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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
COVENTREE INC.,
GEOFFREY CORNISH and DEAN TAI

REASONS FOR DECISION ON SANCTIONS AND COSTS

Hearing:	October 26 and 27, 2011	
Decision:	December 23, 2011	
Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	Mary G. Condon	- Vice-Chair
	Paulette L. Kennedy	- Commissioner
Appearances:	Jane Waechter Michelle Vaillancourt Donna Campbell Shauna Flynn Christie Johnson Daniel Waldman	- For Staff of the Commission
	Robert W. Staley Shara Roy Jason Woycheshyn Kent E. Thomson Sean Campbell Derek Ricci	- For Coventree Inc.
	J. Thomas Curry Monique Jilesen Nadia Campion	- For Geoffrey Cornish
	Paul Le Vay Johanna Braden Paul Saguil	- For Dean Tai

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REASONS FOR DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") to consider pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") whether it was in the public interest to make an order with respect to sanctions and costs against Coventree Inc. ("**Coventree**"), Geoffrey Cornish ("**Cornish**") or Dean Tai ("**Tai**") (collectively referred to as the "**Respondents**").

[2] The hearing on the merits was heard over 45 days from May 12, 2010 to December 9, 2010 and the decision on the merits and our reasons were issued on September 28, 2011 (the "**Merits Decision**").

[3] Following the release of the Merits Decision, we held a separate hearing on October 26 and 27, 2011 to consider submissions from Staff of the Commission ("**Staff**") and counsel for Coventree, Cornish and Tai regarding sanctions and costs. We issued our order with respect to sanctions and costs on November 8, 2011 (the "**Sanctions Order**"). A copy of our Sanctions Order is attached as Schedule A to these reasons.

[4] These are our reasons for imposing the sanctions and costs under the Sanctions Order.

[5] Capitalized terms that are not defined in these reasons are used as defined in the Merits Decision.

II. THE MERITS DECISION

[6] On December 7, 2009, the Commission issued a Notice of Hearing in this matter pursuant to sections 127 and 127.1 of the Act in connection with a Statement of Allegations issued by Staff on the same day.

[7] This proceeding related to whether Coventree complied with its obligations (i) to make full, true and plain disclosure of all material facts in its final prospectus dated November 15, 2006 offering its common shares for sale to the public, and (ii) to disclose material changes that Staff alleged occurred on January 19, 2007 and August 1, 2007, or thereafter. Staff alleged that Cornish and Tai, both senior officers and directors of Coventree, authorized, permitted or acquiesced in Coventree's non-compliance with the Act and were therefore deemed also to have not complied with the Act. Staff also alleged that Coventree breached the Act in April 2007 by making a misleading statement as to the total U.S. subprime mortgage assets held by Coventree sponsored conduits.

[8] We concluded in the Merits Decision that:

(a) Coventree contravened subsection 75(1) of the Act by failing to forthwith issue and file a news release disclosing the material change with respect to Coventree that occurred as a result of the DBRS January Release;

(b) Coventree contravened subsection 75(2) of the Act by failing to file a material change report in respect of the material change referred to in paragraph (a) above in accordance with that subsection;

(c) Coventree contravened subsection 75(1) of the Act by failing to forthwith issue and file a news release disclosing the material changes with respect to Coventree that occurred by the close of business on August 1, 2007;

(d) Coventree contravened subsection 75(2) of the Act by failing to file a material change report in respect of the material changes referred to in paragraph (c) above in accordance with that subsection;

(e) each of Cornish and Tai authorized, permitted or acquiesced in Coventree's non-compliance with Ontario securities law referred to in paragraphs (a) to (d) above and were deemed to also have not complied with Ontario securities law in accordance with section 129.2 of the Act; and

(f) the conduct of Coventree in contravening Ontario securities law as provided in paragraphs (a) to (d) above, and the conduct of each of Cornish and Tai in contravening Ontario securities law as provided in paragraph (e) above, was contrary to the public interest.

[9] The allegations of Staff that Coventree breached section 56 and subsection 126.2(1) of the Act were dismissed.

[10] We relied upon our findings and conclusions in the Merits Decision in determining the appropriate sanctions and costs orders in the circumstances.

III. SANCTIONS AND COSTS REQUESTED BY STAFF

[11] Staff requested the following sanctions and costs orders against Coventree:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, that trading in any securities by Coventree cease until such time as Coventree is wound-up;

(b) pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to Coventree until such time as Coventree is wound-up;

(c) pursuant to paragraph 8.5 of subsection 127(1) of the Act, that Coventree be prohibited from becoming or acting as a registrant until such time as Coventree is wound-up;

(d) pursuant to paragraph 9 of subsection 127(1) of the Act, Coventree pay an administrative penalty of $5 million for its failures to comply with Ontario securities law; and

(e) pursuant to subsections 127.1(1) and (2) of the Act, Coventree, Cornish and Tai jointly pay the disbursements incurred during the investigation and costs of or related to the hearing that were incurred by or on behalf of the Commission, in the amount of $1.5 million.

[12] Staff requested the following sanctions and costs orders against each of Cornish and Tai:

(a) pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to each of Cornish and Tai for a period of five years;

(b) pursuant to paragraph 6 of subsection 127(1) of the Act, that each of Cornish and Tai be reprimanded;

(c) pursuant to paragraph 7 of subsection 127(1) of the Act, that each of Cornish and Tai resign any positions that they hold as a director or officer of a reporting issuer;

(d) pursuant to paragraph 8 of subsection 127(1) of the Act, that each of Cornish and Tai be prohibited from becoming or acting as a director or officer of a reporting issuer for a period of five years;

(e) pursuant to paragraph 9 of subsection 127(1) of the Act, that each of Cornish and Tai pay an administrative penalty of $5 million for their failures to comply with Ontario securities law;

(f) pursuant to subsections 127.1(1) and (2) of the Act, Cornish and Tai, jointly with Coventree, pay the disbursements and costs in accordance with paragraph 11(e) of these reasons; and

(g) pursuant to subsection 127(2) of the Act, that neither Cornish nor Tai may seek to accept, directly or indirectly, any indemnification from Coventree in relation to any administrative penalty ordered by the Commission.

