

Court of Appeal File No. C45725
Court File No. 06-CL-6328

COURT OF APPEAL FOR ONTARIO

BETWEEN

MR. A.

Applicant
(Respondent in Appeal)

and

ONTARIO SECURITIES COMMISSION

Respondent
(Appellant in Appeal)

**FACTUM OF THE APPELLANT,
ONTARIO SECURITIES COMMISSION**

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**FACTUM OF THE APPELLANT,
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PART I—INTRODUCTION

1. The Ontario Securities Commission (the "Commission") appeals from the Order of The Honourable Mr. Justice Colin Campbell ("Mr. Justice Campbell") dated June 27, 2006 (the "Order"), pronounced in the Ontario Superior Court of Justice (Commercial List) at Toronto, Ontario. The Order properly dismissed the application by Mr. A. to quash a summons to witness issued under the *Ontario Securities Act*, R.S.O. 1990, c.S.5 (the "*Act*") on March 1, 2006 (the "Summons"). In dismissing the application, however, Mr. Justice Campbell imposed conditions on the conduct of the Commission's examination of Mr. A. pursuant to the Summons. The Commission will argue on appeal that those conditions ought to be removed because they are unnecessary, inconsistent with the Commission's role and authority, and inimical to the Commission's ability to fulfill its important function in the public interest.

PART II—OVERVIEW

2. This appeal involves the question whether the Court should stop or limit an examination authorized by statute, properly undertaken by the Commission, on the grounds that the person being interviewed is worried that his testimony to the Commission might later be used against him in another country.

3. This question has significant implications for the Commission and for securities regulation in Ontario. If the Court stops or limits the Commission's examination on the grounds urged by Mr. A., then whenever the subject matter of a Commission investigation is also being looked into by authorities in another country, the Commission may be unable to effectively fulfill its statutory mandate to protect Ontario investors and the Ontario capital markets.

4. Mr. A. was the CEO and CFO of Company B, until he was fired. Company B is publicly held, and is listed on the Toronto and New York Stock Exchanges. Shortly before it fired Mr. A., Company B announced that it would have to restate its financial results for the previous three and a half years. An independent review by Company B had also revealed the existence of improper accounting practices endorsed by senior management.

5. As a result of these developments and in furtherance of its responsibility for the due administration of Ontario securities law and the regulation of capital markets in Ontario, the Commission began its own investigation into the circumstances leading to the restatement and the role played by Mr. A. (among others) in those circumstances.

During the same period, the Securities and Exchange Commission (“SEC”) commenced its own investigation into these same circumstances.

6. After the Commission issued and served Mr. A. with the Summons compelling his attendance at an examination in connection with the Ontario investigation, Mr. A. brought his application to quash the Summons pursuant to sections 7, 8 and 24(1) of the *Charter of Rights and Freedoms*, R.S.C. c.C-12 (the “*Charter*”) to prevent his examination on the basis that there was a “significant likelihood that any evidence [he] is compelled to give in response to the Summons could be used against him in a criminal proceeding in the United States.”

7. Mr. Justice Campbell dismissed Mr. A.’s application. He properly found no breach of Mr. A.’s rights under the *Charter*. He concluded that the Summons had been issued for a proper investigative purpose. He observed that if the Commission is to succeed in its important public purpose, it must be able to carry out its mandate as intended by the legislature. He concluded that the regime proposed by the Commission is appropriate for the protection of Mr. A.’s *Charter* rights.

8. Following additional submissions made on his invitation, however, Mr. Justice Campbell later delivered an Addendum to his Reasons. Despite reaffirming his original conclusions, he imposed two conditions that made it very difficult for the Commission’s investigation to continue. The first condition requires the Commission to reconstitute its investigation teams. The second imposes a continuous review procedure during the Commission’s examination of Mr. A., with immediate recourse on motion to

a judge of the Commercial List to resolve any issue about the propriety of questions asked during the examination.

9. The Commission will argue in this Court that the two conditions imposed by Mr. Justice Campbell are unnecessary and unjustified.

10. In exercising its investigative authority under the *Act*, the Commission is entitled to deploy its staff on teams as it sees fit. Commission staff members are entitled to know all information gleaned in any investigation. The issue is not what the Commission staff members know. The issue is disclosure to the SEC, and that may only happen in this case following due process, on notice to Mr. A.

11. Mr. A. was a voluntary participant, for his own profit, in a licensed activity, the effective regulation of which is essential to substantial and pressing societal interests. He enjoyed the benefits of participation in both the Canadian and U.S. markets, and knew perfectly well that his conduct was subject to scrutiny by both Canadian and U.S. regulators. He cannot now be heard to complain when both regulators co-operate with each other to investigate why a public company significantly restated financial results for a period during which he held its most senior offices.

12. In all the circumstances, there is no justification for requiring the Commission to reconstitute its investigation teams. To do so would disqualify all those who have been involved in the investigation to date from participating in Mr. A.'s

examination, and would effectively end an important investigation that has been underway for more than two years.

13. Nor is there any need to provide for continuous review, by motion to a Commercial List Judge, of the Commission's examination of Mr. A. Providing such a recourse demonstrates a misunderstanding of the Commission's role and the nature of its examination of Mr. A. This is not an examination in a civil or criminal proceeding. It is an examination in the course of a regulatory investigation in Ontario by an independent and specialized agency into the conduct of a person who voluntarily participated in the regulated activity. The examination will be carried out subject to the protections in the *Act* and the *Charter*. The effect of Mr. Justice Campbell's Order is to usurp the Commission's jurisdiction. The conditions imposed by the Order should be set aside, and the Commission permitted to get on with its important work in the public interest.

PART III—FACTS

EVENTS GIVING RISE TO COMMISSION INVESTIGATION

14. Mr. A. is the former CEO and CFO of Company B. His employment was terminated for cause on April 28, 2004.

Reasons for Decision of C. Campbell J. dated April 25, 2006 ("Reasons"), Appeal Book and Compendium, Tab 4 at para. 4

15. Company B is a public corporation listed on both the Toronto and New York Stock Exchanges. The Commission is authorized by statute to oversee and regulate the activities of Company B in the public interest.

Ontario Securities Act, R.S.O. 1990, c.S.5, as amended (the "*Act*"), s. 1.1

16. In late October 2003, Company B announced that it intended to restate approximately \$900 million of liabilities carried on its previously reported balance sheet as of June 30, 2003. At the same time, the Audit Committee of Company B initiated a review by an independent third party of the facts and circumstances leading to the restatement. The independent review showed that improper accounting practices endorsed by senior management had resulted in, among other things, significant bonuses being paid to senior management at a time when the company was not profitable.

