

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

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

MR. A.

Applicant
(Respondent in Appeal)

- and -

ONTARIO SECURITIES COMMISSION

Respondent
(Appellant in Appeal)

AMENDED NOTICE OF APPEAL

THE APPELLANT, THE ONTARIO SECURITIES COMMISSION, APPEALS to the Court of Appeal for Ontario from the order of Mr. Justice Campbell dated June 27, 2006 made at the Ontario Superior Court of Justice (Commercial List) in Toronto, Ontario (the "Order").

THE APPELLANT ASKS that the order be set aside and an order be made dismissing the Application to quash the summons and denying the granting of declaratory relief under s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter") or alternatively, setting aside paragraphs 3 and 6 of the Order.

THE GROUNDS OF APPEAL are as follows:

Background

1. The Respondent, Mr. A., was summoned to attend an examination pursuant to an investigation order into certain matters relating to Company B. The investigation

order, dated February 22, 2006, was issued pursuant to s. 11(1)(a) (the “S.11(1)(a) Order”) of the *Ontario Securities Act*, R.S.O. 1990 c. S. 5 as amended (the “Act”). In addition to the s. 11(1)(a) Order, the Commission also issued a separate investigation order dated February 22, 2006 under sections 11(1)(a) and (b) of the Act (the “S.11(1)(a) and (b) Order”) to assist the United States Securities and Exchange Commission (the “SEC”) in its investigation of Company B. The Commission first issued an Order pursuant to S. 11(1)(a) to investigate these matters on June 18, 2004.

2. The same Ontario investigation Staff are appointed to investigate under both investigation orders pursuant to section 11(1)(a) and section 11(1)(b). SEC Staff are not named to the S.11(1)(a) Order.
3. The existence of a U.S. criminal investigation of Mr. A is known and the Summons issued to Mr. A was made pursuant to the S.11(1)(a) Order for the use of the Ontario investigation Staff for Ontario purposes. Pursuant to s. 17 of the Act, Staff agreed that no disclosure of the transcript or evidence obtained could be made to the SEC, or to any other authority, without a disclosure motion being brought on notice to Mr. A before the Commission and subject to the appeal rights available to Mr. A pursuant to the Act.
4. Notwithstanding the protection under the Act, Mr. A. brought an Application for declaratory relief under ss. 7 and 24(1) of the *Charter* seeking a declaration that Mr. A could not be compelled and quashing the summons.

The Reasons Issued April 25, 2006 (the “Reasons”)

5. The Application was heard before the Honourable Mr. Justice Campbell on April 4, 2006.

6. At the outset of Submissions, the respondent proposed an order that it would consent to, to confirm the provisions of the Act and maintain, by Court Order, the confidentiality of the information obtained.
7. On April 25, 2006 Justice Campbell issued reasons (the “Reasons”) dismissing the Application. In the Reasons, Mr. Justice Campbell found that:
 - (i) Mr. A’s *Charter* rights were not breached and the Application to quash the summons was dismissed.
 - (ii) Pursuant to the supervisory role of the Commission and the protective mechanisms of ss. 16 to 19 of the Act, Staff of the Commission are aware of their varying roles and duties.
 - (iii) The independence of the Commission and its role in supervising Staff provide the first layer of *Charter* protection, with rights of appeal, or review by a Judge of the Commercial List thereafter providing further *Charter* supervision. Specifically, Mr. Justice Campbell held:

... there is an important public interest in the oversight by the OSC of its own process, which includes protection of Charter rights of those being investigated under the Securities Act.

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. The financial state of a major Canadian corporation that allegedly misrepresented its financial statements in various years does have a broad purpose involving shareholders, financial markets, employees and regulators.
 - (iv) Given the supervisory and adjudicative role of the Commission it was not necessary to consider the elaborate supervision by the Court envisaged in the decision of *Catalyst Fund General Partner Inc. v. Hollinger Inc.* (2005), 255 DLR (th) 233 (Ont. SCJ); appeal dismissed: [2005] OJ No. 4666 (Ont. CA) (hereinafter “*Catalyst*”).
 - (v) Any concerns regarding the process should be brought first before the Commission with a right of appeal to the Divisional Court or, on a consensual basis, to a Commercial List Judge.

