Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue Queen ouest, Toronto ON M5H 3S8

Citation: *Cormark Securities Inc (Re)*, 2023 ONCMT 23
Date: 2023-06-15
File No. 2022-24

IN THE MATTER OF
CORMARK SECURITIES INC., WILLIAM JEFFREY KENNEDY, MARC JUDAH BISTRICER, and SALINE INVESTMENTS LTD.

REASONS FOR DECISION

(Rule 27 of the *Capital Markets Tribunal Rules of Procedure and Forms*)

Adjudicators:	M. Cecilia Williams (chair of the panel) Sandra Blake Timothy Moseley	
Hearing:	By videoconference, May 4, 2023	
Appearances:	Anna Huculak Nicole Fung	For Staff of the Ontario Securities Commission
	Joseph Groia Kevin Richard	For Marc Judah Bistricer
	Melissa MacKewn	For William Jeffrey Kennedy
	Derek Ricci	For Saline Investments Ltd.
	Graham Splawski	For Cormark Securities Inc.

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1. OVERVIEW

[1] On May 8, 2023, we dismissed a motion brought by Marc Judah Bistricer for the disclosure of documents that he says are in the possession of Staff of the Ontario Securities Commission and that were obtained as part of its investigation of this matter. These are our reasons for dismissing the motion.

[2] Staff alleges that Cormark Securities Inc., Bistricer and William Jeffrey Kennedy carried out a series of transactions involving short sales, a private placement and a share swap, that were abusive and contrary to the animating principles of the *Securities Act*[1] (the **Act**). Staff made disclosure to Bistricer in the normal course. Bistricer seeks additional disclosure. He described this request in three different ways, which we examine in detail below.

[3] This motion presents the following issues:

a. Is Bistricer's request for disclosure sufficiently clear?

b. Is Bistricer entitled to the disclosure that he is seeking from Staff?

[4] We conclude that Bistricer's disclosure request is unclear with respect to the specific documents he seeks. As a result, we cannot grant the requested relief. Giving Bistricer's request the most generous possible meaning, we still conclude that he is not entitled to the disclosure he is seeking because the documents are not relevant to the allegations Staff has made against Bistricer and the other respondents.

2. ANALYSIS

2.1 Introduction

[5] We start our analysis with a description of the series of transactions at issue. We then look at the investigation orders under which Staff gathered documents. Then, we consider the three different ways Bistricer described the documents he is seeking to have disclosed, which leave Staff and us uncertain about the scope of his request. Finally, we give Bistricer's request for disclosure its most

[1] RSO 1990, c S.5

generous possible meaning and conclude that the documents he is seeking are irrelevant to the issues in this matter.

[6] The alleged activity involved Saline Investments Ltd., in anticipation of a private placement by Canopy Growth Corporation (**Canopy**):

a. selling Canopy shares short in the open market;

b. buying an equal number of Canopy shares in the private placement;

c. swapping the private placement shares for free-trading Canopy shares under a securities lending agreement; and

d. using the free-trading shares to settle the short sales.

[7] During the investigation that preceded Staff's filing of the Statement of Allegations, the Commission issued two orders under s. 11 of the Act. A s. 11 order starts a formal investigation and allows Staff to compel evidence for the investigation. Neither of these orders specifically targeted any of the respondents.

[8] The initial order authorized Staff to investigate persons and companies who may have engaged in: (i) improper short selling of securities of reporting issuers in advance of public offerings and private placements, (ii) tipping or insider trading, and (iii) conduct that resulted in or contributed to a misleading appearance of trading activity in, or an artificial price for, the securities.

[9] Amendments to the initial s. 11 order expanded the investigation to include persons or companies who may have traded in securities on their own accounts or on behalf of other persons or companies, where the trades would be distributions of the securities, without preliminary prospectuses or prospectuses having been filed.

2.2 The scope of Bistricer's disclosure request is unclear

[10] Staff submits that Bistricer's request is too vague and imprecise to determine what documents are included or whether any responsive documents even exist. We agree.

[11] Bistricer describes the documents he is requesting in three different ways, but submits that his request is clear because the three different formulations are

merely different ways of referring to the same information. We disagree. The imprecision and lack of clarity are apparent on a review of the different formulations:

a. In paragraph [h] of Bistricer's motion, "Requested Documents" is defined as "…all documents in Staff's possession which pertain to any transactions that have similarities to the transactions at issue in this matter, which would include the short sales, private placement and/or the securities lending agreement." The term 'similarities' is too imprecise and open-ended. Similarity is a question of degree. Any order we make must be clear and definitive, and must enable someone subject to the order to determine what they must do to comply.[2] The word 'similarities' is too vague to permit that. Arguably, every transaction of any kind has some 'similarity' to the subject transactions. How similar would a transaction have to be for it to be caught within the order? We cannot know, based on Bistricer's formulation.

b. Paragraph 2 of Bistricer's written submissions uses different language. It defines the disclosure requested as being for documents that are "of the same type" as those referred to in the statement of allegations. Our plain reading of "the same type" implies a narrower set of documents than does "similarities", but in any event, the phrase "of the same type" is also insufficiently precise.

c. In oral submissions, Bistricer adopted a completely different approach. He described his request as being for disclosure of everything Staff received pursuant to the s. 11 orders, including all documents, as well as transcripts of examinations, and if no transcripts exist, then notes from those examinations. This request is more precise than what Bistricer sought in his motion document or in his written submissions, but it is also significantly broader than either of those requests.