"Summary of Findings and of Recommended Remedial Measures of the Independent Review prepared by Wilmer Cutler Pickering Hale and Dorr", Appeal Book and Compendium, Tab 8 at pp. 54-55

SCHEME OF THE *ACT*

17. The *Act* confers wide powers and discretion on the Commission to investigate, audit and enforce securities regulation for and in the public interest. The primary goals of the *Act* are to "provide protection to investors from unfair, improper or fraudulent practices", and to "foster fair and efficient capital markets and confidence in capital markets."

Act, s.1.1

18. Among the Commission's powers is the authority to investigate possible breaches of the *Act* or other securities regulations. Pursuant to section 11, the Commission may issue investigation orders appointing persons authorized to investigate matters relating to the due administration of securities law in Ontario or to assist another jurisdiction in its Regulation. Section 11 provides as follows:

11.(1) The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,

- (a) for the due administration of Ontario securities law or the regulation of capital markets in Ontario; or
- (b) to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction.

Act, ss. 11 (1)(a) and (b)

19. A person appointed to investigate pursuant to an order made under section 11 has the authority to issue a summons to a witness, with the same force and effect as a court-issued subpoena. A refusal to comply with the summons may give rise to contempt proceedings.

Act, s. 13(1)

20. A summons may be issued pursuant to an investigation under either or both of sections 11(1)(a) or (b). That is, a witness may be examined by the Commission for the purposes of either an Ontario securities law investigation or a foreign securities law investigation, or both.

Act, s. 13(1)

21. The Summons served on Mr. A. was authorized pursuant to section 11(1)(a) for the purpose of an Ontario investigation, though it could properly have been authorized pursuant to section 11(1)(b), or jointly under both sections 11(1)(a) *and* (b).

Summons, Appeal Book and Compendium, Tab 9

22. A witness who objects to the relevance or propriety of questions during an examination may apply to the Commission for a ruling. A review of its ruling may then be sought in the Divisional Court pursuant to the *Judicial Review Procedure Act*.

Judicial Review Procedure Act, R.S.O. 1990, c.J.1, s. 2

23. The *Act* provides significant protection to witnesses examined in the course of a Commission investigation. Section 16(1) provides that, except in accordance with section 17, neither the nature nor content of an order authorizing an investigation, nor the testimony and information obtained from a witness, can be disclosed to anyone by the Commission without an order. Section 16(2) provides that all testimony and information, as well as other documentation, are confidential, and “for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order.” No other regulator is named in the section 11(1)(a) investigation order pursuant to which the Summons was issued.

Act, s. 16
Summons, Appeal Book and Compendium, Tab 9

24. Section 17 of the *Act* stipulates how and when the Commission may disclose any of the information obtained from a witness in an investigation:

- (a) the Commission must first make an order authorizing the disclosure to “any person or company”, after giving the witness notice and an opportunity to be heard;
- (b) the Commission is prohibited from permitting the disclosure of any testimony obtained to any “police force” or to “a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction” unless it has the witness’ written consent to do so;
- (c) any disclosure order may be subject to terms and conditions; and
- (d) any such order may be appealed to the Divisional Court.

Act, ss. 9, 17 (1), (2) and (3)

25. To accommodate the circumstances of Mr. A., the Commission agreed in the case at bar to two additional and exceptional arrangements:

- (a) the Commission agreed to reproduce the substance of sections 16 and 17 in Mr. Justice Campbell's Order, to reiterate and emphasize the disclosure protections afforded to him under the *Act*; and
- (b) the Commission agreed that any appeal from a section 17 disclosure order, if made, could be brought to a Superior Court of Justice (Commercial List) judge, rather than to the Divisional Court in the more lengthy procedure prescribed by section 9 of the *Act*.

Additional Commission Submissions dated June 12, 2006, Appeal Book and Compendium, Tab 16 at pp. 117-118

MUTUAL ASSISTANCE IN THE INTERNATIONAL REGULATION OF SECURITIES

26. In addition to the statutory framework for investigations established by the *Act*, memoranda of understanding signed by the Commission, the SEC and other regulators create statutorily authorized commitments to international co-operation in securities enforcement. Both the 1988 Memorandum of Understanding ("MOU") and the 2002 International Organization of Securities Commissions' Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and Exchange of Information ("IOSCO MMOU") (collectively, the "MOUs") complement the statutory scheme and reflect commitments by securities regulators to work co-operatively to assist each other on a reciprocal basis. The MOUs are not inconsistent with, and do not derogate from the protections afforded by the statutory scheme.

Act, s. 2.1(5)
MOU, Appeal Book and Compendium, tab 11
IOSCO MMOU, Appeal Book and Compendium, tab 12

27. The Supreme Court of Canada has held that the 1988 MOU has a valid and important purpose. This MOU relates to the enforcement of domestic securities law, both by obtaining reciprocal assistance from foreign regulators, and by discovering foreign securities law violations by domestic registrants. In discussing the role of the

MOU, the Court held “[t]here can be no disputing the indispensable nature of interjurisdictional co-operation among securities regulators today.”

Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494 at paras. 27 and 28.

28. In 2002, the Commission also became signatory to the IOSCO MMOU, which further provided for mutual assistance and the exchange of information for purposes of enforcing securities laws in the signatories’ respective jurisdictions.

IOSCO MMOU, Appeal Book and Compendium, tab 12

29. The MOUs are non-binding statements of intent between parties. They are not a rule or regulation of the *Act*. They do not take priority over the provisions of the *Act*.

Global Securities Corp. (Re) (1997), 28 BCSCWS 40 (B.C.S.C.) at 4-5

30. The framework provided by the *Act* and the mutual assistance provided for in the MOUs operate to provide Mr. A with constitutional safeguards while simultaneously achieving a significant public objective.

COMMISSION INVESTIGATES COMPANY B

31. In March, 2004, staff of the Commission commenced an investigation into the circumstances surrounding the Company B restatement. In June, 2004, certain Commission staff were appointed pursuant to section 11(1)(a) of the *Act* to investigate and to enquire into a number of matters related to Company B, including the need for a restatement and the termination of Mr. A.

Affidavit of John Dash, Appeal Book and Compendium, Tab 13 at para. 8 and Company B Press Releases, Exhibits F to H and J, Exhibit Book, Tab 1, pp. 23-33 and 35-38
June 18, 2004 Investigation Order, Appeal Book and Compendium, Tab 14

32. On about April 5, 2004, Company B announced that the SEC had issued a formal order of investigation in connection with the company's restatement of its financial results for certain periods and its announcement regarding the likely need to restate other previously filed financial results.

