of that tribunal makes most appeals an exercise in futility.²

Background

On February 11, 2015, the Commission released its decision finding that Eda Ageuci, Henry Fiorillo, Dennis Wing, and Kimberly Stephany had contravened the insider trading and tipping provisions under s. 127 of the *Securities Act* (the Act).³ The sanctions were set out in a later decision released on June 24, 2015.⁴

The Commission concluded that Ms. Ageuci, an administrative assistant at an investment bank, had access to material non-public information about transactions her firm was working on. Ms. Ageuci tipped Mr. Fiorillo, Mr. Wing, and Ms. Stephany who all went on to make well-timed and profitable trades. Mr. Fiorillo, Mr. Wing, and Ms. Stephany appealed. Ms. Ageuci did not.

The appeal

In a decision written by Associate Chief Justice Marrocco, the Divisional Court rejected the appellants' arguments that the Commission had drawn improper inferences from the evidence before it, which was largely circumstantial, that they had been deprived of procedural fairness, and that the sanctions ordered were excessive.

Inferences Drawn From Circumstantial Evidence

In rejecting the appellants' submissions about the inferences drawn by the Commission, Justice Marrocco closely examined the factual findings of the Commission, the evidentiary record before it, and the errors alleged by the appellants. The suggestion that the cases of *Walton v Alberta (Securities Commission)*⁵ and *Re Azeff*⁶ required a rigid "approach" to assessing circumstantial evidence in insider trading cases was rejected.⁷ The types of circumstantial evidence that may constitute indicia of insider trading or tipping are not fixed and will vary according to the case.

Justice Marrocco went on to undertake a detailed assessment of the evidence before the Commission, finding there was sufficient support in the record before the Commission for the factual findings made and inferences drawn.

In reasons concurring with the result, Justice Morawetz took a different approach than Justice Marrocco, declining to enter into a detailed review of the evidence and relying instead upon the deferential standard of review applicable to Commission decisions:

Given that the Commission is a specialized tribunal and that its decisions in insider trading cases are subjected to a reasonableness standard of review, this court should not substitute its own conclusions concerning what kind of market behavior is sufficient to permit it to draw the inference that material non-public information was communicated for those of the Commission.

I am satisfied that the Commission's reasons adequately explain why it drew the inferences that it did and that the appellants arguments before this court should be rejected because they are an invitation to this court to retry the matter. This is inconsistent with the standard of review which this court has decided in the past to apply to decisions of the Commission in insider trading.⁸

Procedural Fairness

The court also rejected arguments that the appellants had been deprived of procedural fairness due to having received allegedly insufficient notice and disclosure prior to investigative examinations, the Commission's misuse of portions of Ms. Agueci's compelled testimony at the hearing, and failure to apply the normal rules of procedure for the use of her compelled testimony.

Following prior decisions, the court determined that there is a low threshold of fairness at the investigative stage for reasons, including that no penalty could be imposed in an investigation, people in the securities industry have a reasonable expectation that the Commission may investigate their market activity, and there were opportunities to correct or explain answers given during investigatory interviews.⁹

The court rejected the appellants' argument that staff had unfairly introduced only the favourable parts of Ms. Agueci's compelled testimony at the hearing while denying them the opportunity to cross-examine her because she had elected not to testify at the hearing.¹⁰ The court held that the appellants had no right to cross-examine Ms. Agueci because she was not an adverse witness.¹¹ Furthermore, the appellants were able to, and did, introduce excerpts from her compelled testimony that they intended to rely on.¹²

The court disagreed with the suggestion that, as Ms. Agueci was effectively a witness for staff, it was improper for staff to discredit her testimony by introducing evidence that contravened parts of her compelled evidence that they had put into the record. Ms. Agueci was not a witness for staff; she was a respondent to allegations that she had contravened the *Act*.¹³ In any case, the normal rules of procedure only prohibit a party from impeaching the general credibility of its own witness.¹⁴ The court held that Commission was entitled to accept staff's evidence that contradicted Ms. Agueci's testimony since it did not go to general credibility.

Sanctions

The court rejected arguments that the sanctions imposed were excessive. The orders fell within the reasonable range of outcomes available to the Commission based upon the Commission's findings on the merits.¹⁵

Arguments that the measure of profits for disgorgement should be limited to the period between the date of insider trades and when the insider information became public also failed. The Commission had the discretion under Section 127(1) of the *Act* to disgorge any amounts that were the result of non-compliance. This permitted the Commission to order the disgorgement of actual profits, not just those made during the period that the information was non-public.¹⁶

Conclusion

The Divisional Court's decision affirms the reluctance of Ontario courts to interfere with the factual findings of securities regulators in insider trading cases. Respondents to insider trading allegations who may have hoped *Walton* signalled that assessments of circumstantial evidence by securities regulators would be closely scrutinized upon review will be disappointed. Justice Morawetz's concurring judgment rejecting the proposition that an appeal from a Commission

decision is an invitation to re-assess and re-evaluate the evidentiary record before the Commission will likely discourage future appeals.

The Divisional Court will have the opportunity to add further commentary on insider trading and the standard of review when it releases its decision in the appeal of *Re Azeff*, which was heard in late October 2016.

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Footnotes

- ¹ *Fiorillo v Ontario Securities Commission*, 2016 ONSC 6559 (Div Ct) ("*Fiorillo*"): <<http://canlii.ca/t/gvb96>>.
- ² See: *Pushka v Ontario (Securities Commission)*, 2016 ONSC 3041 (Div Ct); *Northern Securities Inc. v Ontario (Securities Commission)*, 2015 ONSC 3641 (Div Ct); *Cornish v Ontario (Securities Commission)*, 2013 ONSC 1310 (Div Ct).
- ³ *Re Agueci*, 38 OSCB 1573.
- ⁴ *Re Agueci*, 38 OSCB 5995.
- ⁵ *Walton v Alberta (Securities Commission)*, 2014 ABCA 273
- ⁶ *Re Azeff*, (2015) OSCB 2983. .
- ⁷ *Fiorillo*, para 149.
- ⁸ *Fiorillo*, para 383.
- ⁹ *Fiorillo*, paras 76, 85, 91, and 95.
- ¹⁰ *Fiorillo*, paras 103 and 106.
- ¹¹ *Fiorillo*, para 103.
- ¹² *Fiorillo*, para 108.
- ¹³ *Fiorillo*, para 114.
- ¹⁴ *Fiorillo*, para 115.
- ¹⁵ *Fiorillo*, paras 217 and 297.
- ¹⁶ *Fiorillo*, para 312.

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