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The (Not So) Long Arm of the OSC: Commission Declines Jurisdiction in Public Interest Dispute

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In declining jurisdiction in a proceeding initiated by an activist shareholder, the Ontario Securities Commission (OSC) articulated its approach to long-arm regulation. The recently released reasons in *In the Matter of Mangrove Partners and In the Matter of TransAlta Corporation*[1] provide new and important guidance on joint hearings and the factors to be considered by a Canadian securities commission when asked to assert jurisdiction in a dispute that is being addressed by another commission.

Background

On March 25, 2019, TransAlta, a TSX- and NYSE-listed Calgary-based power generator and electricity marketer, announced that it had entered into an Investment Agreement with an affiliate of Brookfield Renewable Partners. Under the Investment Agreement, Brookfield agreed to invest $750 million in TransAlta in non-voting exchangeable debentures and preferred shares. The first tranche of $350 million was slated to close three business days following the 2019 annual meeting of TransAlta's shareholders, and the second tranche of $400 million is slated to close in October 2020. The securities are exchangeable by Brookfield after December 31, 2024, into an equity ownership interest of up to 49% in an entity holding TransAlta's Alberta hydro assets at a value based on a multiple of the hydro assets' future adjusted EBITDA.

The Brookfield transaction, which did not require shareholder approval, was opposed by Mangrove Partners, which later partnered with Bluescape Energy Partners. Mangrove and Bluescape together held 10.1% of TransAlta's common shares and sought to engage with TransAlta to obtain board seats and other changes. They subsequently filed a joint Schedule 13D and submitted a notice of intention under TransAlta's advance notice bylaw to nominate five directors for election at the upcoming shareholders' meeting. In anticipation of a potential proxy contest at the shareholders' meeting and to avoid binding a newly constituted board to its proposed transaction with Brookfield, TransAlta negotiated a right to enable a new board to revisit the transaction (Governance Out). Under this novel Governance Out, if two directors not recommended by the TransAlta board were elected at the 2019 meeting, TransAlta had the right for 30 days to terminate the Brookfield transaction.

TransAlta's largest shareholder, RBC Global Asset Management, publicly supported the transaction and agreed to vote for the management slate of directors at the 2019 meeting. Ultimately, the shareholders voted overwhelmingly in favour of all of management's director nominees to the TransAlta board, including two Brookfield nominees who were nominated pursuant to the Investment Agreement. The first tranche of the transaction closed on the scheduled date of May 1, 2019.

Application and Decision

Mangrove brought an application for a joint hearing before both the Ontario and Alberta Securities Commissions (ASC) to cease trade the transaction under the Commissions' public interest powers. On a preliminary motion, the OSC ruled that, although both Commissions had jurisdiction to entertain Mangrove's application because a sufficient nexus existed with both provinces, the OSC would not exercise its jurisdiction to participate in a joint hearing with the ASC.

In declining to exercise its jurisdiction, the OSC made the following important findings:

- The OSC had jurisdiction to entertain Mangrove's application under its public interest power given that TransAlta's securities are listed on the TSX, TransAlta is a reporting issuer in Ontario and it has Ontario investors.

- Nevertheless, the factors that connected this dispute to Alberta were more compelling, since (i) TransAlta has its head office in Calgary; (ii) the ASC is its principal regulator; (iii) the hydro assets that are the subject of the Investment Agreement are located in Alberta; (iv) representatives of TransAlta based in Calgary were central participants in the negotiations of the Investment Agreement and in the discussions with Mangrove; and (v) the ASC possesses very similar public interest jurisdiction to that possessed by the OSC under s. 127 of Ontario's *Securities Act*.
- The involvement of the OSC in addition to the principal regulator requires compelling circumstances. This might occur, for example, if the applicable Ontario securities laws were not substantially the same as the securities laws in the jurisdiction of the principal regulator; if Ontario investors or capital markets were being affected in a fundamentally different or unique way by the transaction in question (as in the Commission's previous decision in *AbitibiBowater*); or if there are novel issues relating to pan-Canadian legislation (as in the Commission's previous decisions in *Aurora* and *Hecla*).
- The factors in this case that established the existence of the OSC's jurisdiction (e.g., TSX listing, Ontario reporting issuer status and Ontario investors) "would be present in many cases." As a result, if these factors were sufficient to justify the assertion by the OSC of jurisdiction to participate in a joint hearing with the principal regulator, the OSC would find itself becoming "involved in many disputes involving TSX-listed companies" in addition to other commissions with stronger connections to the dispute in question. This would be unduly costly and unnecessary, and increase the possibility of conflicting decisions.
- To the extent that issues arise under Ontario-specific rules or policies that can be addressed under the public interest jurisdiction of the principal regulator, they should be addressed by that regulator, or through a more limited application to the OSC regarding those specific issues.

Key Takeaways

- Joint hearings involving the OSC and other securities commissions are the exception, not the rule.
- The OSC will generally not thrust itself into a dispute that is being addressed by another Canadian securities commission, unless the connecting factors with Ontario, or the differences in applicable rules or public policy, provide non-routine, compelling reasons for it to do so.
- Joint hearings may not promote harmonization and co-ordination since the possibility exists that conflicting decisions will be rendered by commissions that hear the same matter with equal legal authority.
- Relying on a rule or policy that is unique to one province or territory will not necessarily function as a "back door," compelling the securities commission in that province or territory to assert jurisdiction in a joint application. This is especially the case if the other commission may address the underlying public policy concerns under its own rules or policies. Alternatively, such a specific issue could be brought to the applicable securities commission through a limited application that deals only with those specific issues.
- Speed and the willingness of the principal regulator to act may be an overriding factor: the OSC noted that "it was an important consideration that the ASC was prepared to hear preliminary matters arising from the Application in short order following the OSC's hearing on the Motions."

Davies represented TransAlta Corporation with respect to the Brookfield transaction and the proceedings before the OSC and ASC.

[1] *Mangrove Partners (Re)*, 2019 ONSEC 18 available at: https://www.osc.gov.on.ca/en/Proceedings_rad_20190530_mangrove-partners.htm.

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