Affidavit of John Dash, Appeal Book and Compendium, Tab 13 at para. 4 and Exhibit C, Exhibit Book, Tab 1, pp. 19-20

33. On May 14, 2004, Company B announced that it was the subject of a criminal investigation by the U.S. Attorney's Office for the Northern District of Texas, Dallas Division. On August 16, 2004, Company B announced that it was being investigated by the Royal Canadian Mounted Police.

Affidavit of John Dash, Appeal Book and Compendium, Tab 13 at paras. 10 and 13, and Exhibits I and K, Exhibit Book, Tab 1, pp. 33 and 39

34. In April, 2004, the SEC made a formal request for assistance to staff of the Commission in regard to the investigation of the matters surrounding Company B's restatement of financial results. The request was made pursuant to the MOU and IOSCO MMOU.

Affidavit of M. McLaughlin, Appeal Book and Compendium, Tab 10 at paras. 2-3
Letter from E. Jacobs to M. Watson dated April 30, 2004, Appeal Book and Compendium, Tab 17

35. While the two regulators are cooperating to the extent contemplated by the *Act* and the MOUs, their investigations are separate.

Affidavit of John Dash, Appeal Book and Compendium, Tab 13 at para. 8

36. On February 22, 2006, the Commission issued two further investigation orders; one authorized certain additional members of the staff of the Commission to investigate and was made using the authority of section 11(1)(a) of the *Act* (the “Investigation Order”); the second authorized the same staff members and certain members of the SEC staff to investigate and was made under the authority of sections 11(1)(a) and (b) (the “Joint Order”).

Investigation Orders, Appeal Book and Compendium, Tab 15

37. The Summons was issued by the Commission on March 1, 2006 to examine Mr. A. for the purposes of furthering its investigation of Company B in respect of the “due administration of Ontario securities law”. The Summons was issued pursuant to the section 11(1)(a) Investigation Order, not the Joint Order.

Affidavit of John Dash, Appeal Book and Compendium, Tab 13 at para. 19
Summons, Appeal Book and Compendium, Tab 9

38. It has always been the Commission’s intention to examine Mr. A. only in the presence of Commission staff members, entirely without the involvement of the SEC representatives, and to treat his testimony with the confidentiality required by the *Act*. Indeed, by issuing the Summons under the section 11(1)(a) Investigation Order, the Commission ensured that only its staff would take part in the examination.

39. Mr. A. brought an application under sections 7, 8 and 24(1) of the *Charter* to quash the Summons and for a declaration that he could not be compelled to testify under oath and produce documentation. The basis of his application was that there was a “significant likelihood that any evidence [he] is compelled to give in response to the Summons *could be used against him in a criminal proceeding in the*

United States”, and that this “likelihood” engaged his *Charter* rights sufficiently to warrant a constitutional exemption to his obligation to testify (emphasis added).

Notice of Application, Appeal Book and Compendium, Tab 6 at paras. 16-17

40. Neither in his Notice of Application nor in his submissions at the hearing of the application did Mr. A. or his counsel ask that separate teams of Commission staff members be appointed under each of the Investigation Orders and the Joint Order, or that in any examination of Mr. A., recourse should be provided to the Court for rulings on the propriety of questions.

MR. JUSTICE CAMPBELL'S INITIAL REASONS

41. Mr. Justice Campbell dismissed Mr. A.'s *Charter* application for reasons released on April 25, 2006 (the “Reasons”). In summary:

- (a) he found, consistent with the Supreme Court of Canada decision in *B.C. Securities Commission v. Branch*, that the investigative powers of the provincial securities commissions are constitutional;
- (b) he found that the Summons was issued for a proper investigative purpose;
- (c) he stated that he was “far from satisfied that the OSC could simply turn over material or testimony to U.S. authorities without an Order of the Commission on notice to Mr. A. or alternatively an Order of this Court. To speculate how otherwise this might happen without legal redress [he did] not find helpful”;
- (d) he did “not accept either that the OSC could not be trusted or that the investigation regime flowing from the section 11(1)(a) Investigation Orders would result in testimony and information being transferred to U.S. authorities in circumstances where Mr. A. would lose Fifth Amendment protection”;
- (e) he reiterated that the Commission occupies a “particularly important public purpose: the regulation of the public securities industry in Ontario and Canada”;

- (f) he concluded that if that public purpose is to succeed, “the OSC must be able to and be seen to carry out its legislative mandate in the manner that was intended by the legislature of the Province”;
- (g) he concluded that “the regime proposed by the OSC is appropriate for protection of Mr. A.’s *Charter* rights”; and
- (h) he stated that given the supervisory and adjudicative role of the Commission, it was not necessary to consider the elaborate supervision that was envisaged in the *Catalyst v. Hollinger* case.

Reasons, Appeal Book and Compendium, Tab 4 at paras. 43, 47, 48, and 52-60
B.C. Securities Commission v. Branch, [1995] 2 S.C.R. 3 at paras. 34-35

EVENTS FOLLOWING THE INITIAL REASONS

42. At an appointment to settle the terms of the formal order following the delivery of the Reasons, Mr. Justice Campbell requested further written submissions from the parties on the issue whether Commission staff members who are appointed under both the Investigation Orders and the Joint Order could attend the examination. An exchange of lengthy letters ensued, and they now form part of the record.

Additional Commission Submissions dated June 12, 2006, Appeal Book and Compendium, tab 16 at p. 114
 Additional Submissions of Mr. A. dated June 21, 2006, Appeal Book and Compendium, tab 18

43. Following receipt of these additional submissions, Mr. Justice Campbell issued an addendum to his reasons (the “Addendum”) on June 27, 2006. In the Addendum, he specifically upheld the validity of the Commission process set out in the statute and reaffirmed his earlier finding that Mr. A. had not proven that a breach of his *Charter* rights had occurred. Notwithstanding those two findings, he concluded that due to a potential risk of a *Charter* violation at some time during the investigation, he should specify who can conduct the examination and he should impose court supervision on the

examination, despite the statutory regime and the checks and balances contained within the *Act* itself.

Addendum, Appeal Book and Compendium, Tab 5, paras. 6, 10, 11, 12 and 16

44. Specifically, he ordered that no Commission staff member named in the Joint Order (issued under sections 11(1)(a) and (b)) could participate in the examination of Mr. A., despite his acknowledgment in both the Reasons and the Addendum that the Commission staff members named under the Investigation Order are the same as those appointed under the Joint Order (the difference being that three SEC employees are also appointed under the Joint Order). The effect of Mr. Justice Campbell's order is to quash the Summons in respect of all of those at the Commission who have been involved in the investigation (an investigation commenced over two years ago), who are now disqualified by his Order from participating in the examination. Without an order permitting access to the information obtained under the Joint Order, any new investigator would be conducting the interview in a factual vacuum.