IV. STAFF SUBMISSIONS

[13] Staff submitted that the misconduct of the Respondents was serious and went to the heart of the Commission's mandate to protect investors and to foster fair and efficient capital markets. Staff submitted that the Respondents' misconduct had a significant negative impact on the efficiency, integrity and reputation of Ontario's capital markets. Further, Staff submitted that the Respondents gave a low priority to Coventree's statutory disclosure obligations and downplayed the legitimate interest of shareholders and investors in receiving information about material adverse corporate events.

[14] Staff submitted that it is important that the sanctions imposed on the Respondents reflect the critical importance of timely disclosure by public companies and the vital role of senior officers in ensuring that such disclosure is made, regardless of whether the information to be disclosed is positive or negative in nature. Staff submitted that a strong message should be sent

to the market that exactly the same diligence, care and attention should be exercised in relation to negative material changes as would be exercised in relation to positive material changes.

[15] In Staff's submission, the Respondents gave a low priority to Coventree's statutory disclosure obligations and downplayed the legitimate interest of shareholders and investors in receiving information about material adverse events. The Respondents' assessments of whether material changes had occurred were cursory, and Staff submitted that the Respondents appeared to have been focused on justifying why they should not disclose events to shareholders. The Respondents instead should have carried out a balanced and thorough assessment of Coventree's disclosure obligations.

[16] Staff submitted that Coventree was a highly sophisticated public company, was highly experienced in the capital markets, and was well-placed to properly assess its disclosure obligations. As such, Staff submitted that the Commission should find that Coventree's experience in the marketplace was an aggravating factor in its sanctions decision. Further, any sanctions imposed must reflect both Cornish and Tai's significant role and influence in managing Coventree and their experience, expertise and background in relation to the capital markets.

[17] Staff submitted that investors were dependent upon the Respondents to ensure that Coventree provided mandatory statutory disclosure. The instances of non-disclosure in this case had a substantial impact on the value of Coventree's shares. Staff submitted that to create a general deterrent effect and to foster compliance with issuers' disclosure obligations, the sanctions and costs requested by Staff were necessary.

V. RESPONDENTS' SUBMISSIONS

A. Coventree Submissions

[18] Coventree submitted that if there was ever a case in which a Commission panel should show compassion and restraint in imposing sanctions, this is that case. Coventree submitted that the appropriate sanctions in this case should be a reprimand and a modest administrative penalty that should not exceed $200,000.

[19] Coventree submitted that a reprimand would provide a strong censure of past conduct and impress on the public the importance of timely, accurate and complete disclosure, while at the same time recognizing that Coventree did not breach the Act intentionally and did not intentionally mislead anyone.

[20] Coventree argued that Staff's submissions were flawed in that their position (i) flies in the face of the foundational principles of parity and proportionality; (ii) disregards a number of the most important findings in the Merits Decision; and (iii) invites us to impose monetary sanctions that, as a matter of law, cannot be granted in the circumstances of this case.

[21] Coventree submitted that this case is unprecedented because the Panel in the Merits Decision went out of its way to make a series of highly favourable findings in respect of Coventree and the individual Respondents that are quite extraordinary in a case of this nature, and distinguish this case from any of the disclosure cases relied upon by Staff. Coventree

submitted that the sanctions sought by Staff can only fairly be regarded as punitive in nature, and in the circumstances of this case, the sanctions sought are in no way warranted.

[22] In considering the issue of sanctions, Coventree submitted that it is critically important that we bear in mind that disclosure issues of the nature involved in this matter can be difficult and complicated, and are precisely the sorts of issues in respect of which reasonable people can differ.

[23] Coventree submitted that it was clear on the evidence as well as on the Panel's findings in the Merits Decision that there was no scheme to deceive public shareholders regarding the impact of market developments on Coventree and that no one associated with Coventree intended to breach the Act in any way or at any time. Coventree submitted that the evidence established that the culture of Coventree was to act professionally, take its responsibilities seriously and to treat investors fairly. Unlike the issuers in other typical enforcement proceedings, Coventree was not a company characterized by bad faith, recklessness or deceitful conduct.

[24] Coventree submitted that the honest and well-meaning conduct of Coventree that was at issue in this proceeding that resulted in unintentional breaches of the Act on two occasions, simply cannot be grouped together with the egregious and wilful misconduct that is characteristic of the previous disclosure cases heard by the Commission. Accordingly, Coventree submitted that any proportionately appropriate sanctions imposed on Coventree should be considerably less severe than the sanctions imposed on issuers in previous disclosure cases. This is so for at least the following three reasons.

[25] First, Coventree did not intentionally breach the Act or attempt to mislead public shareholders or investors. Rather, Coventree at all times considered its disclosure obligations seriously and in good faith, and in accordance with what it understood the law to be at the time. It is unlikely and illogical that imposing severe sanctions against Coventree for what was, at most, an error in judgment made in exceptionally difficult and unprecedented circumstances, will prevent or dissuade other well-meaning reporting issuers from unintentionally contravening securities laws in the future.

[26] Second, courts and numerous Canadian administrative tribunals have recognized that the intense publicity and reputational harm associated with proceedings of this nature act as a powerful deterrent in dissuading others from engaging in similar conduct. In this case, the notoriety now associated with Coventree by virtue of this lengthy, high-profile enforcement proceeding is sufficient to accomplish any general deterrent objective that we might reasonably have.

