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Citation: Macdougall (Re), 2022 ONSEC 5
Date: 2022-04-11
File No. 2022-4

IN THE MATTER OF
FRASER MACDOUGALL and CHRIS BOGART

-and-

IN THE MATTER OF
TRYP THERAPEUTICS INC.

REASONS FOR DECISION
(Subsection 3.5(2) of the *Securities Act*, RSO 1990, c S.5)

Hearing:	In writing	
Decision:	April 11, 2022	
Panel:	Timothy Moseley	Vice-Chair and Chair of the Panel
Submissions:	Hein Poulus, QC Joseph Ensom	For the Applicants, Fraser Macdougall and Chris Bogart
	Jennifer L. Whately Gordon Smith Nazma Lee	For the Executive Director, British Columbia Securities Commission
	Alexandra Matushenko Jason Koskela David Mendicino Mariko Rivers Vivian Lee Tegan Raco Troy Hilson	For Staff of the Ontario Securities Commission

REASONS FOR DECISION

I. OVERVIEW

[1] Fraser Macdougall and Chris Bogart (the **Applicants**) applied to both the Ontario Securities Commission (**OSC**) and the British Columbia Securities Commission (**BCSC**) for relief with respect to a proposed financing transaction.

[2] The Applicants requested preliminarily that their application be heard jointly by the OSC and the BCSC, so that the two panels would, at the same time, hear all the evidence and submissions.

[3] The Applicants filed written submissions in support of the request for a joint hearing, as did Staff of the OSC and the Executive Director of the BCSC. The respondent Tryp Therapeutics Inc. (**Tryp**) advised that it did not oppose the request. On March 10, 2022, I ordered, for reasons to follow, that the hearing proceed jointly as requested.[1] These are the reasons for that order.

II. NATURE AND STATUS OF THE MAIN APPLICATION

[4] The Applicants are minority shareholders of Tryp, which is a reporting issuer in British Columbia, Alberta and Ontario. Tryp's principal regulator is the BCSC. The Applicants alleged that Tryp contravened securities legislation by entering into a related party transaction without minority shareholder approval and without an available exemption from such approval. Their allegation relied on Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**),[2] which has been implemented in Ontario but not in British Columbia.

[5] The Applicants also alleged that the transaction is an inappropriate defensive tactic.

[6] The hearing on the merits of the main application was scheduled to begin on April 11, 2022. On April 8, after I issued the order for a joint hearing, but before the merits hearing began, the Applicants withdrew the main application. That withdrawal was a subsequent event that had no bearing on my decision to allow a joint hearing and has no bearing on the substance of these reasons. However, for editorial accuracy, I have adopted language throughout that reflects the fact that the application is no longer pending at the time of issuance of these reasons.

III. ANALYSIS OF THE REQUEST FOR A JOINT HEARING

A. Introduction

[7] The request for a joint hearing raised two issues. First, does the OSC have the authority to conduct a hearing jointly with the BCSC in this case? If yes, should the OSC exercise its discretion to do so?

[8] In issuing the order for a joint hearing, I concluded that the answer is yes to both questions. I will address each of them in turn.

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[1] (2022), 45 OSCB 2762
[2] (2008), 31 OSCB 1321

B. Authority to conduct a joint hearing

[9] Ontario's *Securities Act* (the **Ontario Act**) allows the OSC to hold a joint hearing with another body authorized by statute to regulate trading in securities, commodities or derivatives.[3] The OSC and the other body must have concurrent jurisdiction to hear the application.

[10] In this case, the OSC has both the subject matter jurisdiction to decide the issues raised in the main application and the remedial jurisdiction to make most of the orders requested by the Applicants.

[11] The Applicants sought relief under paragraphs 127(1)2, 2.1 and 3 of the Ontario Act, including orders from the OSC to cease trading and prohibit purchasing of securities related to Tryp's proposed financing until Tryp obtained shareholder approval. While the appropriateness and sufficiency of the requested relief would have been a question to be determined at the merits stage of the main application, for the purposes of this request for a joint hearing, it is sufficient to note that the relief requested on the main application is within the OSC's jurisdiction.