Addendum, Appeal Book and Compendium, Tab 5, paras. 4, 13 and 14

45. The second condition imposed by Mr. Justice Campbell in the Addendum was a "comeback" clause: if Mr. A. objected to answering a relevant question, presumably on the basis that his Fifth Amendment rights would be in jeopardy, then he could, on motion, in this application, seek summary relief from Mr. Justice Campbell or another judge of the Superior Court of Justice (Commercial List). Such a motion could be brought without first seeking an order of the OSC.

Addendum, Appeal Book and Compendium, Tab 5 at para. 16

PART IV—ISSUES AND THE LAW**TEST ON APPEAL**

46. Mr. A. brought a *Charter* application seeking a *Charter* remedy. The remedies granted by Mr. Justice Campbell purportedly were made pursuant to section 24(1) of the *Charter*.

47. Determinations of alleged *Charter* breaches and remedies are questions of law. With respect to questions of law, the standard of review to be applied by the appellate court is one of correctness. Findings of fact, and inferences drawn from them, whether from oral argument or documentary evidence, are not to be reversed absent “palpable and overriding error.”

Housen v. Nikolaisen, [2002] 2 S.C.R. 235 at paras. 7-8, 10, 19 and 23

ISSUES ON APPEAL

48. It is respectfully submitted that the following issues arise on this appeal:
- (a) Did Mr. Justice Campbell err in providing a remedy under section 24(1) of the *Charter* without having found a *Charter* breach?
 - (b) Did Mr. Justice Campbell apply the correct test in deciding whether there was evidence sufficient to conclude that a prospective *Charter* breach existed?
 - (c) Did Mr. Justice Campbell err in law by issuing an order that improperly interferes with the Commission’s investigation and its legislative mandate?

(A) **Mr. Justice Campbell Erred by Providing a Remedy Under Section 24(1) of the *Charter* Without Finding a *Charter* Breach**

49. Although he dismissed Mr. A.'s application in substance, Mr. Justice Campbell included two elements in his disposition that amount to remedies under section 24(1) of the *Charter*. Those elements are the conditions that he imposed, first to exclude the Commission staff members named in the Joint Order from the examination of Mr. A., and then to impose continuous judicial supervision of the examination, should it ever take place.

50. Section 24(1) of the *Charter* provides as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

This subsection cannot support an application for a remedy in the absence of any *Charter* violation. A *Charter* breach is necessarily a condition precedent to the conferral of a remedy. The section does not make remedies available where the deprivation of rights is merely future or potential.

Bowen v. Minister of Employment and Immigration, [1984] 2 F.C. 507, 58 N.R. 223 (C.A.)
Re N and D (1985), 49 O.R. (2d) 490 (Prov.Ct.(Fam.Div.)),
 application for judicial review dismissed 54 O.R. (2d) 550 (Div.Ct.)

51. Mr. A. bore the onus of establishing a breach of the *Charter*. Mr. Justice Campbell rightly concluded that Mr. A. had not met that onus. He found that:

- (a) there was no breach of Mr. A.'s *Charter* rights at the present time; and
- (b) the regime proposed by the Commission is appropriate for the protection of Mr. A.'s *Charter* rights

Addendum, Appeal Book and Compendium, Tab 5 at para. 10
 Reasons, Appeal Book and Compendium, Tab 4 at para. 47

52. The Appellant respectfully submits that in light of his finding that no breach of Mr. A.'s *Charter* rights had been established, Mr. Justice Campbell could not properly grant a remedy under section 24(1) of the *Charter*.

(B) Mr. Justice Campbell Erred By Not Applying the Correct Test For a Prospective *Charter* Breach

53. Mr. Justice Campbell appears to have granted relief to Mr. A. on the basis that the investigation, "although in compliance with the *Securities Act*, **runs the risk of interference** with *Charter* protected values even though no direct breach has been established" (emphasis added).

Addendum, Appeal Book and Compendium, Tab 5 at paras. 6 and 12

54. *Charter* remedies are not granted when there is no breach of a *Charter* right nor a prospective breach of such a right. A "risk of interference with *Charter* protected values" is not equivalent to finding a prospective *Charter* breach, and is therefore insufficient to ground a *Charter* remedy. Mr. Justice Campbell did not apply the test for a prospective breach. Had he done so, the Appellant submits that no such prospective breach would have been found.

55. Relief may be granted for a prospective *Charter* violation, but only in circumstances where the claimant is able to prove that there is a "sufficiently serious risk that the alleged violation will in fact occur." The onus of proving a prospective breach is a high one, and it rests with the claimant.

Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),
[1995] 2 S.C.R. 97 at para. 108
Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441 at 458

56. The standard of proof to which a claimant like Mr. A. is subject depends upon the circumstances presented by the particular case. At the very least, he must prove that there is a “real and substantial risk” or a “high probability” that a *Charter* violation will occur absent a remedy. The Supreme Court of Canada has recognized that there may be circumstances where the standard is that a *Charter* breach is a “virtual certainty.”

Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),
ibid. at paras. 109-111

57. Before a court will restrain government action, it must be satisfied that there is a very real likelihood that the individual’s *Charter* rights will be prejudiced. To do so, the court must take into account all of the surrounding circumstances, including:

- (a) the nature of the right said to be threatened;
- (b) the extent to which the anticipated harm is susceptible of proof; and
- (c) the nature and importance of the government action sought to be restrained.

Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),
ibid. at para. 110

58. Had Mr. Justice Campbell applied the correct test to determine if there was a prospective *Charter* breach, he would necessarily have concluded that there was none. The nature of Mr. A.’s section 7 rights must be considered in its context; he engaged in licensed activity of his own volition and ultimately for his own profit. In return for the opportunity to reap the benefits of participating in the industry, Mr. A. undertook to conform with the extensive regulations and requirements that are “fundamental to maintaining an efficient, competitive market environment in a context where imperfect information is endemic.”

B.C. (Sec. Comm.) v. Branch, *supra* at para. 77

59. Further, there was no evidence in the record to establish that the probable effect of Mr. A. being examined under oath would be a breach of his *Charter* rights. Indeed, at least initially, Mr. Justice Campbell himself found that the hypothetical arguments put to him by Mr. A. as to how the compelled testimony might find its way into the hands of the SEC or U.S. Department of Justice were speculative and “unhelpful”. Such speculation is clearly insufficient to meet the high onus of proof required by the Supreme Court of Canada to establish a prospective *Charter* breach.