[27] Third, the events that gave rise to this sanctions hearing occurred more than four years ago in the context of an unprecedented and extraordinary global economic crisis that affected not just Coventree, but credit and commercial paper markets throughout the world. These were matters that Coventree had no ability to control, influence or predict with any degree of accuracy. The unique and unprecedented nature of the circumstances of this case minimize significantly, if not completely, the need for general deterrence.

[28] Coventree submitted that the sanctions proposed by Staff against Coventree would serve no preventative purpose and would merely cause further harm to innocent public shareholders. Coventree is in the process of being wound-up. Coventree has no intention of either issuing securities or applying to become a registrant under the Act prior to its winding up. Accordingly, Coventree submitted that there is no need for the registration prohibition and removal of exemptions order requested by Staff. Coventree submitted that any significant administrative penalty against Coventree would simply punish innocent shareholders by reducing any distribution that will ultimately be made in connection with its winding-up. Further, Coventree submitted that there is quite clearly no need to specifically deter Coventree from committing future breaches of its continuous disclosure obligations because the company is being wound-up.

[29] With respect to costs, Coventree submitted that there can be no doubt that Coventree and the other Respondents participated in this proceeding in a responsible, informed and well-prepared manner in a way that helped the Panel understand the issues before it. Indeed, the Panel made express findings regarding the unimpeachable credibility of the current and former Coventree employees who testified at the hearing. It is also clear from the record, and from the Merits Decision, that Coventree cooperated with Staff in its investigation. Moreover, in light of the complex matters at issue in this case and the Panel's decision, there can be no suggestion, and indeed, there has been no suggestion, that Coventree should have admitted anything that it refused to admit. All of these factors weigh against the Panel making a costs award as requested by Staff.

B. Cornish Submissions

[30] Cornish submitted that the findings against him were at the lower end of the spectrum of allegations that have been made in the past to the Commission and do not include allegations of fraud, self-dealing, wilful misconduct, recklessness or bad faith. Cornish submitted that his conduct is distinguishable from prior decisions of the Commission in which serious sanctions were imposed for failures to disclose material changes.

[31] In Cornish's submission, the position taken by Staff on sanctions is not supported by the Panel's findings in the Merits Decision, Cornish's personal circumstances, or the legal principles and precedents applicable to the making of orders in the public interest under the Act.

[32] Cornish submitted that the Commission should consider the following factors as mitigating in the circumstances:

(a) the Commission found that Cornish did not intend to breach the Act or intentionally mislead shareholders;

(b) there was no suggestion that Cornish breached the Act with a view to profiting from the breach;

(c) Cornish continuously considered Coventree's disclosure obligations and took diligent steps to ensure that the Coventree board was fully informed;

(d) Cornish testified honestly and credibly at the hearing on the merits and cooperated fully with Staff's investigation; and

(e) Cornish's reputation is one of honesty, intelligence and integrity (as supported by the numerous character references submitted); and he has been an effective contributor to the capital markets.

[33] Cornish also adopted the submissions of Coventree and Tai.

[34] Cornish submitted that in all the circumstances his conduct does not warrant significant sanctions and that the appropriate sanction is solely a reprimand.

C. Tai Submissions

[35] Tai submitted that the onerous sanctions that Staff seeks are not commensurate with the Panel's findings and cannot be justified by the relevant legal principles.

[36] Tai acknowledged the fundamental importance of timely and accurate continuous disclosure to the fairness, efficiency and integrity of capital markets. However, Tai submitted that not all failures to make timely disclosure are the same, and it is appropriate for us to consider the nature and seriousness of the relevant violations of the Act.

[37] Tai submitted that there is no evidence of actual harm to investors as a result of Tai's violations of the Act. While this does not excuse the failure to make timely and accurate disclosure, it does suggest that the sanctions should reflect that lack of evidence.

[38] Tai submitted that the Commission should consider the following factors as mitigating in the circumstances:

(a) Tai was a skilled and diligent businessman. His reputation according to those who testified at the hearing as well as those who submitted character references was one of honesty and integrity;

(b) Tai is not a lawyer and has no legal training or experience in interpreting the law of continuous disclosure;

(c) there was no evidence that Tai intentionally breached the Act or attempted to intentionally mislead public shareholders or investors;

(d) Tai continually sought the input of Coventree's board of directors as well as other members of senior management, which included two experienced securities lawyers;

(e) Tai took diligent steps to ensure that the Coventree board was fully informed of events and was able to make informed decisions;

(f) Tai cooperated fully in responding to Staff's investigation and attended voluntary interviews over the course of three days; and

(g) Tai made no profit from Coventree's failures to disclose.

[39] Tai also adopted the submissions of Coventree and Cornish.

[40] Tai submitted that in all the circumstances his conduct does not warrant significant sanctions and that the appropriate sanction is solely a reprimand.

VI. ANALYSIS AND SANCTIONS IMPOSED

A. The Law on Sanctions

[41] The Commission's dual mandate is (a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets (section 1.1 of the Act).

[42] Subsection 127(1) of the Act gives the Commission power to make various orders if in the opinion of the Commission it is in the public interest to do so. The Commission's jurisdiction under subsection 127(1) is neither remedial nor punitive. Rather, the Commission's authority under subsection 127(1) is prospective in operation and preventative in nature. The Supreme Court of Canada has stated that:

> … The purpose of an order under s.127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.
> …
> Pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited… The sanctions under the section are preventive in nature and prospective in orientation.
>
> (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at paras. 43 and 45)

[43] Accordingly, the Commission's objective when imposing sanctions is not to punish past conduct but to restrain future conduct that may be harmful to investors or Ontario's capital markets. This objective was described in *Re Mithras Management Ltd.* as follows:

> … [T]he role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here

> to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.
>
> (*Re Mithras Management Ltd.* (1990), 13 OSCB 1600 at pp. 1610-1611)

[44] In *Norshield Asset Management (Canada) Ltd. (Re)* (2010), 33 OSCB 7171 at paras. 92 and 93, the Commission confirmed that its role is not to punish respondents in Commission proceedings for breaches of Ontario securities law nor to right any wrongs suffered by investors. The Commission noted, however, that the impact of the breaches of the Act on investors is a factor to consider when determining the appropriate sanctions.