- (vi) The allegation that the Commission “cannot be trusted” or that the investigative regime following the s. 11(a) orders will necessarily result in Mr. A’s testimony be “given” to U.S. authorities in circumstances where Mr. A’s Fifth Amendment rights would be violated without notice to Mr. A. was unfounded. Specifically, Mr. Justice Campbell held that “[t]o speculate how otherwise this might happen without legal redress I do not find helpful.”
 - (vii) The “regime proposed by the OSC is appropriate for protection of Mr. A’s *Charter* rights”.
8. In the Reasons, Mr. Justice Campbell made the following obiter remarks:
- “The OSC may wish to consider that it would appear more transparent to have separate investigation teams to deal with testimony from Mr. A. and the material being reviewed under the s. 11(1)(b) Order with SEC officials. Obviously the SEC officials will not be part of the 11 (1)(a) Order involving Mr. A.” (at para. 61)
9. No relief relating to separate investigation teams for the S.11(1)(a) Order and the S.11(1)(a) and (b) Order was sought in the Notice of Application or at any time in the proceeding and no evidence was adduced on the matter at the return of the Application.

The Chambers Appointment to Settle the Terms of the Order

10. Subsequent to the release of the Reasons, the parties were unable to agree as to the terms of the Order and on June 1, 2006 attended before Justice Campbell at a 9:30 a.m. chambers appointment to settle the terms of the order (the “Chambers Appointment”). During the course of the Chambers Appointment, Justice Campbell addressed his obiter comments and requested further submissions on the issue of separate investigation teams. At the Chambers Appointment, the Court also indicated that the assistance it was offering was not as an appeal route from a final decision of the Commission in regards to any disclosure order it

might make, but rather in a supervisory role as to the examination of Mr. A. and questions that might be posed to him during the course of the examination.

The Addendum to Reasons dated June 27, 2006 (the “Addendum”)

11. On June 27, 2006, Mr. Justice Campbell issued an Addendum to Reasons. In the Addendum, Mr. Justice Campbell found that:
- (i) no breach of Mr. A’s *Charter* rights was found;
 - (ii) there was a risk of a *Charter* breach that was “more than an illusory risk”;
 - (iii) the risk of inadvertent or purposeful disclosure was worthy of *Charter* protection even where there was no direct evidence of a breach, but only the risk of a breach;
 - (iv) separate investigation teams were required under each of the s. 11(1)(a) and joint 11(1)(a) and (b) orders; and
 - (v) the order should contain a come-back clause to a judge of the Commercial List to consider if questions posed during the examination “run the risk of *Charter* breach”.

The Order dated June 27, 2006 (“the Order”)

12. Pursuant to the Reasons and Addendum, an Order was issued and entered on June 27, 2006. Paragraphs 3 and 6 of the Order provide:

3. THIS COURT ORDERS THAT, subject to the terms of this Order, the Applicant shall and is compelled to attend before those persons named in the Investigation Orders [being the S.11(1)(a) Order and the original S.11(1)(a) Order issued in 2004], and not named in any order under s. 11(1)(b) of the Act for an examination under oath pursuant to the Summons;

6. THIS COURT ORDERS THAT to the extent that any issue may arise between the parties with respect to the propriety of questions asked of the Applicant, either of the parties hereto may, without prejudice to the parties’ right of appeal from any order of the OSC,

bring a motion in this Application to a Judge of the Commercial List of the Ontario Superior Court of Justice and the Court shall remain seized of this Application for that purpose;

13. Paragraph 3 of the Order effectively requires that separate investigation teams be put in place for the s. 11(1)(a) and joint 11(1)(a) and (b) investigation orders. The effect of this paragraph is that no investigator who has been involved for the past 2 ½ years in the investigation of Company B may participate in the examination of Mr. A, rather, the Mr. A interview must be conducted by an entirely new team.
14. Paragraph 6 of the Order contains a come back clause to a Judge of the Commercial List in regards to the “propriety of any questions” asked of Mr. A at his examination. Paragraph 6 eviscerates the Commission’s jurisdiction as a tribunal of first instance over the investigation process and the examination of Mr. A and denies the Commission the opportunity to supervise its own process in accordance with the Act and the *Charter*. The effect of paragraph 6 of the Order is to impose the Court supervision envisaged in the *Catalyst* decision, contrary to the Reasons.