Reasons, Appeal Book and Compendium, Tab 4 at para. 52
Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),
supra at paras. 112 and 128

60. Mr. Justice Campbell did not apply the approach mandated by the Supreme Court of Canada. He failed to consider what would be the appropriate standard of proof in the circumstances of the case. He did not balance the rights of the individual against the interests of the state in receiving the compelled testimony, as he was required to do.

Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),
supra at paras. 112 and 128

61. In addition, the essence of the argument advanced by Mr. A. was not that the probable effect of his compelled testimony was a violation of his section 7 *Charter* rights, but rather, that the ultimate result *might* be the use of such testimony by U.S. authorities in a criminal prosecution against him. Mr. Justice Campbell found, however, that the predominant purpose of the Summons was not to determine Mr. A.’s criminal liability. He further found it unlikely that a U.S. court would not honour the Canadian process designed to preserve derivative use immunity of validly taken testimony.

Reasons, Appeal Book and Compendium, Tab 4 at paras. 43 and 53

62. Given the public importance of the government action sought to be restrained, namely obtaining evidence to regulate the securities industry, and the protections already in place for use of Mr. A.'s compelled testimony under the *Act*, under sections 7 and 13 of the *Charter*, and under section 5 of the *Canada Evidence Act*, it is submitted that the appropriate standard of proof in the context of this case would be that it was a "virtual certainty" a violation of Mr. A.'s *Charter* rights would occur. Such a standard properly balances the interests of the state in regulating the securities industry and protecting the public with the rights of Mr. A., who participated in this regulated industry of his own volition and ultimately, for his own profit.

B.C. Securities Commission v. Branch, *supra* at paras. 35, 75-77
Canada Evidence Act, R.S., 1985, c.C-5, s. 5

63. On any of the standards for proving a prospective breach – be it a "real and substantial risk" or a "virtual certainty" – Mr. A. failed to meet his onus and was not, therefore, entitled to a remedy which overrides the statute and interferes with the statutory investigative regime.

64. Moreover, section 24(1) is designed to give a remedy to the claimant where no other remedy exists in the ordinary course. Should Mr. A.'s section 7 rights be at risk if incriminating evidence is obtained on the examination, a remedy is available to him under section 17 of the *Act*, which requires an order made on notice to him for the disclosure of that evidence, and under section 13 of the *Charter*, which prohibits the use of compelled evidence in subsequent proceedings against him. In his reasons for decision, Mr. Justice Campbell recognized and affirmed the adequacy of these remedies.

Reasons, Appeal Book and Compendium, Tab 4 at para. 44

65. Finally, the remedy furnished by Mr. Justice Campbell is inappropriate, given the contents of Mr. A.'s section 7 *Charter* rights. Mr. Justice Campbell gave undue weight to the hypothetical risk to Mr. A.'s Fifth Amendment rights in crafting the remedy. For there to be any risk to his Fifth Amendment rights in the United States, the following events would have to occur, none of which is supported by the evidence in the application record:

- (a) self-incriminating evidence is given by Mr. A. at the examination;
- (b) Commission staff appointed under the Investigation Order disclose the testimony and information obtained at the examination to the SEC without obtaining a disclosure order under section 17 of the *Act*, and contrary to their duties under section 16;
- (c) alternatively, a section 17 disclosure order is made without considering the necessity of seeking an undertaking from the criminal law authorities regarding the use of his evidence;
- (d) the section 17 disclosure order does not reflect the provisions of subsection (3) which prohibits the sharing of testimony with any police authority absent Mr. A.'s written consent;
- (e) criminal proceedings are commenced against Mr. A. by U.S. authorities and he is extradited without any terms or conditions regarding the use of evidence;
- (f) the evidence is incriminatory in relation to the criminal allegations;
- (g) evidence is admitted by the U.S. courts contrary to the Fifth Amendment and with no conditions or protections; and
- (h) the evidence contributes to a finding of guilt or wrongdoing.

66. Permutations of hypothetical risks are infinite. They are not evidence, and they do not justify a finding of a prospective breach of the *Charter* and the consequent halting of an important investigation.

67. By granting Mr. A. the right to refuse questions on the examination and to resort to the court for directions, Mr. Justice Campbell infused Mr. A.'s section 7 *Charter* rights with Fifth Amendment-like protection. A witness has no right under the *Charter* to refuse a question on the basis that the answer might incriminate him. The protection against self-incrimination in our system is found in use immunity provided by section 13 of the *Charter*, together with section 7 derivative-use immunity.

R. v. S. (R.J.), [1995] 1 S.C.R.

(C) The Order Improperly Interferes with the Commission's Investigation and Its Legislative Mandate

(I) PARAGRAPH 3 OF THE ORDER INTERFERES WITH THE COMMISSION'S INVESTIGATION POWERS

68. Investigations conducted under the authority of the *Act* should be granted a wide discretion. As the British Columbia Court of Appeal has confirmed, it is not for the Court to investigate the investigators.

British Columbia Securities Commission v. S. (B.D.) (2003) 226 D.L.R. (4th) 393 (B.C.C.A.) at para. 33
British Columbia Securities Commission v. Branch, *supra* at para. 34

69. The Supreme Court of Canada in *Branch* noted the "expertise and specialization" of securities commissions reflected in the breadth of provisions relating to investigations, audits, hearings and orders:

"In reading these powerful provisions, it is clear that it was the legislature's intention to give the Commission a very broad discretion to determine what is in the public's interest." ...

...An inquiry of this kind [ie: pursuant to the subpoena power] legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of

substantial public importance, namely, obtaining evidence to regulate the securities industry.

British Columbia Securities Commission v. Branch, supra at para. 35

70. Mr. Justice Campbell correctly decided that the Summons was issued for a proper purpose.

British Columbia Securities Commission v. Branch, supra at para. 65
Reasons, Appeal Book and Compendium, Tab 4 at para. 43

71. Having so decided, Mr. Justice Campbell should have accorded the Commission appropriate deference, and not imposed restrictions which effectively halted the examination.

72. By imposing the conditions contained in paragraph 3 of the Order, Mr. Justice Campbell erred in law. The *Act* permits Commission staff members to participate in investigations under both section 11(1)(a) and (b). There is no provision or practice that prohibits the same staff from participating in both kinds of investigations at the same time. Mr. Justice Campbell's restriction on who can participate in Mr. A.'s examination effectively halts the section 11(1)(a) investigation and suggests that concurrent section 11(1)(a) and (b) investigations cannot be staffed by the same people. Such a restriction has no foundation in the *Act* or jurisprudence, and is a practical impediment in this and other investigations.