[45] Further, the Supreme Court of Canada has recognized general deterrence as an additional factor that the Commission may consider when imposing sanctions. In *Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 60, the Supreme Court stated that: "…it is reasonable to view general deterrence as an appropriate and perhaps necessary consideration in making orders that are both protective and preventative".

[46] The Commission must ensure that the sanctions imposed in each case are proportionate to the circumstances and the conduct of each respondent. The Commission has previously identified the following as some of the factors that a panel should consider when imposing sanctions:

(a) the seriousness of the conduct and the breaches of the Act;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been recognition by a respondent of the seriousness of the improprieties;

(e) whether or not the sanctions imposed may serve to deter not only those involved in the matter being considered, but any like-minded people, from engaging in similar abuses of the capital markets;

(f) the size of any profit obtained or loss avoided from the illegal conduct;

(g) the size of any financial sanction or voluntary payment;

(h) the effect any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(i) the effect of the sanctions on the reputation and prestige of the respondent;

(j) the remorse of the respondent; and

(k) any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 OSCB 7743 at p. 7746; and *Re M.C.J.C. Holdings Inc. and Michael Cowpland* (2002), 25 OSCB 1133 at para. 26)

We considered these factors in coming to our conclusions with respect to the appropriate sanctions against the Respondents.

[47] Ultimately, the sanctions imposed should protect investors and Ontario's capital markets and deter others from similar conduct in the future.

B. Importance of Timely Disclosure

[48] Disclosure by reporting issuers is a fundamental cornerstone of securities regulation. Section 2.1 of the Act states that:

> In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:
>
> …
>
> 2. The primary means for achieving the purposes of this Act are,
>
> i. requirements for timely, accurate and efficient disclosure of information,
>
> …

[49] The Commission has emphasized the importance of disclosure to investors and capital markets in a number of decisions. In *Re Philip Services Corp.*, the Commission stated that:

> Disclosure is the cornerstone principle of securities regulation. All persons investing in securities should have equal access to information that may affect their investment decisions. The Act's focus on public disclosure of material facts in order to achieve market integrity would be meaningless without a requirement that such disclosure be accurate and complete and accessible to investors.
>
> (*Re Philip Services Corp.* (2006), 29 OSCB 3941, at para. 7)

[50] That comment applies equally to the disclosure of material changes under subsection 75(1) of the Act.

[51] As noted in the Merits Decision:

> [144] The Commission recognized in *Re YBM Magnex International Inc.* (2003), 26 OSCB 5285 ("*Re YBM Magnex*") that timely disclosure of material changes enhances the fairness and efficiency of capital markets. Other decisions that have accepted that principle include *Pezim v. British Columbia (Superintendent of Brokers)* [1994] 2 S.C.R. 557 ("*Re Pezim*"), *Re Philip*

Services Corp. (2006), 29 OSCB 3971 ("*Philip Services Corp*."), *Re AiT Advanced Information Technologies Corp*. (2008), 31 OSCB 712 ("*Re AiT*"), and *Re Rex Diamond Corp.* (2008), 31 OSCB 8337 (OSC) ("*Re Rex Diamond*").

[52] Section 75 of the Act is a key element of the disclosure regime imposed under the Act. That section requires that a reporting issuer forthwith disclose all material changes that occur with respect to the issuer. A material change is defined for this purpose as a change in a reporting issuer's business, operations or capital that would reasonably be expected to have a significant effect on the market price or value of the issuer's securities. Section 75 imposes that disclosure obligation in order to ensure that all investors have equal access to material information with respect to a reporting issuer when they are making investment decisions with respect to the reporting issuer's securities.

[53] As a result of Coventree's failure to disclose the material changes referred to in paragraph 8 of these reasons, shareholders and investors were uninformed of material information that we concluded would have significantly affected the market price or value of Coventree shares and would have affected the investment decisions of shareholders and investors with respect to Coventree shares.

[54] With respect to the material change that occurred as a result of the DBRS January Release, we concluded in the Merits Decision that "… In our view, a reasonable shareholder or investor would consider Coventree's inability to carry out future credit arbitrage transactions important information in making an investment decision with respect to Coventree shares" (Merits Decision, at para. 338).

[55] With respect to the material change that occurred by the close of business on August 1, 2007, we stated in the Merits Decision that a reasonable shareholder or investor would have considered the relevant information "… critically important in making an investment decision with respect to Coventree shares" (Merits Decision, at para. 596).