[12] In addition, because Tryp is a reporting issuer in Ontario, it is subject to MI 61-101. One of the Applicants' central allegations was that Tryp improperly relied on an MI 61-101 exemption, thereby inappropriately circumventing the requirement to obtain minority shareholder approval for the related party transaction. Because the OSC has adopted MI 61-101, it has jurisdiction to determine whether exemptions contained in that instrument are in fact available to Tryp.

[13] Accordingly, the OSC has jurisdiction over the subject matter of the main application, and may grant the requested relief. The OSC has authority to conduct the hearing jointly if it considers it appropriate to do so.

[14] I turn now to my reasons for exercising my discretion to make that order.

C. Discretion to order that the hearing be conducted jointly

[15] Generally, issuer-related matters that touch on multiple jurisdictions are addressed by the issuer's principal regulator. Joint hearings are an exception and should be held only in compelling circumstances that justify the OSC involving itself in a dispute being addressed by another securities commission.[4] Differences in rules or public policy can meet the standard of compelling and non-routine circumstances.[5]

[16] In this case, the main application has a clear and strong connection with British Columbia, Tryp's principal regulator. However, that connection does not preclude the OSC from exercising its jurisdiction. I concluded that the important differences in applicable regulatory requirements warrant a joint hearing. That conclusion is reinforced by the novel issues raised on this application and the efficiencies that would be gained by proceeding jointly.

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[3] RSO 1990, c S.5, s 3.5(2)

[4] *AbitibiBowater Inc (Resolute Forest Products) (Re)*, 2012 ONSEC 12, (2012) 35 OSCB 3645 at para 56

[5] *Mangrove Partners (Re)*, 2019 ONSEC 18, (2019) 42 OSCB 5057 (***Mangrove***) at para 40

[17] The regulatory differences arise because MI 61-101 has not been adopted in British Columbia. As a result, only the OSC can make a decision relating to MI 61-101 in this case, including:

a. whether any MI 61-101 exemptions were available to Tryp;

b. whether it would be in the public interest to deny Tryp an exemption that would otherwise be available, even if Tryp did not violate Ontario securities law; and

c. if there were any breaches of MI 61-101, what the appropriate remedies would be.

[18] British Columbia has no rules or instruments similar to MI 61-101 that address related party transactions in the same way, and more specifically, that require an issuer to obtain shareholder approval of a proposed related party transaction in advance of a transaction, absent proper reliance on an enumerated exemption.[6] Accordingly, Ontario's participation is essential.

[19] Even though British Columbia has not adopted MI 61-101, the related issues might still have been of interest to the BCSC. The evidence and submissions that the OSC would have heard may well have been relevant to the BCSC's public interest authority. That possibility supports the conclusion that it would have been appropriate to conduct the merits hearing jointly, had it proceeded.[7]

[20] In addition, the main application appeared to raise a novel question as to whether the subject transaction was an inappropriate defensive tactic that might have engaged the underlying policy concerns set out in National Policy 62-202 – *Take-Over Bids – Defensive Tactics*, even though outside the context of a take-over bid. In the specific circumstances of the main application, a joint hearing would have promoted sound and responsible harmonization and co-ordination of securities regulation regimes, a goal enshrined in principles contained in the Ontario Act.[8]

[21] Finally, a joint hearing would have realized efficiencies, particularly because the issues and arguments before the two regulators were likely to have been substantially the same and because it appeared at the time that there was some urgency to resolving the dispute due to the pending transaction and an associated conditional undertaking.

IV. CONCLUSION

[22] For the above reasons, I concluded that the main application should be heard jointly by the BCSC and the OSC.

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[6] MI 61-101, ss 5.6 and 5.7
[7] *Aurora Cannabis Inc (Re),* 2018 ONSEC 10, (2018) 41 OSCB 2325 at para 58
[8] Ontario Act, s 2.1

[23] Any order to that effect must be premised on the BCSC having reached the same conclusion.[9] After confirming that the BCSC panel that considered the request for a joint hearing had indeed reached that conclusion, I issued my order.

Dated at Toronto this 11th day of April, 2022.

"*Timothy Moseley*"

Timothy Moseley

[9] *Mangrove* at para 41