Act, s. 11(1) and (b)

73. There are good, practical reasons to use the same Commission staff members in investigations for both Ontario securities purposes and for the purposes of

assisting in the administration of securities laws in another jurisdiction. The use of distinct teams that cannot share information would result in two teams investigating the same facts separately, thereby promoting redundancy and waste of the Commission's resources. It may result in information gaps with one team not having all relevant facts in hand when reporting to the Commission. Such inefficiency is not consistent with the investigation provisions or the goals of the *Act*.

74. The ban on staff members who were appointed under both the Joint Order and the Investigation Order – therefore all current Commission appointees – from examining Mr. A. stems from the Judge's apparent assumption that Mr. A.'s testimony may unlawfully find its way into the hands of U.S. authorities and from there be admitted into evidence in a criminal proceeding against Mr. A. Even if there was sufficient evidence to support such an assumption (which there was not), any potential concerns about the possibility of Mr. A. giving incriminating testimony that could be used subsequently against him were matters best addressed under the *Act*, and required no intercession by the court at this stage. By imposing the restriction, Mr. Justice Campbell failed to give sufficient weight to the procedural and substantive safeguards contained in the *Act*, in the *Charter* and in the *Canada Evidence Act*.

75. Mr. Justice Campbell concluded in both his Reasons and his Addendum that the Commission staff investigating Mr. A. could be trusted. He also did not accept that the "investigative regime following on the section 11(a) [sic] Orders directed to Mr. A. will necessarily result in his testimony under oath being 'given' to U.S. authorities in circumstances where he would lose his Fifth Amendment protection." In the

Addendum, he reaffirmed his conclusion to “uphold the validity of the OSC process as set out in the statute.”

Reasons, Appeal Book and Compendium, Tab 4 at para. 48
Addendum, Appeal Book and Compendium, Tab 5 at para. 6

76. Paragraph 3 of the Order is not consistent with the ‘valid process set out in the statute.’ To the contrary, it seriously impairs the Commission’s ability to conduct this investigation because a new team of investigators must be appointed, without the benefit of any information obtained in the course of the Joint Order investigation. Such interference with the process set out in the statute has no justification on the facts of this case, unduly complicates and delays the pressing investigation of Company B, and creates a menacing precedent for future “investigations of the investigators”.

(II) PARAGRAPH 6 OF THE ORDER IMPROPERLY IMPORTS THE CATALYST REGIME

77. The Commission, like other specialized tribunals, has both the expertise and the jurisdiction to hear *Charter* challenges. Courts have repeatedly stated that such specialized tribunals enjoy a high degree of curial deference.

Cuddy Chicks Ltd. v. Ontario Labour Relations Board et al. (1989), 62 D.L.R. (4th) 125 (Ont.C.A.) at 130-132

78. The usual and proper procedure for an examination pursuant to a section 13 summons is for the witness to attend and answer all questions pertaining to the investigation. A section 11 investigation is just that – an investigation. It is not an examination for discovery in a civil action. It is not a cross-examination in a civil or criminal trial. It is an examination for the purposes of furthering a legislatively mandated investigation by a regulatory body of possible breaches of the *Act*.

British Columbia Securities Commission v. Branch, supra at paras. 75-81

79. Should Mr. A. have concerns about the propriety of a question on *Charter* grounds, his recourse, like any other witness summonsed pursuant to section 13, is to the Commission for a ruling. The Commission has the jurisdiction and expertise to make a *Charter* ruling. The Divisional Court has confirmed that it is better that the Commission “with its expertise deal with the applicability of section 7 of the *Charter* in the context of the process having regard to the nature of the hearing, the statutory framework and the special circumstances of the matter.”

Parr v. Ontario (Sec. Comm.) (1996), 11 C.C.L.S. 144 at 145 (Div.Ct.)

80. The imposition of paragraph 6 of the Order, the so-called “comeback clause”, creates unprecedented judicial oversight of a legislatively mandated examination. Close and continuous court supervision as envisioned by paragraph 6 does not respect or reflect the integrity and role of the Commission.

Act, s. 13, 16 and 17

81. Moreover, paragraph 6 gives Mr. A. the right to apply to any Commercial List judge for a ruling on the propriety of any question for any reason – not just for *Charter* reasons. As Mr. A.’s counsel submitted on June 21, 2006, the purpose of paragraph 6 of the Order “is to introduce the standard Ontario regime for ruling upon objections to questions asked during an examination” which “are improper either because they are irrelevant or improperly asked.”

Additional Submissions of Mr. A. dated June 21, 2006, Appeal Book and Compendium, Tab 18 at p. 136

82. The procedure belatedly requested by Mr. A. after the release of the Reasons is the very kind of court supervision Mr. Justice Campbell ordered in *Catalyst*

v. *Hollinger*. This, despite both Mr. A.'s and Mr. Justice Campbell's explicit rejection of *Catalyst*-like oversight in the circumstances of a Commission investigation.

Reasons, Appeal Book and Compendium, Tab 4 at paras. 13, 14 and 46

83. Paragraph 6 effectively imports the civil procedure for refusals on an examination for discovery. There is no authority for the imposition of such procedures on the Commission regime.

84. Paragraph 6 is also unnecessary. If the Commission deems a question pursuant to the examination proper and not in breach of Mr. A.'s *Charter* rights, the ruling is subject to judicial review under the *Judicial Review Procedure Act*.

Judicial Review Procedure Act, R.S.O. 1990, c.J.1

(III) PARAGRAPHS 3 AND 6 OF THE ORDER INTERFERE WITH THE COMMISSION'S RIGHTS AND RESPONSIBILITIES UNDER THE MOU AND IOSCO MMOU

85. The Supreme Court of Canada has affirmed the importance of interjurisdictional co-operation between securities regulators in today's integrated, international securities markets. Reciprocal co-operation from other securities regulators is necessary for the Commission to carry out its domestic mandate effectively.

Global Securities v. B.C. (Sec. Comm.), [2000] 1 S.C.R. 494 at paras.27 and 32

86. The restrictions contained in the Order interfere unduly with the Commission's international commitments under the MOU and IOSCO MMOU. These memoranda recognize that domestic law supercedes the signatories' obligations to share information and integrate their investigations. To the extent that disclosure of Mr. A.'s

testimony is protected by a section 17 order, domestic law and international obligations are properly balanced.