[56] We expressed in the Merits Decision our concerns with the decisions made by the Coventree disclosure committee as to Coventree's obligations under section 75 of the Act. We stated that:

> [756] We have indicated in these reasons a number of our concerns with the decisions made by the Coventree disclosure committee with respect to Coventree's obligations under section 75 of the Act to disclose material changes. We would reiterate here that:
>
> > (a) Coventree's disclosure in its MD&A did not satisfy its obligation to disclose material changes by news release in accordance with section 75 of the Act …;
> >
> > (b) the fact that extensive risk factors were disclosed in the Prospectus and that "US subprime "contagion" etc. [was] widely discussed in the press" did not mean that public shareholders and investors had sufficient information to be able to fully assess the effects on, and consequences for, Coventree and its business of the events and developments that were unfolding in late

> July and early August 2007; to the contrary, we have concluded they did not have sufficient information to do so;
>
> (c) Coventree's obligation was to disclose changes that had occurred in its business or operations that were material; that disclosure obligation was not "premature" and did not require Coventree to speculate about or predict uncertain future events … ; and
>
> (d) the Draft Press Release prepared by Cornish addressed only spread widening and thereby failed to address a number of very significant events and developments that were discussed at the August Board Meeting … and that we have concluded constituted material changes.
>
> In our view, the various rationalizations of the disclosure committee did not justify the decisions it made not to publicly disclose events and developments that had occurred and constituted "material changes" within the meaning of the Act by the close of business on August 1, 2007.
>
> [757] In particular, in our view, the reasons Tai expressed to the Board for not issuing a news release on August 2, 2007 … did not justify that decision.
>
> [758] Further, Child's notes of the disclosure committee meeting on August 7, 2007 indicate that the relevant test used by securities regulators to determine when disclosure is required "is whether the information can be reasonably expected to influence investors". The disclosure committee concluded that "disclosure was not required under this test" … . We see no reasonable basis for that conclusion. To the contrary, we have concluded that a number of the events and developments that had occurred by the close of business on August 1, 2007 would have significantly affected the investment decisions of public shareholders and investors … .
>
> (Merits Decision, commencing at para. 756).

[57] Cornish and Tai played a key role in making the disclosure decisions that were the subject matter of this proceeding. We made the following statements in the Merits Decision:

> [768] Officers and directors of a reporting issuer are ultimately responsible for ensuring that timely and accurate information is disclosed by the issuer in accordance with the Act:
>
> > The responsibility of companies to make timely and accurate financial disclosure ultimately rests with directors of those companies. In practice, the responsibility is shared by the directors, audit committees, chief executive officers, chief financial officers and other management. The company itself would also be responsible.

(*Re Standard Trustco* (1992), 15 OSCB 4322 at 4364) ("*Re Standard Trustco*")

> [769] More is expected of directors and officers who have superior qualifications, such as experienced business people, and more is expected of inside directors, such as Cornish and Tai, who have much greater involvement in corporate decision making and much greater direct access to corporate information (*Soper v. Canada* (1997) F.C.J. No. 881, at paras. 37 to 41; see also *Re YBM Magnex*, supra, at paras. 177, 183 and 184). The chief executive officer of a corporation plays a "pivotal" role in "co-ordinating, compiling and vetting material corporate disclosure" (*Re Biovail*, supra, at para. 387, referring to *Re Ironside*, 2006 ABASC 1930, at paras. 963 and 982; and *Re Workum and Hennig*, 2008 ABASC 363, at para. 713).
>
> [770] Both Cornish and Tai were leaders of Coventree and senior officers. Cornish was President and Tai was CEO of Coventree. They were both members of the Board and of Coventree's strategic council and disclosure committee. They had the knowledge, experience and access to information that their roles implied. Both Cornish and Tai were directly involved in deciding whether Coventree should make disclosure of the material changes in its business that we have found occurred on January 22, 2007 and by the close of business on August 1, 2007.
>
> (Merits Decision, commencing at para. 768).

[58] Accordingly, the failure by Coventree to disclose the material changes identified in the Merits Decision, and the contraventions of the Act by Cornish and Tai as a result of having authorized, permitted or acquiesced in those contraventions, require significant sanctions as a matter of specific and general deterrence.

C. Multiple Contraventions of the Act

[59] We concluded in the Merits Decision that there were four breaches of the Act by the Respondents: the failure to forthwith issue and file a news release with respect to the material changes that occurred as a result of the DBRS January Release and by the close of business on August 1, 2007, and the failures to file material change reports in respect of those two material changes.

[60] In our view, the substance of those breaches of the Act was the failure to make timely public disclosure of the two material changes that we found had occurred. If appropriate news releases had been issued by Coventree in respect of those material changes, the failure to file material change reports would have constituted, in our view, less serious breaches of the Act.

[61] This is relevant because, under paragraph 9 of subsection 127(1) of the Act, we are entitled to order a person to pay an administrative penalty of not more than $1.0 million for each failure to comply with the Act.

[62] We also agree with the submissions of the Respondents that the maximum sanctions that may be ordered in respect of a breach of the Act must be reserved for the most egregious circumstances.

D. The *Kienapple* Principle

[63] The Respondents submitted that the principle in the criminal case of *Kienapple v. The Queen* [1975], 1 S.C.R. 729 (***"Kienapple"***) applies to sanctions imposed under the Act. That principle is that an accused cannot be punished for more than one offence arising out of the same set of facts. In *Kienapple*, the accused was convicted of both rape and unlawful sexual intercourse with a female under 14 years of age. The Supreme Court of Canada concluded that there should not be multiple convictions or penalties for the same delict against the same girl.

[64] *Kienapple* was applied to an administrative and disciplinary proceeding in *Carruthers v. College of Nurses of Ontario* [1996], O.J. No. 4275 (***"Carruthers"***). The Court in that case stated that:

> There is no quarrel with the proposition that a registrant/member ought to be held liable for each breach of the governing rules of the profession. No one, however, should be twice punished for the same delict or matter. It is as much the case for professional discipline as it is for a regulatory offence.

[65] *Kienapple* was a criminal case and we doubt whether the principle reflected applies to an administrative proceeding before us, notwithstanding the statement in *Carruthers* referred to above. As noted above, under paragraph 9 of subsection 127(1) of the Act, the Commission is expressly entitled to order an administrative penalty of not more than $1.0 million *for each failure to comply with the Act*. The Commission has a long history of decided cases in which it has treated substantially the same conduct as giving rise to multiple breaches of the Act; for instance, where the same conduct constitutes an illegal distribution of securities as well as a contravention of the requirement for registration.