[12] Saying that the three requests are the same does not make them so. None of those formulations allows us to issue an order that would be sufficiently precise

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[2] *Ironside, Re*, 2005 ABASC 683 at para 84

for Staff to implement. We conclude therefore that Bistricer's request is too unclear to form the basis of a disclosure order.

[13] Despite that finding, we now turn to consider what the outcome would be were we to give his requests the most generous meaning.

2.3 Bistricer is not entitled to the disclosure that he is seeking from Staff as the documents sought are irrelevant

2.3.1 Introduction

[14] If we attempt to put aside the uncertainty, and interpret Bistricer's requests generously, is Bistricer entitled to disclosure of any additional documents that might fall within one or more of his three formulations? We conclude that he is not, because those documents are irrelevant to the allegations against the respondents.

[15] We begin by considering the law with respect to Staff's disclosure obligation. We then address the following issues:

a. Does the existence of an allegation that is not tied to a specific contravention of Ontario securities law change the nature of Staff's disclosure obligation?

b. Is evidence of general practise in the market relevant to the allegations?

c. Does Staff have an obligation to disclose all the material it obtained under a s.11 order?

2.3.2 Staff's disclosure obligation

[16] Rule 27(1) of the *Capital Markets Tribunal Rules of Procedure and Forms* (the ***Rules***) requires Staff to provide every other party "copies of all non-privileged documents in Staff's possession that are relevant to an allegation." Staff's duty of disclosure in an enforcement proceeding is akin to the standard imposed on the Crown in criminal proceedings.[3]

[17] When assessing relevance, Staff must:

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[3] *BDO Canada LLP (Re)*, 2019 ONSEC 21 (**BDO Canada**) at para 13, citing *R v Stinchcombe*, [1991] 3 SCR 326

a. include not only documents on which Staff intends to rely, but also documents that might reasonably assist a respondent in making full answer and defence to Staff's allegations, including by helping the respondent make tactical decisions;

b. assess the relevance of documents in the context of the specific allegations being made by Staff;

c. reasonably anticipate defences or issues that a respondent might properly raise, to inform Staff's assessment of relevance;

d. include both inculpatory and exculpatory documents; and

e. err on the side of inclusion.[4]

[18] The threshold for relevance is low and includes "materials which may have only a marginal value to the ultimate issues" at a hearing.[5]

[19] The burden lies with the respondent making the disclosure request to articulate a basis for that request. The respondent must establish a sufficient connection between the documents or information they say are missing and their ability to make full answer and defence to Staff's allegations.[6]

2.3.3 Does the existence of an allegation that is not tied to a specific contravention of Ontario securities law change the nature of Staff's disclosure obligation?

[20] Bistricer notes that Staff's allegations go beyond specified contraventions of Ontario securities law. Staff has alleged that "this type of abusive short selling may cause" certain negative impacts on the capital markets, and highlights the involvement of registrants and the risk-free nature of the transactions. Staff says that these circumstances combine to make the conduct at issue therefore abusive and contrary to the animating principles of the Act, therefore warranting sanctions under s. 127 of the Act even if the Tribunal finds no contraventions of Ontario securities law.

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[4] BDO Canada at para 14

[5] *R v Dixon,* 1998 CanLII 805 at para 23, quoted in *Agueci (Re)*, 2012 ONSEC 44 at para 35

[6] BDO Canada at paras 16-17

[21] Bistricer submits that through these broader allegations, Staff has raised the issue of similar types of transactions and their potential impact on the market. Bistricer says he is merely seeking to have Staff disclose those similar transactions to him so that he may effectively respond.

[22] Staff submits that the improvement of conduct is a critical part of securities regulation. In pursuit of that objective, one must measure conduct against the applicable regulatory standard.[7] The regulatory standard is not determined by what others are doing or how often they are doing it.

[23] We do not agree that an allegation of conduct that warrants an order under s. 127 of the Act even absent any breaches of Ontario securities law, in and of itself broadens what documents might be relevant to a respondent. There is nothing inherent in a public interest allegation that makes broad disclosure of information unrelated to the specific respondents and their alleged conduct automatically relevant. The issue here, based upon the Statement of Allegations, is the involvement by registrants in this specific series of transactions in securities of a particular public issuer.