MOU, Appeal Book and Compendium, Tab 11, article 5(3)
IOSCO MMOU, Appeal Book and Compendium, Tab 12, article 6(e)

87. While the *Act* governs the Commission's obligations under the MOU and IOSCO MMOU where there is a conflict, the court should strive to interpret and apply the *Act* in a manner that enables respect by the Commission for those obligations. The provisions of the *Act* must be considered in their international context. The Commission's obligations under the MOU and the IOSCO MMOU ought to have informed Mr. Justice Campbell's interpretation of the *Act* and the propriety of the examination procedure in much the same way that international treaties inform the contents of *Charter* rights in the human rights context.

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at paras. 46, 59-60, 75 and 76

88. Mr. Justice Campbell failed to take into account that the Commission may properly gather information not only for any Ontario investigation but also for securities regulators in other jurisdictions. The SEC, in turn, may find information in the course of its own investigation which, subject to any U.S. domestic laws, will be shared with the Commission to further the Ontario investigation. Given the international nature of the securities market, such interjurisdictional co-operation among securities regulators is "indispensable".

Global Securities v. B.C. (Sec. Comm.), [2002] 1 S.C.R. 494 at 499 and 509

89. The Supreme Court of Canada has recognized the importance of the MOU to the proper investigation and enforcement of domestic securities regulation. In *Global Securities*, the Court accepted that if a domestic securities regulator (like the Commission) is to be assured of assistance from other regulators, it must reciprocate and provide similar assistance when requested.

Global Securities v. B.C. (Sec. Comm.), *ibid* at 509, 511 and 512

90. The participation of the same Commission staff members in both the Ontario investigation pursuant to the Investigation Order, and the U.S. investigation pursuant to the Joint Order is perfectly proper and necessary. The two teams should not be hindered under the Order from pursuing their investigations and sharing information. It is up to the Commission in the first instance to determine whether and how much of Mr. A.'s testimony may be shared with the SEC, in a hearing with ample due process protections for Mr. A., and ultimately reviewable by the Divisional Court or the Superior Court of Justice (Commercial List) on appeal. This process respects the rights and responsibilities of the Commission under the MOU and IOSCO MMOU. The unusual process introduced by Mr. Justice Campbell does not.

91. Mr. Justice Campbell, therefore, misapprehended his role on the application by ordering court supervision of an examination that is authorized and governed by the *Act*. He effectively quashed a proper summons and halted an important examination in an investigation conducted on behalf of the Canadian investing public. That Mr. A. is under investigation by the SEC and U.S. Attorney's Office on the other side of the border should not insulate him from complying with his obligations under the

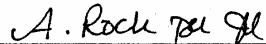
Act on this side of the border. His application to quash the Summons should be dismissed without conditions.

PART V—ORDER REQUESTED

92. The Commission respectfully requests:
- (a) that the Order dated June 27, 2006 be set aside and an order be made dismissing the application to quash the summons and denying declaratory relief under section 24(1) of the *Charter* without conditions;
 - (b) alternatively, that paragraphs 3 and 6 of the Order dated June 27, 2006 be struck; and
 - (c) costs of the appeal fixed and payable forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 15, 2006


ALLAN ROCK, Q.C.


JASMINKA KALAJDZIC

423439/3

Solicitors for the Respondent
(Appellant in Appeal)

CERTIFICATE OF SOLICITOR

An order under subrule 61.09(2) is not required. Counsel for the Appellant estimates that two (2) hours will be required for his oral argument, not including reply.

September 15, 2006

A. Rock per JM
ALLAN ROCK, Q.C.

SCHEDULE A—AUTHORITIES

1. *B.C. Securities Commission v. Branch*, [1995] 2 S.C.R. 3
2. *Bowen v. Minister of Employment and Immigration*, [1984] 2 F.C. 507, 58 N.R. 223 C.A.
3. *British Columbia. Securities Commission v. S (B.D.)* (2003), 226 D.L.R. (4th) 393 (B.C.C.A.)
4. *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2005) 255 DLR (4th) 233 (Ont. S.C.J.); aff'd, [2005] O.J. No. 4666 (Ont. C.A.)
5. *Cuddy Chicks Ltd. v. Ontario Labour Relations Board et al.* (1989), 62 D.L.R. (4th) 125 (Ont. C.A.)
6. *Global Securities Corp. v. B.C. (Securities Commission)*, [2000] 1 S.C.R. 494
7. *Global Securities Corp. (Re)* (1997), 28 BCSCWS 40 (B.C.S.C.)
8. *Housen v. Nikolaisen*, [2002] 2 SCR 235
9. *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441
10. *Parr v. Ontario (Securities Commission)* (1996), 11 C.C.L.S. 144 (Div.Ct.)
11. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97
12. *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451
13. *Re N and D* (1985), 49 O.R. (2d) 490 (Prov.Ct. Fam.Div.), application for judicial review dismissed 54 O.R. (2d) 550 (Div.Ct.)
14. *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3

SCHEDULE B—STATUTES**1. Ontario Securities Act, R.S.O. 1990, c.S.5, as amended, sections 1.1, 2.1, 9, 11, 13, 16 and 17****Purposes of Act****1.1** The purposes of this Act are,

- (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. 1994, c. 33, s. 2.

Principles to consider**2.1** In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:

1. Balancing the importance to be given to each of the purposes of this Act may be required in specific cases.
 2. The primary means for achieving the purposes of this Act are,
 - i. requirements for timely, accurate and efficient disclosure of information,
 - ii. restrictions on fraudulent and unfair market practices and procedures, and
 - iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.
 3. Effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission.
 4. The Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations.
 5. The integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.
 6. Business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized. 1994, c. 33, s. 2.
5. The integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.

Appeal of Commission's decision

9.(1) A person or company directly affected by a final decision of the Commission, other than a decision under section 74, may appeal to the Divisional Court within thirty days after the later of the making of the final decision or the issuing of the reasons for the final decision. 1994, c. 11, s. 356 (1).

Stay

(2) Despite the fact that an appeal is taken under this section, the decision appealed from takes effect immediately, but the Commission or the Divisional Court may grant a stay until disposition of the appeal. R.S.O. 1990, c. S.5, s. 9 (2).

Certification of documents

(3) The Secretary shall certify to the Divisional Court,

- (a) the decision that has been reviewed by the Commission;
- (b) the decision of the Commission, together with any statement of reasons therefor;
- (c) the record of the proceedings before the Commission; and
- (d) all written submissions to the Commission or other material that is relevant to the appeal. R.S.O. 1990, c. S.5, s. 9 (3); 1994, c. 11, s. 356 (2).

Respondent on appeal

(4) The Commission is the respondent to an appeal under this section. 1994, c. 11, s. 356 (3).