[66] Staff submits in any event that subsections 75(1) and (2) of the Act impose different obligations and requirements on a reporting issuer. It seems to us that the failure to issue and file a news release in respect of a material change is an offence that is distinct from the failure to file a material change report in respect of the same material change. Further, in imposing administrative sanctions, we must be satisfied that the overall sanctions imposed are proportionate to the conduct of the respondents involved and are in the public interest.

E. Mitigating Factors

[67] In imposing sanctions on the Respondents, we considered the following mitigating factors:

(a) As we found in the Merits Reasons, there was no evidence that would lead us to conclude that Cornish or Tai intentionally breached the Act or attempted to intentionally mislead public shareholders and investors (see para. 772 of the Merits

Decision). Further, Coventree did disclose in its shareholder letters and in its Management's Discussion & Analysis a number of the matters we considered important to shareholders. We also note that Coventree was intending to make further public disclosure in its Management's Discussion & Analysis following the August 13, 2007 board meeting.

(b) The disclosure decisions Coventree was faced with on August 1, 2007 raised difficult and relatively complex issues in the face of the unprecedented market impact of the credit crisis that occurred in August 2007. Further, the breaches of the Act by the Respondents were less egregious than the circumstances in a number of the previous disclosure cases decided by the Commission and referred to us (those previous decisions were *Re Cineplex Corporation, Drabinsky and Gottlieb* (1983), 6 OSCB 3845, *Re Standard Trustco* (1992), 15 OSCB 4322, *Re YBM Magnex International Inc*. (2003), 26 OSCB 5285, *Re Rex Diamond Corp.* (2008), 31 OSCB 8337 and *Re Biovail Corporation* (2010), 33 OSCB 8914).

(c) Neither Cornish nor Tai profited personally from Coventree's breaches of section 75 of the Act. To the contrary, as controlling shareholders of Coventree, they suffered substantial financial losses as a result of the events that gave rise to this proceeding. Those losses were, in effect, shared pro rata with other Coventree shareholders.

(d) Cornish and Tai identified for the Coventree board at the August 1, 2007 board meeting all of the market and other developments that we concluded gave rise to a material change by the close of business on August 1, 2007, and the directors ultimately did not object to the decision reached by Cornish and Tai not to have Coventree issue a news release at that time.

(e) There was a very high level of cooperation by each of the Respondents with Staff in the course of Staff's investigation of this matter.

(f) Coventree and its board acted responsibly in appointing a special committee of independent directors to investigate the allegations made by Staff. That special committee prepared a report at a very substantial cost to Coventree.

F. Other Relevant Considerations

[68] In considering the appropriate administrative penalty to impose in these circumstances, we also considered that Coventree is a substantial public company with significant financial assets. It seems to us that in order to determine an appropriate administrative penalty, we must consider the size of the relevant issuer and the potential financial impact of the sanctions imposed. A nominal financial sanction relative to the size and financial resources of an issuer does not accomplish our goal of specific and general deterrence.

[69] We considered the sanctions imposed by the Commission in each of the previous decisions of the Commission involving disclosure referred to in paragraph 67(b) of these reasons.

[70] None of the decisions of the Commission referred to us are on all fours with the circumstances in this matter. While the facts here are quite different, we do note the terms of

settlement in *Re Melnyk* (2007), OSCB 5253. That matter involved, among other things, the failure of the respondent to disclose certain information that resulted in incomplete and misleading disclosure in the issuer's management information circulars. Pursuant to the terms of settlement, the Commission imposed on the respondent a one year ban in acting as a director of Biovail Inc., an administrative penalty of $750,000, costs of $250,000 and a reprimand. We also considered the sanctions imposed by the Commission in *Re Rowan* (2010), 33 OSCB 91.

[71] We note that substantially higher financial sanctions than we imposed in this matter have been imposed by the Commission under a number of other Commission settlements (see, for instance, *Re AGF Funds Inc.* (2005), 28 OSCB 875*, Re Research in Motion Ltd.* (2009), 32 OSCB 4434, *Re Biovail* (2009), 32 OSCB 1094, *Re HSBC Bank Canada* (2010), 33 OSCB 62, and *Re Canadian Imperial Bank of Commerce* (2010), 33 OSBC 73). While those settlements are relevant, Staff and the respondents are free in a settlement to agree to whatever financial and other sanctions they negotiate. In imposing sanctions after a merits hearing, we are bound by the provisions of subsection 127(1) of the Act and legal principles with respect to imposing sanctions.

[72] We would add that the sanctions we imposed related to the specific findings we made in the Merits Decision concerning the failure by Coventree to disclose material changes and file material change reports. While those breaches of the Act occurred in the context of the disruption in the ABCP market that took place on August 13, 2007, they do not relate to any matters that were not expressly the subject matter of this proceeding.

[73] Finally, in imposing sanctions on Coventree, we recognized that Coventree is in the process of winding-up. That means that Coventree will not be participating in Ontario capital markets in the future.

G. Sanctions Imposed on Coventree

[74] We concluded that we should impose on Coventree the administrative sanctions referred to in paragraph 89 of these reasons, including a $1.0 million administrative penalty. We concluded that significant administrative sanctions were appropriate in the circumstances but not at the top end of the range of penalties that we could have imposed. We concluded that, while the market conduct prohibitions contained in the Sanctions Order were appropriate, they should not interfere with Coventree's winding-up.

H. Sanctions Imposed on Cornish and Tai

[75] Cornish and Tai authorized, permitted or acquiesced in Coventree's failure to disclose the two material changes that we concluded in the Merits Decision had occurred. Having imposed an administrative penalty of $1.0 million on Coventree, we concluded that the same administrative penalty should be imposed, on an aggregate basis, on Cornish and Tai. Accordingly, we imposed an administrative penalty on each of Cornish and Tai of $500,000.