2.3.4 Is evidence of general practise in the market relevant to the allegations?

[24] Bistricer submits that the prevalence of these types of transactions, how often they occur together, and the impact they have on the market are relevant to the respondents' choices about what their defences should be and how best to advance those defences. Bistricer also submits that the information is relevant to the respondents' determination of what lay and expert evidence to call, and what questions to ask Staff's witnesses about the impact of "this type" of transaction on Ontario's capital markets.

[25] Staff submits that the determination of whether Bistricer breached the prospectus requirement or acted in a manner that would engage the animating principles of the Act turns on how Bistricer conducted himself, not on how others conducted themselves, or whether others engaged in conduct like the respondents', or the frequency or consequences of any such conduct.

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[7] *Caldwell Investment Management Ltd. (Re),* 2018 ONSEC 50 at para 40

[26] In the only case Staff cites that is on point, in our view, the Tribunal concludes that "Although it may have been common practice at the time for brokers to allocate 'hot' new issues to traders at institutions in return for business, this practice is improper where it places either the trader at the institution or the broker in a position where his interest conflicts with those of the institution."[8]

[27] The standard against which the respondents' conduct is to be measured, apart from any potential contravention, is whether their conduct was abusive or engaged the animating principles of the Act. What others might have done or how frequently they might have done it is irrelevant to whether those criteria are met. Staff's allegation is that the type of conduct alleged may cause the specified consequences. The allegation is not that the type of conduct always, or usually, or often, causes those consequences. Even if there were some relevance to the prevalence of similar conduct, we have no basis to conclude that any information Staff has would be representative in any way and would be probative of prevalence.

[28] Bistricer also suggested that information about whom Staff contacted would be useful, because it would allow Bistricer to seek the views of others who might have engaged in similar transactions. We disagree that those views, even if admissible, would be relevant to any issues involving the respondents.

[29] We therefore conclude that there is no basis to order Staff to disclose information that indicates what practices others are engaging in.

2.3.5 Does Staff have an obligation to disclose all material obtained pursuant to a s. 11 order?

[30] Bistricer's third version of his request, made only in oral submissions, is that he wants everything that Staff obtained under a s. 11 order. We agree with Staff's submission that its disclosure obligation does not extend that far.

[31] Bistricer offered no authority that supports his broad request. In his submissions, Bistricer attempted to reverse the onus, saying that Staff had cited no authority for being able to withhold evidence obtained under a s. 11 order that gave rise to the proceeding. We reject this attempt to reformulate the long-standing test for

[8] Biscotti, Re (1993), 16 OSCB 31 at paras 112, 123 and 111

disclosure. It does not follow from the fact that Staff obtained information in an investigation that the information is automatically relevant to the allegations. In fact, the opposite is often true, particularly where the allegations that Staff ultimately settles on relate only to a subset of the matters that Staff investigated.

[32] Bistricer also attempts to bolster his position on this issue by submitting that the investigation was part of this proceeding, and Staff must disclose documents obtained during the proceeding. We disagree, for two reasons: (i) we are aware of no authority for the proposition that a different standard applies to documents Staff obtains within a proceeding than applies to documents obtained outside a proceeding; and (ii) in any event, an investigation does not form part of a proceeding.

[33] On the latter point, Bistricer bases his submission on the Tribunal's decision in *Sextant Capital Management Inc. (Re)*,[9] in which the panel concluded that "the investigative stage and the adjudicative stage are not separate proceedings, but rather stages in one proceeding, in the circumstances of this matter."[10]

[34] In our view, that conclusion does not correctly describe investigations and proceedings under the current statutory and regulatory regime, and if our view on that question represents a departure from the previous decision of this Tribunal, then we respectfully do so. More recent decisions separate investigations from the proceedings that often follow them, and are more faithful to the characterization of a "proceeding" in the *Statutory Powers Procedure Act*,[11] this Tribunal's *Rules*, and elsewhere. At this Tribunal, a proceeding starts with the issuance of a Notice of Hearing by the Secretary, following the filing with the Tribunal of an Application or a Statement of Allegations.[12]

[35] That issue aside, we repeat our earlier conclusion that Staff's disclosure obligation does not extend to everything Staff obtains in the course of an investigation. The test remains one of relevance.

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[9] 2010 ONSEC 25 (***Sextant***)
[10] *Sextant* at para 10
[11] RSO 1990, c S.22
[12] *Sharpe* at paras 81-82

3. CONCLUSION

[36] We conclude that Bistricer's various requests for disclosure leave too much uncertainty about what he asks for, and are either too imprecise or too broad.

Dated at Toronto this 15th day of June, 2023

"M. Cecilia Williams"

M. Cecilia Williams

"Sandra Blake"

Sandra Blake

"Timothy Moseley"

Timothy Moseley