Minister

(4.1) The Minister is entitled to be heard by counsel or otherwise on the argument of an appeal under this section, whether or not the Minister is named as a party to the appeal. 1994, c. 11, s. 356 (3).

Powers of court on appeal

(5) Where an appeal is taken under this section, the court may by its order direct the Commission to make such decision or to do such other act as the Commission is authorized and empowered to do under this Act or the regulations and as the court considers proper, having regard to the material and submissions before it and to this Act and the regulations, and the Commission shall make such decision or do such act accordingly. R.S.O. 1990, c. S.5, s. 9 (5).

Further decisions

(6) Despite an order of the court on an appeal, the Commission may make any further decision upon new material or where there is a significant change in the circumstances, and every such decision is subject to this section. R.S.O. 1990, c. S.5, s. 9 (6).

Investigation order

11. (1) The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,

- (a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or
- (b) to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358.

Power of investigator or examiner

13. (1) A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (1).

Rights of witness

(2) A person or company giving evidence under subsection (1) may be represented by counsel and may claim any privilege to which the person or company is entitled. 1994, c. 11, s. 358.

Inspection

(3) A person making an investigation or examination under section 11 or 12 may, on production of the order appointing him or her, enter the business premises of any person or company named in the order during business hours and inspect any documents or other things that are used in the business of that person or company and that relate to the matters specified in the order, except those maintained by a lawyer in respect of his or her client's affairs. 1994, c. 11, s. 358.

Authorization to search

(4) A person making an investigation or examination under section 11 or 12 may apply to a judge of the Ontario Court of Justice in the absence of the public and without notice for an order authorizing the person or persons named in the order to enter and search any building, receptacle or place specified and to seize anything described in the authorization that is found in the building, receptacle or place and to bring it before the judge granting the authorization or another judge to be dealt with by him or her according to law. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (2).

Grounds

(5) No authorization shall be granted under subsection (4) unless the judge to whom the application is made is satisfied on information under oath that there are reasonable and probable grounds to believe that there may be in the building, receptacle or place to be searched anything that may reasonably relate to the order made under section 11 or 12. 1994, c. 11, s. 358.

Power to enter, search and seize

(6) A person named in an order under subsection (4) may, on production of the order, enter any building, receptacle or place specified in the order between 6 a.m. and 9 p.m., search for and seize anything specified in the order, and use as much force as is reasonably necessary for that purpose. 1994, c. 11, s. 358.

Expiration

(7) Every order under subsection (4) shall name the date that it expires, and the date shall be not later than fifteen days after the order is granted. 1994, c. 11, s. 358.

Application

(8) Sections 159 and 160 of the *Provincial Offences Act* apply to searches and seizures under this section with such modifications as the circumstances require. 1994, c. 11, s. 358.

Private residences

(9) For the purpose of subsections (4), (5) and (6), "building, receptacle or place" does not include a private residence. 1994, c. 11, s. 358.

Non-Disclosure

16. (1) Except in accordance with section 17, no person or company shall disclose at any time, except to his, her or its counsel,

- (a) the nature or content of an order under section 11 or 12; or
- (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13. 1994, c. 11, s. 358.

Confidentiality

(2) If the Commission issues an order under section 11 or 12, all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and shall not be disclosed or produced to any other person or company or in any other proceeding except as permitted under section 17. 2002, c. 18, Sched. H, s. 7.

Disclosure by Commission

17. (1) If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,

- (a) the nature or content of an order under section 11 or 12;
- (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13; or
- (c) all or part of a report provided under section 15. 1994, c. 11, s. 358.

Opportunity to object

(2) No order shall be made under subsection (1) unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to,

- (a) persons and companies named by the Commission; and
- (b) In the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained. 1994, c. 11, s. 358.

Disclosure to police

(3) Without the written consent of the person from whom the testimony was obtained, no order shall be made under subsection (1) authorizing the disclosure of testimony given under subsection 13 (1) to,

- (a) a municipal, provincial, federal or other police force or to a member of a police force; or
- (b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1994, c. 11, s. 358.

Terms and conditions

(4) An order under subsection (1) may be subject to terms and conditions imposed by the Commission. 1994, c. 11, s. 358.

Disclosure by court

(5) A court having jurisdiction over a prosecution under the *Provincial Offences Act* initiated by the Commission may compel production to the court of any testimony given or any document or other thing obtained under section 13, and after inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant to make full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution. 1994, c. 11, s. 358.

Disclosure in investigation or proceeding

(6) A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1), but may do so only in connection with,

- (a) a proceeding commenced or proposed to be commenced by the Commission under this Act; or
- (b) an examination of a witness, including an examination of a witness under section 13. 2001, c. 23, s. 210.

Disclosure to police

(7) Without the written consent of the person from whom the testimony was obtained, no disclosure shall be made under subsection (6) of testimony given under subsection 13 (1) to,

- (a) a municipal, provincial, federal or other police force or to a member of a police force; or
- (b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1999, c. 9, s. 196.

2. *Canadian Charter of Rights and Freedoms, sections 7, 8, 13 and 24(1)*

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

3. *Judicial Review Procedure Act, R.S.O. 1990, c.J.1, section 2*

Applications for judicial review

2. (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

Error of law

(2) The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision. R.S.O. 1990, c. J.1, s. 2 (2).

Lack of evidence

(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review. R.S.O. 1990, c. J.1, s. 2 (3).

Power to set aside

(4) Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision. R.S.O. 1990, c. J.1, s. 2 (4).

Power to refuse relief

(5) Where, in any of the proceedings enumerated in subsection (1), the court had before the 17th day of April, 1972 a discretion to refuse to grant relief on any grounds, the court has a like discretion on like grounds to refuse to grant any relief on an application for judicial review. R.S.O. 1990, c. J.1, s. 2 (5).

Where subs. (5) does not apply

(6) Subsection (5) does not apply to the discretion of the court before the 17th day of April, 1972 to refuse to grant relief in any of the proceedings enumerated in subsection (1) on the ground that the relief should have been sought in other proceedings enumerated in subsection (1). R.S.O. 1990, c. J.1, s. 2 (6).

4. Canada Evidence Act, R.S., 1985, c. C-5, section 5**Incriminating questions**

5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

Answer not admissible against witness

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil

proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.
R.S., 1985, c. C-5, s. 5; 1997, c. 18, s. 116.

MR. A.

vs. ONTARIO SECURITIES
COMMISSION

Applicant (Respondent in Appeal)

Respondent (Appellant in Appeal)

Court of Appeal File No: C45725
Court File No. 06-CL-6328

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT TORONTO

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