[76] The conduct of Cornish and Tai addressed in the Merits Decision was their conduct as officers and directors of Coventree. We concluded that general deterrence required us to impose a one-year prohibition on Cornish and Tai acting as an officer or director of a reporting issuer,

other than Coventree. We did not consider it necessary in the circumstances to impose any other market conduct prohibitions on Cornish or Tai. That was not necessary in order to protect investors or our capital markets from their future conduct.

[77] Given that Coventree is in the process of winding-up and may wish the assistance of Cornish in doing so, we were prepared to exclude Coventree from our prohibitions on Cornish and Tai acting as a director or officer of a reporting issuer.

[78] We also considered a reprimand to be appropriate in the circumstances.

[79] Staff requested that we issue an order to the effect that Cornish or Tai not seek or accept any indemnification from Coventree in respect of any administrative penalty imposed by us. No notice was given to Cornish and Tai prior to the merits hearing that Staff was seeking such an order. In our view, Staff cannot now seek to do so. In any event, in our view, we have no authority under subsection 127(2) of the Act to make such an order. That subsection allows us to make an order under section 127 "subject to such terms and conditions as the Commission may impose". In our view, subsection 127(2) does not give us authority to make a substantive order, such as that requested, that is not specifically authorized under sections 127 or 127.1 of the Act. There is nothing, however, preventing Staff from negotiating a provision in a settlement agreement limiting the ability of a director or officer to seek indemnification under corporate law.

[80] We concluded in the circumstances that no distinction should be made between Cornish and Tai in imposing administrative sanctions. Both were leaders of Coventree and both participated equally in the disclosure decisions made by Coventree that were the subject matter of this proceeding.

I. Costs

[81] Staff requested reimbursement of disbursements related to the investigation of this matter and costs related to the litigation phase of this matter. Staff requested $1.5 million of costs to be paid jointly by the Respondents; we awarded costs of $250,000 against only Coventree. Reducing the cost award requested by Staff does not imply any criticism of Staff for its investigation of this matter, for bringing this proceeding or for Staff's conduct at the hearing. To the contrary, we have no reason to believe that Staff did not act throughout this matter responsibly, professionally and in good faith. Further, we have no doubt that the disbursements and costs requested by Staff were properly incurred and qualify to be reimbursed by the Respondents. There is no doubt that a proceeding of this nature is very expensive both for the Commission and for respondents.

[82] We determined the amount of our costs award against Coventree by applying the following considerations.

[83] First, the Respondents and their legal counsel conducted themselves throughout the hearing in a professional and responsible manner. They agreed to a statement of agreed facts with respect to a number of factual issues. In our view, they did not waste our time at the hearing on irrelevant or tangential matters. Legal counsel for the Respondents assisted us in our deliberations through the submissions they made and the materials they filed.

[84] Second, Staff was successful on its allegations that Coventree failed to forthwith disclose two material changes and to file material change reports in respect of those material changes. Staff was not successful on two other principal allegations, both of which took significant hearing time. We also note that Staff did not satisfy us that it was appropriate in the circumstances to treat the Respondents as having breached the Act on every day following the occurrence of the relevant material change until public disclosure was made. We concluded as a result of these considerations that any cost award should be very substantially reduced.

[85] Further, as noted above, the circumstances giving rise to this hearing raised difficult and relatively complex legal issues. A number of the issues discussed in the Merits Decision had not been expressly addressed in prior Commission decisions.

[86] Finally, an award of costs is a matter in our discretion. We are concerned not to unduly penalize or discourage respondents through our costs awards from bringing matters before the Commission that respondents wish to contest in good faith.

[87] All of the substantive allegations made by Staff were made against Coventree. The contraventions of the Act by Cornish and Tai were derivative in the sense that their contraventions arose because they authorized, permitted or acquiesced in Coventree's conduct. Accordingly, while there is no doubt that Cornish and Tai played a key role in making the Coventree disclosure decisions that were the subject matter of this proceeding, the allegations against Cornish and Tai personally did not add substantially to the length of the merits hearing.

[88] In the circumstances, we ordered that Coventree pay costs of $250,000 in connection with the hearing of this matter. That is a substantial costs award based on the Commission decisions we reviewed. We did not order Cornish or Tai to pay any costs.

VII. FINDINGS AND CONCLUSIONS AS TO SANCTIONS AND COSTS

[89] With respect to Coventree, we ordered pursuant to the Sanctions Order that:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Coventree cease until such time as Coventree completes its winding-up;

(b) pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Coventree until such time as Coventree completes its winding-up;

(c) pursuant to paragraph 9 of subsection 127(1) of the Act, Coventree pay an administrative penalty of $1.0 million; and

(d) pursuant to subsection 127.1(2) of the Act, Coventree pay $250,000 of the costs incurred by the Commission in connection with the hearing of this matter.

We also provided that the sanctions referred to in paragraphs (a) and (b) should not prevent Coventree's winding-up or any trade in securities reasonably related to the winding-up.

[90] With respect to each of Cornish and Tai, we ordered pursuant to the Sanctions Order that:

(a) pursuant to paragraph 6 of subsection 127(1) of the Act, each of Cornish and Tai be reprimanded;

(b) pursuant to paragraph 7 of subsection 127(1) of the Act, each of Cornish and Tai resign any positions that he may hold as a director or officer of a reporting issuer, other than Coventree;

(c) pursuant to paragraph 8 of subsection 127(1) of the Act, each of Cornish and Tai be prohibited from becoming or acting as a director or officer of a reporting issuer, other than Coventree, for a period of one year; and

(d) pursuant to paragraph 9 of subsection 127(1) of the Act, each of Cornish and Tai shall pay an administrative penalty of $500,000.

