



BANKING ON CORPORATE

A SHORT STORY ABOUT SHORT SELLING

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When Randy Newman famously sang “short people got no reason to live,” he was parodying baseless prejudices, in that case against the vertically challenged. However, his lyrics would probably resonate with some issuers had they been prompted to focus on “short sellers,” who profit from share price reductions.

Even then, in contemporary culture it is usually inappropriate to single out any group, with two possible exceptions. One is the unconvincing and ineffective crowd, which were the attributes that saved the day in a recent securities case in Alberta. And the other, of which I’m a proud member, is people whose cultural references are rooted in the 1970s.

The Alberta case *Re Cohodes* focused on short-sale allegations. The Alberta Securities Commission, having concluded that there was prima facie evidence that social media disclosure disseminated by a short seller was untrue, focused on whether the disinformation campaign was effective, and whether, somewhat ironically, the enforcement against the short seller should fail because he was not sufficiently influential, and his information was not sufficiently credible, to have had any effect on the market.

The issuer in question was Badger Daylighting Ltd., a publicly traded company in the business of providing excavation services in Canada and the United States. Badger excavates materials for its customers and then transports and disposes of them for those customers. In May 2017, on the same day Badger released its quarterly financial results, Marc Cohodes, described in a Bloomberg article as a “rambunctious” short-seller who “famously sparred” with a number of high-profile companies, publicly announced that he had begun “shorting” Badger’s shares four months previously and that he was about to launch his website with his short thesis about Badger. He also started posting a significant number of tweets claiming, among other things, that Badger was guilty of illegally dumping toxic waste and was a “criminal operation.”

One of the peaks of Cohodes’ Badger campaign, and the focus of attention of the Alberta regulator, was a tweet in June 2018 that included a photograph of a Badger truck in the darkness, in dump position. The caption to the photograph claimed that the picture showed illegal toxic dumping. Badger responded that the picture was taken by one of Badger’s operating partners to show that lighting had been installed on the truck, and that the picture was not in a random field, as Cohodes implied, but a client’s oil and gas lease facility on which material had been excavated by Badger and deposited in accordance with the client’s request.

The regulator concluded that the tweeted photograph was prima facie untrue and

focused on whether Cohodes would reasonably have expected the tweet to have a significant effect on the market price or value of Badger shares. This issue turned in part on Cohodes’ credibility, which put the parties in unusual positions: Alberta regulatory staff was arguing that Cohodes had a substantial following and meaningful influence and Cohodes was put in the position of arguing that nobody really listened to him.

Staff focused on the fact that Cohodes had more than 25,000 followers and a reputation and some profile as reflected in the Bloomberg article. But the panel noted that most of Cohodes’ postings about Badger garnered few or no comments and the lack of impact that his tweets seemed to have on Badger’s share price. There were approximately 160 Badger-related tweets — any new development an invitation to tweet — over a 14-month period during which the share price rose by 20 per cent and where there was no apparent correlation between the tweets and share price movements. Cohodes’ own counsel argued that “the market ... ignores his information.” Where the Bloomberg article was concerned, the panel

noted that Cohodes’ fame could be attributed at least in part to his “unusually blunt speech and theatrical antics,” and that the article in itself did not establish that Cohodes had an enduring reputation for predictive acuity such that a reasonable investor might find his views helpful in making investment decisions about Badger shares.

The panel therefore concluded that Cohodes’ tweeted photograph could not reasonably have been expected to have had a significant effect on Badger’s share price. The decision shows that for regulators looking to clamp down on short-seller misconduct there is a high burden (also not a slight to those vertically challenged). In some sense the short seller was rewarded in the conduct of the case for apparent ineffectiveness. I could analogize to the corporate lawyer who docketed and therefore charges more the slower he or she is. That could be embarrassing but I’m confident that I could make the argument persuasively that nobody listens to me either. ☹

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