The Judge Erred in Law and Exceeded his Jurisdiction

15. The Judge erred in law and exceeded his jurisdiction by i) imposing Court supervision over the examination of Mr. A as set out in paragraph 6 of the Order and/or ii) requiring the establishment of two separate investigation teams for both the Ontario investigation and the joint investigation. The judge erred in making this order in that he:
 - (i) provided a remedy under s. 24(1) of the *Charter* without having found a *Charter* breach;
 - (ii) granted a *Charter* remedy without first finding that there was a “high degree of probability” or a “sufficiently serious risk” that Mr. A’s *Charter* rights would be breached. In so doing he applied the incorrect test for finding a prospective *Charter* breach and granting a remedy;

- (iii) granted a *Charter* remedy on the basis of a risk where there was no factual record to establish a sufficient risk;
 - (iv) granted a *Charter* remedy for a premature and contingent risk without balancing the rights of the Applicant with the regulatory mandate and public interest objective of the Commission as delineated in the Act;
 - (v) notwithstanding the refusal to quash the Summons, granted a *de facto* result which effectively halts the examination of Mr. A by Staff for the purposes of the Ontario investigation and has vacated the legal force of the Summons;
 - (vi) fashioned a remedy that was vague and unworkable and inconsistent with the Act;
 - (vii) granted extraterritorial application to the *Charter* (or expanded the scope of the Fifth Amendment of the Constitution of the United States to apply to persons under investigation in Ontario) contrary to the binding authority established in *R. v. Spencer* [1985] 2 SCR 278 and followed by a substantial body of binding jurisprudence which provides that the Charter does not apply extraterritorially; and
 - (viii) granted relief which was not requested in the Application and upon which a factual record was not before the court or argued in a manner consistent with the *Rules of Civil Procedure*.
16. Additionally, in ordering court supervision of an examination authorized and governed by the Act, the judge exceeded his jurisdiction and erred at law in that:
- (i) the Act gives jurisdiction at first instance to the Commission to supervise the investigation and examination process and to make determinations regarding alleged *Charter* breaches. Consistent with this authority, Mr. Justice Campbell in the Reasons found that the Commission was the appropriate forum for determining its own process at the first stage with review of a final order of the Commission by a Commercial List Judge on consent or by way of the statutory right of appeal to the Divisional Court. By reversing this finding in the Addendum and by ordering that the Commercial List court supervise the examination, the Judge exceeded his jurisdiction and usurped the Commission's authority;
 - (ii) the decision not to quash the summons was final. There is no continued proceeding before the Judge over which the Court has jurisdiction. The Judge is *functus officio* of the matter and the court cannot remain seized of the application for that purpose; and

- (iii) the Judge failed to make an order that recognized the appropriate deference to the Commission, particularly given his findings in the Reasons.

The Judge Erred in Giving Effect to the Following Irrelevant Considerations in the Addendum

- 17. By suggesting that Staff's refusal to grant Mr. A expansive rights not afforded by the Act, or to any other individual, so as to "allay the concerns" of Mr. A meant that Staff were acting without transparency or efficiency, the Judge factored into his decision an irrelevant consideration which led to the wrong conclusion at law.
- 18. By concluding that the examination would likely not proceed without further disagreement between the parties, the Judge factored into his decision an irrelevant consideration which did not justify usurping the Commission's jurisdiction to deal with future disagreements between the parties.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- 1. The Order appealed from is a final order of the Superior Court of Justice; and
- 2. Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. s. C.43 and Rule 61 of the *Rules of Civil Procedure*.

September 18, 2006

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