[91] We confirmed in the Sanctions Order, for greater certainty, that the Sanctions Order was not intended to prevent Cornish or Tai making any claims for indemnity from Coventree in respect of the amounts referred to in paragraph 90(d) of these reasons.

[92] We also ordered that the amounts referred to in paragraphs 89(c) and 90(d) of these reasons, be allocated to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act.

VIII. CONCLUSION

[93] For the reasons discussed above, we concluded that the sanctions and costs we imposed under the Sanctions Order were proportionate to past decisions of the Commission and to the respective conduct and responsibilities of each of the Respondents in the circumstances. We also concluded that the sanctions and costs imposed under the Sanctions Order were in the public interest.

Dated at Toronto, this 23rd day of December, 2011.

"James E. A. Turner"

James E. A. Turner

"Mary G. Condon"

Mary G. Condon

"Paulette L. Kennedy"

Paulette L. Kennedy

Schedule A

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
COVENTREE INC.,
GEOFFREY CORNISH and DEAN TAI

ORDER
(Sections 127 and 127.1 of the *Securities Act*)

WHEREAS on December 7, 2009, a Statement of Allegations and a Notice of Hearing were issued by the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") in respect of Coventree Inc. ("Coventree"), Geoffrey Cornish ("Cornish") and Dean Tai ("Tai") (collectively, the "Respondents");

AND WHEREAS the hearing on the merits of this matter took place over 45 hearings days from May 12, 2010 to December 9, 2010;

AND WHEREAS by reasons for decision dated September 28, 2011, the Commission determined that:

(a) Coventree contravened subsection 75(1) of the Act by failing to forthwith issue and file a news release disclosing a material change with respect to Coventree that occurred on January 22, 2007;

(b) Coventree contravened subsection 75(2) of the Act by failing to file a material change report in respect of the material change referred to in paragraph (a) above in accordance with that subsection;

(c) Coventree contravened subsection 75(1) of the Act by failing to forthwith issue and file a news release disclosing the material changes with respect to Coventree that occurred by the close of business on August 1, 2007;

(d) Coventree contravened subsection 75(2) of the Act by failing to file a material change report in respect of the material changes referred to in paragraph (c) above in accordance with that subsection;

(e) each of Cornish and Tai authorized, permitted or acquiesced in Coventree's non-compliance with Ontario securities law referred to in paragraphs (a) to (d) above and were deemed also to have not complied with Ontario securities law in accordance with section 129.2 of the Act; and

(f) the conduct of Coventree in contravening Ontario securities law as provided in paragraphs (a) to (d) above, and the conduct of each of Cornish and Tai in contravening Ontario securities law as provided in paragraph (e) above, was contrary to the public interest;

AND WHEREAS the allegations of Staff that Coventree breached section 56 and subsection 126.2(1) of the Act were dismissed;

AND WHEREAS on October 26 and 27, 2011, a hearing was held before the Commission to consider pursuant to sections 127 and 127.1 of the Act whether it is in the public interest to make an order imposing sanctions on, and the payment of costs of the hearing by, Coventree, Cornish or Tai;

AND WHEREAS Coventree is in the process of winding up its affairs and distributing its property and assets to shareholders (referred to in this Order as "winding-up");

AND WHEREAS in coming to its conclusions on sanctions the Commission carefully considered the submissions of all the parties, the principle of proportionality, and the numerous other factors and circumstances that the Commission considered relevant;

AND WHEREAS it is the intention of the Commission to issue, in due course, reasons for imposing the sanctions and costs set forth in this Order;

AND WHEREAS in all the circumstances, the Commission is of the opinion that it is in the public interest to make this Order;

1. IT IS HEREBY ORDERED WITH RESPECT TO COVENTREE THAT:

(a) pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities by Coventree cease until such time as Coventree completes its winding-up;

(b) pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Coventree until such time as Coventree completes its winding-up;

(c) pursuant to clause 9 of subsection 127(1) of the Act, Coventree pay an administrative penalty of $1,000,000; and

(d) pursuant to section 127.1 of the Act, Coventree pay $250,000 of the costs incurred by the Commission in connection with the hearing of this matter;

2. IT IS HEREBY ORDERED WITH RESPECT TO EACH OF CORNISH AND TAI THAT:

(e) pursuant to clause 6 of subsection 127(1) of the Act, each of Cornish and Tai be reprimanded;

(f) pursuant to clause 7 of subsection 127(1) of the Act, each of Cornish and Tai resign any positions he may hold as a director or officer of a reporting issuer, other than Coventree;

(g) pursuant to clause 8 of subsection 127(1) of the Act, each of Cornish and Tai are prohibited from becoming or acting as a director or officer of a reporting issuer, other than Coventree, for a period of one year; and

(h) pursuant to clause 9 of subsection 127(1) of the Act, each of Cornish and Tai shall pay an administrative penalty of $500,000;

3. IT IS FURTHER ORDERED THAT:

(i) the Commission's orders in paragraphs (a) and (b) above shall not prevent the winding-up of Coventree or any trade in securities reasonably related to the winding-up;

(j) for greater certainty, this Order is not intended to prevent Cornish or Tai making any claim for indemnity from Coventree in respect of the amounts payable by them pursuant to paragraph (h) of this Order;

(k) the amounts referred to in paragraphs (c) and (h) above of this Order shall be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act; and

(l) Staff or any of the Respondents shall be entitled to apply to the Commission with respect to any issue or question that may arise related to the interpretation or application of this Order.

DATED at Toronto this 8th day of November, 2011.

"James E. A. Turner"

James E. A. Turner

"Mary G. Condon"

Mary G. Condon

"Paulette L. Kennedy"

Paulette L. Kennedy